STATE OF MICHIGAN

COURT OF APPEALS

ALLEN BAKRI,

Plaintiff-Appellant,

v

MORTGAGE ELECTRONIC REGISTRATION SYSTEM, MERSCORP INC, BANK OF NEW YORK MELLON, f/k/a BANK OF NEW YORK, and TROTT & TROTT PC,

Defendant-Appellees.

UNPUBLISHED
October 30, 2012

No. 297962
Wayne Circuit Court
LC No. 09-030482-CH

AFTER REMAND

Before: BORRELLO, P.J., and METER and SHAPIRO, JJ.

PER CURIAM.

In our previous opinion and later clarification order concerning this case involving an action to quiet title, we noted that, in *Residential Funding Co., LLC v Saurman*, 292 Mich App 321; 807 NW2d 412 (2011), rev'd 490 Mich 877 (2011), a majority of this Court had held that, in order for an entity to foreclose on a mortgagor by advertisement, the mortgagee must also have an interest in the note itself, pursuant to MCL 600.3204(1)(d). We thus remanded to the trial court to determine whether Bank of New York Mellon owned the note at the time that plaintiff was served written notice pursuant to MCR 600.3205a. We now affirm the trial court's order granting summary disposition in favor of defendants.

As discussed in our previous opinion, we disagree with plaintiff's assertion that the trial court erred in denying him the opportunity to amend his first amended complaint under MCR 2.116(I)(5). Also as discussed previously, we find no merit in plaintiff's argument that summary disposition was improper because defendant MERS's assignment of the mortgage to defendant Bank of New York Mellon was null and void here where defendant MERS was not the lender and thus assigned the mortgage to defendant Bank of New York Mellon without the promissory note; i.e. the underlying debt. Because plaintiff granted defendant MERS the power to assign the mortgage, the assignment of the mortgage to defendant Bank of New York Mellon was valid. In addition, because the mortgage specifically granted defendant MERS the power to foreclose on and sell the property as nominee for the lender, its assignee, defendant Bank of New York Mellon, also had that power.

While these findings supports the trial court's decision, we held that this case was governed by *Saurman* to the extent it decided that, under MCL 600.3204(1)(d), the Legislature limited foreclosure by advertisement to those parties with ownership of an interest in the note, and a mortgagee who does not hold such an interest is not "the owner . . . of an interest in the indebtedness secured by the mortgage[,]" MCL 600.3204(1)(d), and thus lacks the authority to foreclose by advertisement. Thus, following defendant Bank of New York Mellon's motion for clarification, we remanded to determine whether Bank of New York Mellon owned the note at the time that plaintiff was served written notice.

Subsequent to this decision, our Supreme Court reversed this Court's holding in *Saurman* by order. *Residential Funding Co, LLC v Saurman*, 490 Mich 909; 805 NW2d 183 (2011). The Court adopted the *Saurman* dissent concerning MERS' status as "the owner . . . of an interest in the indebtedness secured by the mortgage" under MCL 600.3204(1)(d), "because [MERS'] contractual obligations as mortgagee were dependent upon whether the mortgagor met the obligation to pay the indebtedness which the mortgage secured." *Id*. (internal quotation omitted). The Court held that, while MERS did not have an ownership interest in the note, it could still foreclose by advertisement. *Id*. The Court then explained that, historically, Michigan law has not required that the holder of the note and the mortgage be the same entity; in such cases the record holder of the mortgage has the power to foreclose. *Id*. at 910. The Court also found that the 2004 amendment of MCL 600.3204(1) did not change this framework.

Given our Supreme Court's reversal of this Court's decision in *Saurman*, we now find that, regardless of whether Bank of New York Mellon possesses an interest in the note, or the note itself, foreclosure by advertisement was available here. While normally under the law of the case doctrine, this Court's previous decision would stand regardless of its correctness, the doctrine will not preclude reconsideration in light of a subsequent change in the law. *Ashker v Ford Motor Co*, 245 Mich App 9, 13; 627 NW2d 1 (2001). Thus, we are not precluded from reversing its previous reliance on the holding in *Saurman* and upholding the trial court's grant of summary disposition. Moreover, we also note that on remand the trial court found that Bank of New York Mellon did have possession of the note at the time plaintiff was served with written notice, a finding plaintiff has not contested following the return of this case to this Court.

Due to our reliance on *Saurman*, we previously found it unnecessary to address plaintiff's remaining arguments on appeal. We do so now.

Plaintiff argues that summary disposition was improper because the trial court failed to comply with MCL 600.2932(1) and (3), which provide:

> (1) **Interest of plaintiff.** Any person, whether he is in possession of the land in question or not, who claims any right in, title to, equitable title to, interest in, or right to possession of land, may bring an action in the circuit courts against any other person who claims or might claim any interest inconsistent with the interest claimed by the plaintiff, whether the defendant is in possession of the land or not.

* * *

> (3) **Establishment of title, relief afforded.** If the plaintiff established his title to the lands, the defendant shall be ordered to release to the plaintiff all claims thereto. . . .

Here, plaintiff was not entitled to prevail on his quiet title action for the reasons stated above and in our previous opinion. Plaintiff defaulted on his loan, and the terms of the mortgage entitled the mortgage-holder to foreclose on and sell the property. There was no violation of MCL 600.2932(1) or (3).

Moreover, contrary to plaintiff's argument on appeal, summary disposition was not premature. "Generally, a motion for summary disposition is premature if granted before discovery on a disputed issue is complete." *Peterson Novelties, Inc v Berkley*, 259 Mich App 1, 24-25; 672 NW2d 351 (2003). "However, summary disposition may nevertheless be appropriate if further discovery does not stand a reasonable chance of uncovering factual support for the opposing party's position." *Id.* at 25. Although defendants moved for summary disposition before the discovery cutoff date, and the trial court granted the motion before the discovery cutoff date, further discovery did not stand a reasonable chance of uncovering factual support for plaintiff's contention. Therefore, summary disposition was not premature.

Plaintiff finally argues that the mortgage did not create an agency relationship between defendant MERS and plaintiff's lender. To the extent that this issue was not addressed by the trial court, it is unpreserved, and we decline to address it. *Fast Air, Inc v Knight*, 235 Mich App 541, 549; 599 NW2d 489 (1999).

Affirmed. Defendants, having prevailed in full, may tax costs pursuant to MCR 7.219(A).

/s/ Stephen L. Borrello
/s/ Patrick M. Meter
/s/ Douglas B. Shapiro