STATE OF MICHIGAN

COURT OF APPEALS

MICHAEL WHITE,

Plaintiff/Counterdefendant-Appellant,

v

MICHAEL RINESS and ELIZABETH RINESS,

Defendants/Counterplaintiffs/Cross-Plaintiffs-Appellees,

and

JP MORGAN CHASE BANK, NA,

Defendant/Cross-Defendant-Appellee.

UNPUBLISHED
June 18, 2020

No. 347924
Tuscola Circuit Court
LC No. 18-030397-CH

Before: MURRAY, C.J., and RONAYNE KRAUSE and TUKEL, JJ.

PER CURIAM.

Plaintiff Michael White, proceeding *in propria persona*, filed this action against defendants, Michael and Elizabeth Riness and JP Morgan Chase Bank, NA, to enforce alleged property rights to sand and gravel on foreclosed real property. The trial court granted defendants' motion for summary disposition pursuant to MCR 2.116(C)(8). This appeal is being decided without oral argument pursuant to MCR 7.214(E)(1). We affirm in part and remand for further proceedings.

I. FACTS AND PROCEEDINGS

In 2007, Stuart and Bonnie Thornton, owners of real property in Tuscola County, granted a mortgage on the property to Chase Bank, USA, NA. The mortgage was recorded on September 13, 2007. In 2012, Chase Bank assigned the mortgage to JP Morgan. In 2010, the Thorntons executed a lease agreement with two corporate entities owned by plaintiff, Cotton & White and White-Co, Inc. The lease granted Cotton & White and White-Co the exclusive right to

mine sand and gravel for a period of 20 years. White-Co subsequently assigned its interest in the lease to plaintiff.

The Thorntons defaulted on the mortgage loan. In 2012, JP Morgan initiated proceedings to foreclosure the mortgage by advertisement; plaintiff was not notified of the foreclosure proceedings. JP Morgan purchased the property at a sheriff's sale on August 30, 2012. The Thorntons did not redeem the property. In September 2013, JP Morgan sold the property to the Rinesses. The Rinesses advised plaintiff that any interest he held in the property was extinguished by the foreclosure.

In 2018, plaintiff, acting *in propria persona*, filed this action to enforce his alleged property rights pursuant to the sand and gravel lease. Plaintiff requested that the trial court confirm his rights to continue his operations in accordance with the lease, or award him damages for JP Morgan's violation of his rights. The trial court granted summary disposition for defendants pursuant to MCR 2.116(C)(8), on the ground that the lease was extinguished in the foreclosure proceedings.

II. STANDARD OF REVIEW

The trial court's decision on a motion for summary disposition is reviewed de novo. *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999). A motion under MCR 2.116(C)(8) tests the legal sufficiency of the complaint by the pleadings alone. *Id.* at 119. A reviewing court "must accept as true all factual allegations supporting the claim, and any reasonable inferences or conclusions that might be drawn from those facts." *Gorman v American Honda Motor Co*, 302 Mich App 113, 131; 839 NW2d 223 (2013). "[T]he mere statement of a pleader's conclusions, unsupported by allegations of fact, will not suffice to state a cause of action." *ETT Ambulance Serv Corp v Rockford Ambulance, Inc*, 204 Mich App 392, 395; 516 NW2d 498 (1994). Summary disposition under (C)(8) is appropriate only when a claim is "so clearly unenforceable as a matter of law that no factual development could justify recovery." *Wade v Dep't of Corrections*, 439 Mich 158, 163; 483 NW2d 26 (1992). "A party may not support a motion under MCR 2.116(C)(8) with documentary evidence such as affidavits or depositions," but "when an action is premised on a written contract, the contract generally must be attached to the complaint and thus becomes part of the pleadings." *Bodnar v St. John Providence, Inc*, 327 Mich App 203, 212; 933 NW2d 363 (2019). In this case, the relevant deeds and the lease were attached to the Rinesses' answer to plaintiff's complaint. Because an answer qualifies as a pleading, MCR 2.110(A), these documents may be considered for purposes of determining whether summary disposition was appropriate under MCR 2.116(C)(8).

"Issues of statutory interpretation are reviewed de novo." *City of Riverview v Sibley Limestone*, 270 Mich App 627, 630; 716 NW2d 615 (2006). "Statutory provisions must be read in the context of the entire act, giving every word its plain and ordinary meaning. When the language is clear and unambiguous, we will apply the statute as written and judicial construction is not permitted." *Driver v Naini*, 490 Mich 239, 246-247; 802 NW2d 311 (2011).

III. FORECLOSURE

Plaintiff argues that his rights under the lease were not terminated by the foreclosure. We disagree.

"Foreclosure sales by advertisement are defined and regulated by statute. Once the mortgagee elects to foreclose a mortgage by this method, the statute governs the prerequisites of the sale, notice of foreclosure and publication, mechanisms of the sale, and redemption." *Senters v Ottawa Savings Bank, FSB*, 443 Mich 45, 50; 503 NW2d 639 (1993) (citations omitted). Foreclosure by advertisement is governed by MCL 600.3208 *et seq*. With respect to the rights of the purchaser at a foreclosure sale, MCL 600.3236 provides:

> Unless the premises described in such deed shall be redeemed within the time limited for such redemption as hereinafter provided, such deed shall thereupon become operative, and shall vest in the grantee therein named, his heirs or assigns, *all the right, title, and interest which the mortgagor had at the time of the execution of the mortgage, or at any time thereafter*, except as to any parcel or parcels which may have been redeemed and canceled, as hereinafter provided; and the record thereof shall thereafter, for all purposes be deemed a valid record of said deed without being re-recorded, but no person having any valid subsisting lien upon the mortgaged premises, or any part thereof, *created before the lien of such mortgage took effect*, shall be prejudiced by any such sale, nor shall his rights or interests be in any way affected thereby. [Emphasis added.]

Once the statutory redemption period lapses, the mortgagor's right, title, and interest in and to the property are extinguished. *Piotrowski v State Land Office Bd*, 302 Mich 179, 187; 4 NW2d 514 (1942); *Trademark Properties of Michigan, LLC v Fed Nat'l Mtg Ass'n*, 308 Mich App 132, 138-139; 863 NW2d 344 (2014). Furthermore, after the redemption period expires the mortgagor can no longer assert any claim with respect to the property. *Piotrowski*, 302 Mich at 187. Similarly, any interests in the property created after the mortgagor entered into the mortgage also are extinguished. See MCL 600.3236; *Senters*, 443 Mich at 50-53; *In re Parlovecchio*, 315 BR 694 (Bankr ED Mich, 2004) (applying Michigan law and holding that "[w]hen not redeemed, a sheriff's deed ripens into legal title and cuts off all junior interests in the property that were not consented to by the mortgagee").

Defendants rely on MCL 600.3236 in support of their argument that plaintiff's lease interest in the subject property was extinguished upon expiration of the redemption period after foreclosure. The language in MCL 600.3236, that a grantee receives "all the right, title, and interest *which the mortgagor had at the time of the execution of the mortgage*," supports defendants' position that upon the foreclosure sale, any lease rights acquired after execution of the mortgage are extinguished, and the purchaser receives full title and rights originally obtained by the mortgagor. However, plaintiff focuses on the phrase, "or at any time thereafter" to argue that subsequent events affecting the mortgagor's right, title, and interest also affect the grantee's interest. Caselaw does not support plaintiff's position.

In *Schaffer v Eighty-One Hundred Jefferson Ave East Corp*, 267 Mich 437; 255 NW 324 (1934), the defendant De Vos organized the defendant corporation, Eighty One Hundred Jefferson

Avenue East Corporation, to sell apartment units to the plaintiffs who would hold ownership interests in the corporation and leases for the life of the corporation. The prospective purchasers were given notice that the real property was subject to a mortgage. *Id*. at 439-441. The mortgagee foreclosed on the property. *Id*. at 443. The plaintiffs claimed that the foreclosure proceedings were void because they were necessary parties, but received no notice of the proceedings. *Id*. at 443-444. The Court held that "[t]he situation, unequivocally created by the instruments and accepted by the purchasers, is that the association owns the property and plaintiffs are lessees with no more legal or equitable title than have the stockholders in the other corporation. Plaintiffs, as subsequent lessees, are not necessary parties to the foreclosure suit." *Id*. at 447.

In *Tilchin v Boucher*, 328 Mich 355; 43 NW2d 885 (1950), the plaintiff leased property from the vendees of a land contract. The lease was not recorded. *Id*. at 357. The vendee defaulted in the land contract payments. *Id*. The vendor commenced summary forfeiture proceedings, without including the plaintiff as a party. *Id*. at 357-358. Our Supreme Court concluded that the plaintiff "was not a necessary party, and his lease interest was also terminated by the summary proceedings." *Id*. at 358.

In *Hanson v Huetter*, 339 Mich 130, 134; 62 NW2d 663 (1954), our Supreme Court held that "[a] subsequent grant of easement by the mortgagor without the mortgagee's permission and consent could not have been enforced against the mortgagee. The foreclosure placed in defendants' grantor all the right and title that existed in the mortgagee at the time of the execution of the mortgage."

The decisions in *Schaffer*, *Tilchin*, and *Hanson* support defendants' position that plaintiff's lease interest was extinguished at the close of the redemption period. The holding in *Schaffer* that the tenants were not necessary parties to the foreclosure implies that they had no legally cognizable expectation to continue their leases. The holding in *Tilchin* directly states that the plaintiff's lease interest was terminated. The holding in *Hanson* regarding termination of the easement applies by analogy to plaintiff's lease interest. Accordingly, the trial court did not err when it determined that plaintiff's lease interest was extinguished when the property was not redeemed following the foreclosure sale; plaintiff entered into the lease after the property was already mortgaged to JP Morgan and there is no evidence that JPMorgan consented to the lease.

IV. PERSONAL PROPERTY

Plaintiff argues that if he was not entitled to continue his lease, he was still entitled to retrieve from the subject property stone and gravel that had already been extracted from the land while the lease was in effect.

Plaintiff relies on *Blough v Steffins*, 349 Mich 365, 374; 84 NW2d 854 (1957), in which our Supreme Court held that a sharecrop agreement "effected constructive severance of the corn crop and rendered it personal property as between the parties to that agreement." Consequently, when the original landowner and party to the sharecrop agreement conveyed the real property to the defendant, "the crop was personalty as to defendant Steffens likewise and did not pass with the land," but instead remained the personal property of the plaintiff planter. *Id*. Plaintiff's reliance on *Blough* is misplaced because this case does not involve property rights as between parties to an agreement.

We agree, however, that plaintiff would have been entitled to a reasonable opportunity to remove any personal property from the premises upon foreclosure. In *Tilchin*, 328 Mich at 359, our Supreme Court stated that the plaintiff lost his opportunity to remove cabins from the property by failing to remove them when he had "some knowledge of the land contract forfeiture," thereby suggesting that a plaintiff whose lease interest is extinguished by foreclosure has a right to retrieve personal property within a reasonable time of the foreclosure. In *Saveski v California Fed Savings & Loan Ass'n*, 63 Mich App 747, 748; 235 NW2d 34 (1975), the plaintiffs leased and occupied the upper flat of a two-flat home.[1] The owners lived in the lower flat. *Id.* The lender foreclosed on the property and brought an action to recover possession after the expiration of the redemption period. *Id*. at 748-749. The bailiff executing the writ of restitution removed and destroyed the plaintiffs' possessions. *Id*. This Court reversed summary disposition for the defendant on the ground that the plaintiffs established a genuine issue of material fact regarding the defendants' knowledge of the dual occupancy. *Id*. at 751-752. This holding supports the conclusion that renters do not lose their rights to their tangible personal property on foreclosed property. See *id*.

Whether plaintiff was denied the right to retrieve personal property from the subject property is a factual issue that cannot be resolved by the pleadings. Generally, the trial court "shall give the parties an opportunity to amend their pleadings as provided by MCR 2.118, unless the evidence then before the court shows that amendment would not be justified." MCR 2.116(I). Given plaintiff's allegations that equipment and extracted sand and gravel remained on the property before foreclosure, we remand this matter to the trial court to permit plaintiff to amend his complaint to assert a claim related to any tangible personal property on the foreclosed property which he was not afforded a reasonable opportunity to remove.[2]

V. PLAINTIFF'S REMAINING ARGUMENTS

A. EASEMENT

Plaintiff asserts that he had at least an easement right to access his personal property. We disagree.

"An implied easement may arise in essentially two ways: (1) an easement by necessity and (2) an easement implied from a quasi-easement." *Charles A Murray Trust v Futrell*, 303 Mich App 28, 41; 840 NW2d 775 (2013) (quotation marks and citation omitted). "An easement by necessity may be implied by law where an owner of land splits his property so that one of the resulting parcels is landlocked except for access across the other parcel." *Id*. (quotation marks and citation omitted). "In contrast, an easement implied from a quasi-easement requires that at the severance of an estate an obvious and apparently permanent servitude already exists over one part of the estate and in favor of the other." *Id*. at 42 (quotation marks and citation omitted). This case

[1] "Although cases decided before November 1, 1990, are not binding precedent, MCR 7.215(J)(1), they nevertheless can be considered persuasive authority." *In re Stillwell Trust*, 299 Mich App 289, 299 n 1; 829 NW2d 353 (2012) (citation omitted).

[2] The record establishes that plaintiff moved to amend his complaint in the trial court, but the trial court did not rule on the motion.

does not involve any severance of real property. Accordingly, neither of these theories applies to this case.

B. PROFIT À PRENDRE

Plaintiff argues that he has continuing rights to the sand and gravel under a theory of a profit à prendre. We disagree.

"A profit á prendre is the right to acquire, by severance or removal from another's land, something previously constituting part of the land." *Hubscher & Son, Inc v Storey*, 228 Mich App 478, 483; 578 NW2d 701 (1998); see also, e.g., *VanAlstine v Swanson*, 164 Mich App 396, 405; 417 NW2d 516 (1987). A profit á prendre may grant "the right to enter upon the lands of another[] and remove gravel or other material therefrom." *Stockdale v Yerden*, 220 Mich 444, 448; 190 NW 225 (1922); see also, e.g., *VanAlstine*, 164 Mich App at 405 (addressing a profit á prendre of mineral rights). A profit à prendre "is distinguishable from a mere license or easement because it includes the right to remove," but "[t]he holder of the profit owns the minerals only after severance." *VanAlstine*, 164 Mich App at 405. Consequently, there is no right to use the property except as incident to the right of removal. *Stevens Mineral Co v Michigan*, 164 Mich App 692, 698; 418 NW2d 130 (1987). "Until the right is actually exercised and possession is taken, it is a floating, indefinite, and incorporeal right." *Id.*; see also *VanAlstine*, 164 Mich App at 405. The only distinguishing characteristics between an easement and a profit à prendre is that a profit à prendre grants the holder "the right to remove." *VanAlstine*, 164 Mich App at 405.

The body of caselaw discussing this theory establishes nothing more than that plaintiff had rights pursuant to a lease to remove sand and gravel. As such, a profit à prendre does not change the general rule: a lease executed after a mortgage is extinguished through foreclosure and is null and void if the mortgage has not been redeemed. Thus, plaintiff's profit á prendre was extinguished by the foreclosure.

C. MCL 565.81

Plaintiff argues that MCL 565.81 precludes a mortgagee from accepting a pledge of oil and gas rights. MCL 565.81 provides that "it shall be lawful to assign in the mortgage . . . all or any part of the oil and gas located in, on or under oil and gas properties, and all or any part of the rents and profits from oil and gas properties . . . as security for the indebtedness secured by the mortgage or deed of trust." This statute has no relevance to plaintiff's lease because plaintiff's lease was not in effect at the time the mortgage was executed. Furthermore, plaintiff's lease was for sand and gravel rights, not for oil and gas rights. Finally, plaintiff also raises arguments regarding contractors' liens and mechanics' liens, which similarly have no relevance to this case.

D. EXTENT OF JP MORGAN'S SECURITY INTEREST

Plaintiff asserts that its lease is not affected by JP Morgan's security interest because the security interest did not encompass the lease. This argument is without merit. Plaintiff does not identify any language in the mortgage documents excepting sand and gravel rights. Regardless, because plaintiff's lease arose after the mortgage was executed, it was extinguished upon foreclosure of the mortgage as discussed earlier.

E. ROYALTY PAYMENTS

Plaintiff's arguments about the royalty stream are not entirely clear. He seems to argue that JP Morgan and its successors received the same rights and duties that the Thorntons held, i.e., the contractual obligation to allow plaintiff to continue his mining activities until the lease expired along with the right to receive royalty payments in accordance with the lease. But, as discussed and stated numerous times earlier, the lease was extinguished when the foreclosed property was not redeemed. Thus, JP Morgan and its successors own the entirety of the sand and gravel rights on the property, not simply a right to royalty payments

F. DUE PROCESS

Plaintiff argues that he had a right to notice of the foreclosure proceedings pursuant to the Due Process Clause, US Const, Am XIV. "The Fourteenth Amendment to the United States Constitution and Article 1, § 17 of Michigan's 1963 Constitution provide that the state shall not deprive a person of life, liberty, or property without due process of law." *In re Keyes Estate*, 310 Mich App 266, 274; 871 NW2d 388 (2015). "When a protected property interest is at stake, due process generally requires notice and an opportunity to be heard." *Id*. But "foreclosure by advertisement is not a judicial action and does not involve state action for purposes of the Due Process Clause, but rather is based on contract between the mortgagor and the mortgagee." *Cheff v Edwards*, 203 Mich App 557, 560; 513 NW2d 439 (1994).[3] Michigan caselaw holds that lessees are not entitled to notice of foreclosure proceedings. *Tilchin*, 328 Mich at 358. Thus, the foreclosure by advertisement in this case did not violate plaintiff's due process rights.

G. FORECLOSURE BY ADVERTISEMENT

Plaintiff cites no authority for his argument that foreclosure by advertisement cannot affect the rights of interested parties who were not parties to the mortgage agreement. "[A]ppellants may not merely announce their position and leave it to this Court to discover and rationalize the basis for their claims; nor may they give issues cursory treatment with little or no citation of supporting authority." *VanderWerp v Plainfield Charter Twp*, 278 Mich App 624, 633; 752 NW2d 479 (2008). Therefore, this argument may be deemed abandoned. *Id*. In any event, the mortgage was recorded before plaintiff entered into the lease agreement with the Thorntons. Plaintiff thus had notice of the mortgage, and the potential consequences of foreclosure.

H. PURCHASE AGREEMENT

Plaintiff argues that the purchase agreement between JP Morgan and the Rinesses excluded sand and gravel interests. Plaintiff relies on the following provisions in the sales documents:

[3] The cases cited by plaintiff, *In re Wayne Co Treasurer*, 265 Mich App 285; 98 NW2d 879 (2005), and *Dow v Michigan*, 396 Mich 192; 240 NW2d 450 (1976), involve the due-process rights of property owners in tax foreclosures, not lessees in foreclosures by advertisement.

> Subject to no other liens or contractor on property, Buyer to assume mineral rights. Dragline unit to be removed at closing.
>
> * * *
>
> Buyer understands and acknowledges that the property may contain mechanic's or materialmen's liens or other liens resulting from alleged violations of local ordinances and buyer is taking such property subject to such liens . . . .
>
> * * *
>
> 6. PERSONAL PROPERTY. Items of personal property are not included in this sale. . . . Any personal property on the Property may be subject to claims of third Parties.

These provisions are from the agreement between JP Morgan and the Rinesses. They do not confer any benefit on plaintiff. They absolve JP Morgan of responsibilities toward the Rinesses regarding any third-party claims, but they do not create any third-party rights to personal property or liens. Those rights must derive from some other source. Indeed, the statements, "Buyer to assume mineral rights" and "[d]ragline unit to be removed at closing" are contrary to plaintiff's claimed property interest.

I. DAMAGES

Plaintiff asserts in his statement of questions presented that he is entitled to recover damages from the Rinesses because they removed an entrance sign, blocked his access to the mining site, and threatened to remove his equipment. Plaintiff, however, fails to separately address this issue in the body of his brief, thereby abandoning the issue. *VanderWerp*, 278 Mich App at 633.

VI. CONCLUSION

Affirmed in part and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction. We award no costs because no party has prevailed in full, MCR 7.219(A).

/s/ Christopher M. Murray
/s/ Amy Ronayne Krause
/s/ Jonathan Tukel