

STATE OF MICHIGAN
COURT OF APPEALS

HOMESTEAD SAVINGS BANK,

Plaintiff-Appellee,

v

NORMAN NEALEY BUILDERS, INC.,

Defendant-Appellant.

UNPUBLISHED

October 25, 2005

No. 263080

Eaton Circuit Court

LC No. 04-001043-CH

Before: Talbot, P.J., and White and Wilder, JJ.

PER CURIAM.

Defendant appeals as of right from the trial court's order granting summary disposition to plaintiff. We affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

On May 24, 2002 plaintiff loaned money to defendant and received a mortgage concerning multiple units at Riverwood Estates Condominium II in Eaton Rapids. Defendant defaulted on the loan. Notice of the default and a mortgage sale were dated July 24, 2003. That notice was published, and a sheriff's sale was held on September 25, 2003.

The notice and publication incorrectly stated that the redemption period was six months. The actual redemption period was one year from the date of sale. On March 29, 2004, plaintiff's attorney recorded an affidavit to correct the mistake.

On or about August 5, 2004, plaintiff filed a complaint for declaratory action requesting the trial court determine the parties' rights and find that the redemption period for the foreclosure would expire on September 25, 2004, which was one year from the date of the sheriff's sale. At the motion for summary disposition, defendant argued that the entire foreclosure action was void due to the incorrectly stated redemption period. Defendant claims that a strict reading of the statute requires a refile and resale of the property in question with an entirely new redemption period to accompany such new sale proceedings.

The trial court found that defendant was not harmed by the mistake and had not attempted to redeem the property at any time. The trial court, therefore, granted summary disposition in favor of plaintiff.

A trial court's grant or denial of a motion for summary disposition is reviewed de novo by this Court. *Advanta Nat'l Bank v McClarty*, 257 Mich App 113, 116-117; 667 NW2d 880 (2003).

Foreclosure by advertisement is strictly regulated by statute. *Senters v Ottawa Savings Bank, FSB*, 443 Mich 45, 56; 503 NW2d 639 (1993). There is room for equitable consideration, however, where fraud, accident, or mistake is alleged. *Id.* at 55.

The effect of a defect in notice is to render a foreclosure sale voidable. *Jackson Investment Corp v Pittsfield Products, Inc.*, 162 Mich App 750, 755; 413 NW2d 99 (1987). More security is given to the title of real property by holding that a defect renders a foreclosure sale voidable, rather than void. *Id.* at 756. "Such a holding also allows for an examination of whether any harm was caused by the defect." *Id.* If no harm was caused by the defect and the mortgagor would have been in no better position had the notice been fully proper, then this Court will not automatically find the foreclosure sale void. *Id.*

In this case, there is no dispute that a mistake was made by plaintiff in the initial notice and publication that stated the redemption period was only six months. Plaintiff attempted to correct that mistake by recording additional affidavits stating that the redemption period was actually one year. Defendant has not provided any support in the form of pleadings, affidavits, deposition testimony, or other evidence showing how it was prejudiced. There is no allegation that defendant was able or even attempted to redeem the property after the sheriff's sale, whether during the six-month or one-year period of time.

Summary disposition in favor of plaintiff was proper because, although a mistake was made in the notice concerning a foreclosure by advertisement, that mistake did not cause any harm to defendant.

Concerning defendant's due process argument, "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). Accordingly, defendant's argument based on the Due Process Clause is misplaced and not applicable to this case, which involves foreclosure by advertisement based on the mortgage between plaintiff and defendant.

Affirmed.

/s/ Michael J. Talbot

/s/ Helene N. White

/s/ Kurtis T. Wilder