

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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BANK ONE NA,

Plaintiff-Appellant,

v

OTTAWA COUNTY REGISTER OF DEEDS and  
CENTURY PARTNERS LLC and SCOTT  
CARLSON and MATTHEW MILMEISTER and  
BENJAMIN KAMP and DEBORAH KAMP,

Defendants-Appellees.

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UNPUBLISHED

May 20, 2008

No. 277081

Ottawa Circuit Court

LC No. 05-053094-CZ

Before: Jansen, P.J., and Zahra and Gleicher, JJ.

PER CURIAM.

Plaintiff appeals as of right a March 9, 2007, “order taxing costs and attorney fees” in the amount of \$30,899.24 in favor of defendant Century Partners LLC (Century) and defendants Matthew Milmeister (Milmeister) and Scott Carlson (Carlson), principals of Century. We affirm.

I. Basic Facts and Proceedings

This case arises from the foreclosure of a 3.03 acre parcel of real property located at 10200 Fillmore Street, Ottawa County, Michigan (subject property). On March 14, 1994, John Hoelsema and Karen Hoelsema, the owners, granted a mortgage on the subject property to Select-A-Loan in exchange for \$98,000 (senior mortgage). On December 8, 1999, the Hoelsemas granted a second mortgage on the subject property to plaintiff in exchange for \$79,125 (junior mortgage). The Hoelsemas defaulted on both mortgages.

Both loans were foreclosed. The junior mortgage went to sheriff’s sale on June 17, 2004. The senior mortgage went to sheriff’s sale on July 15, 2004. Plaintiff was the successful bidder at the sheriff’s sale for the junior mortgage and was granted a sheriff’s deed indicating a six-month redemption period. Century was the successful bidder at the sheriff’s sale for the senior mortgage and was granted a sheriff’s deed indicating a one-year redemption period. Under MCL 600.3240, a parcel of single residential real property over three acres is subject to a one-year redemption period, and residential real property three acres or under is subject to a six-month redemption period. The law firm that initiated foreclosure of the senior mortgage indicated in the notice of foreclosure sale a six-month redemption period. On February 24, 2005, however,

the law firm filed in Oakland County Circuit Court an affidavit of scrivener's error indicating that the "correct redemption period is One year." The affidavit of scrivener's error was also filed in the Ottawa County Circuit Court on March 14, 2005.

On July 1, 2005, plaintiff sought to redeem the subject property and, Robert Hemphill, (Hemphill), a paralegal for plaintiff counsel contacted Milmeister requesting a redemption figure. Milmeister, unaware of the affidavit of scrivener's error, told Hemphill that based on the notice of foreclosure sale posting and the sheriff's deed, the redemption period had expired. That same day, Hemphill confirmed his belief that the subject property was over 3 acres, and allegedly called Milmeister to challenge any assertion that the redemption period had expired before July 15, 2005. Milmeister did not recall whether Hemphill called again. Hemphill also allegedly sent Milmeister a fax reiterating his position, but Milmeister denied having received such a fax. Plaintiff did not redeem the subject property before July 15, 2005.

On August 14, 2005, plaintiff filed a complaint against Century, Milmeister and the Ottawa County Register of Deeds (OCRD). The complaint alleged Century and Milmeister committed fraud, misrepresentation and negligence by refusing to provide plaintiff the correct redemption deadline and redemption figure, which plaintiff claims prevented it from redeeming the subject property and protecting plaintiff's junior mortgage. Plaintiff also requested a writ of mandamus ordering the OCRD "to calculate and accept an appropriate tender from Plaintiff for the redemption of the senior lien on the subject property." On August 8, 2006, plaintiff filed an amended complaint to include subsequent purchasers of the subject property, defendants Benjamin and Deborah Kamp.

On August 29, 2006, the OCRD moved for summary disposition arguing that it had no legal duty to provide plaintiff a redemption figure. The OCRD specifically argued that as of March 31, 2005, revised MCL 600.3240<sup>1</sup> took effect and expressly prohibited the OCRD from

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<sup>1</sup> Revised MCL 600.3240, provides, in relevant part, that:

(1) A purchaser's deed is void if the mortgagor . . . redeems the entire premises sold by paying the amount required under subsection (2), within the applicable time limit prescribed in subsections (7) to (12), to the purchaser or the purchaser's executors, administrators, or assigns, or to the register of deeds in whose office the deed is deposited for the benefit of the purchaser.

(2) The amount required to be paid under subsection (1) is the sum that was bid for the entire premises sold, with interest from the date of the sale at the interest rate provided for by the mortgage, together with the amount of the sheriff's fee paid by the purchaser under section 2558(2)(q), and an additional \$5.00 as a fee for the care and custody of the redemption money if the payment is made to the register of deeds. The register of deeds shall not determine the amount necessary for redemption. The purchaser shall attach an affidavit with the deed to be recorded under this section that states the exact amount required to redeem the property under this subsection, including any daily per diem amounts, and the

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date by which the property must be redeemed shall be stated on the certificate of sale. The purchaser may include in the affidavit the name of a designee responsible on behalf of the purchaser to assist the person redeeming the property in computing the exact amount required to redeem the property. The designee may charge a fee as stated in the affidavit and may be authorized by the purchaser to receive redemption funds. The purchaser shall accept the amount computed by the designee.

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(4) If after the sale the purchaser, the purchaser's heirs, executors, or administrators, or any person lawfully claiming under the purchaser or the purchaser's heirs, executors, or administrators pays taxes assessed against the property, amounts necessary to redeem senior liens from foreclosure, condominium assessments, homeowner association assessments, community association assessments, or premiums on an insurance policy covering any buildings located on the property that under the terms of the mortgage it would have been the duty of the mortgagor to pay if the mortgage had not been foreclosed and that are necessary to keep the policy in force until the expiration of the period of redemption, redemption shall be made only upon payment of the sum specified in subsection (2) plus the amounts specified in this subsection with interest on the amounts specified in this subsection from the date of the payment to the date of redemption at the interest rate specified in the mortgage, if all of the following are filed with the register of deeds with whom the deed is deposited:

(a) An affidavit by the purchaser or someone in his or her behalf who has knowledge of the facts of the payment showing the amount and items paid.

(b) The receipt or copy of the canceled check evidencing the payment of the taxes, amounts necessary to redeem senior liens from foreclosure, condominium assessments, homeowner association assessments, community association assessments, or insurance premiums.

(c) An affidavit of an insurance agent of the insurance company stating that the payment was made and what portion of the payment covers the premium for the period before the expiration of the period of redemption.

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(6) The register of deeds shall indorse on the documents filed under subsection (4) the time they are received. The register of deeds shall record the affidavit of the purchaser only and shall preserve in his or her files the recorded affidavit, receipts, insurance receipts, and insurance agent's affidavit until expiration of the period of redemption.

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(13) The amount stated in any affidavits recorded under this section shall be the  
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providing a redemption figure.<sup>2</sup> Plaintiff admitted it did not request a redemption figure from the OCRD until after the effective date of the revised MCL 600.3240. After a hearing, the trial court

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amount necessary to satisfy the requirements for redemption under this section.

<sup>2</sup> Compare Former MCL 600.3240, which provided in relevant part, that:

(1) A purchaser's deed is void if the mortgagor, the mortgagor's heirs, executors, or administrators, or any person lawfully claiming under the mortgagor, the mortgagor's heirs, executors, or administrators redeems the entire premises sold by paying the amount required under subsection (2), within the applicable time limit prescribed in subsections (7) to (12), to the purchaser, the purchaser's executors, administrators, or assigns, or to the register of deeds in whose office the deed is deposited for the benefit of the purchaser.

(2) The amount required to be paid under subsection (1) is the sum that was bid for the entire premises sold, with interest from the time of the sale at the rate percent borne by the mortgage, together with the amount of the sheriff's fee paid by the purchaser under section 2558(2)(q), and an additional \$3.00 as a fee for the care and custody of the redemption money if the payment is made to the register of deeds.

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(4) If after the sale the purchaser, the purchaser's heirs, executors, or administrators, or any person lawfully claiming under the purchaser, the purchaser's heirs, executors, or administrators pays taxes assessed against the property, amounts necessary to redeem senior liens from foreclosure, condominium assessments, homeowner association assessments, community association assessments, or premiums on an insurance policy covering any buildings located on the property that under the terms of the mortgage it would have been the duty of the mortgagor to pay if the mortgage had not been foreclosed and that are necessary to keep the policy in force until the expiration of the period of redemption, redemption shall be made only upon payment of the sum specified in subsection (2) plus the amounts specified in this subsection with interest on the amounts specified in this subsection from the date of the payment to the date of redemption at the rate specified in the mortgage, if all of the following are filed with the register of deeds with whom the deed is deposited:

(a) An affidavit by the purchaser or someone in his or her behalf who has knowledge of the facts of the payment showing the amount and items paid.

(b) The receipt or copy of the canceled check evidencing the payment of the taxes, amounts necessary to redeem senior liens from foreclosure,

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granted the OCRD's motion for summary disposition, finding revised MCL 600.3240 applicable and that revised MCL 600.3240 prohibited the OCRD from providing a redemption figure.

On September 5, 2006, Century, Milmeister and Carlson filed a motion for summary disposition. They argued that senior lien holders are not obligated to provide a redemption figure to those seeking redemption. Rather, they claimed that all the information needed to determine a redemption figure was provided on the affidavit of sale, which includes the date of purchase, purchase price and interest rate. In response, plaintiff claimed that while it may be able to determine costs under revised MCL 600.3240(2), it could not determine costs paid to maintain the property, i.e., insurance and taxes, under revised MCL 600.3240(4).

During oral argument on Century's motion for summary disposition, the trial court specifically asked defense counsel the significance of the following statement contained in revised MCL 600.3240(2):

The purchaser shall attach an affidavit with the deed to be recorded under this section that states the exact amount required to redeem the property under this subsection, including any daily per diem amounts, and the date by which the property must be redeemed shall be stated on the certificate of sale.

Defense counsel ceded that the affidavit had not been filed, but maintained the affidavit was not required at the time the sheriffs' deed was filed. Defense counsel further argued that plaintiff could readily determine a redemption figure under MCL 600.3240(2), and further noted that costs under MCL 600.3240(2) are collectible only to the extent that certain evidence reflecting payment of those costs<sup>3</sup> is filed pursuant to MCL 600.3240(2)(a), (b) and (c).

In a written opinion, the trial court granted summary disposition in favor of Century, Milmeister and Carlson. The trial court held that, under former or revised MCL 600.3240, plaintiff could have tendered payment to the purchaser or the OCRD, but that payment nonetheless must be made within one year, which was not done. The trial court further noted that the instant case was not an equitable proceeding, though if it were, plaintiff would not be entitled to relief because plaintiff knew that Milmeister's representation of the redemption date was false yet failed to make any good faith effort to pay the redemptive figure.

Century, Milmeister and Carlson thereafter filed a motion for costs and sanctions, arguing plaintiff had no good faith basis to support its claims. Plaintiff responded that the instant case

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condominium assessments, homeowner association assessments, community association assessments, or insurance premiums.

(c) An affidavit of an insurance agent of the insurance company stating that the payment was made and what portion of the payment covers the premium for the period prior to the expiration of the period of redemption.

<sup>3</sup> In regard to the costs, MCL 600.3240(4) also provides for interest "from the date of the payment to the date of redemption at the interest rate specified in the mortgage."

was unique in that during the one-year redemptive period, revised MCL 600.3240 took effect and altered the redemption requirements by prohibiting the OCRD from providing a redemptive figure and requiring that purchaser attach an affidavit to the sheriff's deed stating the exact amount for redemption.

In a written opinion, the trial court granted Century's, Milmeister's and Carlson's motion for costs and sanctions. The trial court found that "plaintiff's facts do not constitute fraud or a basis on which it is entitled to relief." The trial court entered an order awarding \$30,899.24 to Century, Milmeister and Carlson, which plaintiff now appeals.

## II. Attorneys' Fees

Plaintiff argues that its complaint was not frivolous and that the trial court improperly awarded attorneys' fees.

The determination of a frivolous lawsuit requires the trial court to make a factual finding that considers the particular circumstances of the case. See *Powell Prod, Inc v Jackhill Oil Co*, 250 Mich App 89, 94-95; 645 NW2d 697 (2002). "Whether a claim is frivolous within the meaning of MCR 2.114<sup>[4]</sup> and MCL 600.2591<sup>[5]</sup> depends on the facts of the case," and review of

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<sup>4</sup> MCR 2.114, entitled, "Signatures of Attorneys and Parties; Verification; Effect; Sanctions," provides, in part, that:

(A) Applicability. This rule applies to all pleadings, motions, affidavits, and other papers provided for by these rules. See MCR 2.113(A). In this rule, the term "document" refers to all such papers.

(B) Verification.

(1) Except when otherwise specifically provided by rule or statute, a document need not be verified or accompanied by an affidavit.

(2) If a document is required or permitted to be verified, it may be verified by

(a) oath or affirmation of the party or of someone having knowledge of the facts stated; or

(b) except as to an affidavit, including the following signed and dated declaration: "I declare that the statements above are true to the best of my information, knowledge, and belief."

In addition to the sanctions provided by subrule (E), a person who knowingly makes a false declaration under subrule (B)(2)(b) may be found in contempt of court.

(C) Signature.

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(1) Requirement. Every document of a party represented by an attorney shall be signed by at least one attorney of record. A party who is not represented by an attorney must sign the document.

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(D) Effect of Signature. The signature of an attorney or party, whether or not the party is represented by an attorney, constitutes a certification by the signer that

(1) he or she has read the document;

(2) to the best of his or her knowledge, information, and belief formed after reasonable inquiry, the document is well grounded in fact and is warranted by existing law or a good-faith argument for the extension, modification, or reversal of existing law; and

(3) the document is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation.

(E) Sanctions for Violation. If a document is signed in violation of this rule, the court, on the motion of a party or on its own initiative, shall impose upon the person who signed it, a represented party, or both, an appropriate sanction, which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the document, including reasonable attorney fees. The court may not assess punitive damages.

(F) Sanctions for Frivolous Claims and Defenses. In addition to sanctions under this rule, a party pleading a frivolous claim or defense is subject to costs as provided in MCR 2.625(A)(2). The court may not assess punitive damages.

<sup>5</sup> MCL 600.2591, entitled, "Frivolous action; costs and fees," provides that:

(1) Upon motion of any party, if a court finds that a civil action or defense to a civil action was frivolous, the court that conducts the civil action shall award to the prevailing party the costs and fees incurred by that party in connection with the civil action by assessing the costs and fees against the nonprevailing party and their attorney.

(2) The amount of costs and fees awarded under this section shall include all reasonable costs actually incurred by the prevailing party and any costs allowed by law or by court rule, including court costs and reasonable attorney fees.

(3) As used in this section:

(a) "Frivolous" means that at least 1 of the following conditions is met:

(i) The party's primary purpose in initiating the action or asserting the defense was to harass, embarrass, or injure the prevailing party.

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a trial court's finding of frivolity is for clear error. *Kitchen v Kitchen*, 465 Mich 654, 662; 641 NW2d 245 (2002).

Pursuant to MCL 600.2591, a claim is frivolous when: (1) the party's primary purpose was to harass, embarrass or injure the prevailing party; (2) the party had no reasonable basis to believe the underlying facts were true; or (3) the party's position was devoid of arguable legal merit. The filing of a signed pleading that is not well-grounded in fact and law subjects the filer to similar sanctions pursuant to MCR 2.114(E). [*Jerico Const, Inc v Quadrants, Inc*, 257 Mich App 22, 36-37; 666 NW2d 310 (2003), citing *Yee v Shiawassee Company Bd of Comm'rs*, 251 Mich App 379, 407; 651 NW2d 756 (2002) (Internal citation omitted).]

Further, MCL 2.625, entitled, "Taxation of Costs," provides that, "[i]n an action filed on or after October 1, 1986, if the court finds on motion of a party that an action or defense was frivolous, costs shall be awarded as provided by MCL 600.2591."

Here, we cannot conclude the trial court clearly erred in concluding that plaintiff's complaint was devoid of arguable legal merit.

To establish a prima facie claim of fraudulent misrepresentation, a plaintiff must prove (1) the defendant made a material representation; (2) the representation was false; (3) when the defendant made the representation, the defendant knew that it was false, or made it recklessly, without knowledge of its truth or falsity, and as a positive assertion; (4) the defendant made the representation with the intention that the plaintiff would act on it; (5) the plaintiff acted in reliance on the representation; and (6) the plaintiff suffered damage. [*Derderian v Genesys Health Care Systems*, 263 Mich App 364, 378; 689 NW2d 145 (2004) (Citation omitted).]

Further,

"a false statement of fact, made without knowledge of its falsity or intent to deceive, is actionable [under Michigan's doctrine of innocent misrepresentation] if relied upon by the other party to the contract to their detriment and the party that made the false statement is unjustly enriched." [*Id.* at 380-381 (Citations omitted).]

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(ii) The party had no reasonable basis to believe that the facts underlying that party's legal position were in fact true.

(iii) The party's legal position was devoid of arguable legal merit.

(b) "Prevailing party" means a party who wins on the entire record.

In regard to plaintiff's claims for fraud, misrepresentation and innocent misrepresentation, plaintiff cannot show that it reasonably relied on Milmeister's representations. "There can be no fraud where a person has the means to determine that a representation is not true." *Nieves v Bell Industries, Inc*, 204 Mich App 459, 464; 517 NW2d 235 (1994), citing *Montgomery Ward & Co v Williams*, 330 Mich 275, 47 NW2d 607 (1951); *Webb v First of Michigan Corp*, 195 Mich App 470, 474, 491 NW2d 851 (1992). Further, "someone who knows that a representation is false cannot rely on that representation. Such knowledge prevents not only reasonable reliance, it prevents any reliance at all." *Phinney v Perlmutter*, 222 MichApp 513, 535; 564 NW2d 532 (1997). At the onset, we note that plaintiff's brief on appeal recognized that "[it] might not have been able to prove all six elements." Here, plaintiff clearly did not believe Milmeister's representation that the redemption period for the subject property was only six months. Thus, plaintiff could not have relied on this representation. Further, the refusal to provide plaintiff with a redemption figure cannot reasonably be considered a representation, as nothing was related to plaintiff. Even assuming that Milmeister's refusal is construed as an assertion of incorrect redemption figure, Hemphill testified that he could have readily ascertained a correct redemption figure from the affidavit attached to the sheriff's deed. Indeed, he testified that it was not unusual for persons seeking to redeem to verify the redemption figure they had been provided. "There can be no fraud where a person has the means to determine that a representation is not true." *Nieves, supra* at 464.

Plaintiff also claims that revised MCL 600.3240 "created a duty in a third party purchaser in a senior sheriff's lien to assist the redeeming party." Even assuming that revised MCL 600.3240 required defendants to assist plaintiff in redeeming the property,<sup>6</sup> we nonetheless cannot conclude that the trial court clearly erred in finding plaintiff's claims frivolous. In regard to plaintiff's claims of misrepresentation, fraud and innocent fraud, plaintiff cannot maintain these claims merely on the basis of defendants' failure to follow a statutory duty when plaintiff plainly did not rely on defendant's representations. Further, plaintiff's negligence claim is without support. Specifically, plaintiff cannot establish that defendant's failure to file an affidavit pursuant to revised MCL 600.3240 proximately caused plaintiff to fail to redeem the

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<sup>6</sup> On this point, we find persuasive the decision of a panel of this Court in *Wolf v Homecomings*, per curiam opinion of the Court of Appeals, December 19, 2006 (Docket No 270169), slip op at 2, which held that, "because there is an 'absence of a clear expression by the Legislature' that the amended language of MCL 600.3240 be retroactively applied, . . . the statutory revisions were not applicable to defendant[s] retroactively." Accordingly, defendants were not required to submit an affidavit with the sheriff's deed "that states the exact amount required to redeem the property," after revised MCL 600.3240(2) took effect.

subject property. Revised MCL 600.3240 in no way indicates that the failure to file a redemption figure with the sheriff's deed would toll the redemption period. Yet, plaintiff knew the correct redemption date and took no legal action to preserve or enforce its claim until after the redemption date had passed. Further, plaintiff could have ascertained the correct redemption figure and provided the sum to defendants or the OCRD, yet did not even attempt to do so. Thus, we conclude the trial court did not clearly err in finding plaintiff's claims devoid of arguable legal merit.

Affirmed.

/s/ Kathleen Jansen  
/s/ Brian K. Zahra  
/s/ Elizabeth L. Gleicher