STATE OF MICHIGAN

COURT OF APPEALS

CANVASSER HERITAGE, L.L.C.,

Plaintiff-Appellant,

v

FIFTH THIRD BANK,

Defendant-Appellee,

and

MOUND WARREN HOLDINGS, L.L.C.,

Appellee.

UNPUBLISHED
November 15, 2012

No. 304510
Macomb Circuit Court
LC No. 2011-000260-CZ

Before: FORT HOOD, P.J., and METER and MURRAY, JJ.

PER CURIAM.

Plaintiff Canvasser Heritage, L.L.C., appeals as of right from the trial court's order granting summary disposition to defendant Fifth Third Bank in this action to enjoin defendant from foreclosing by advertisement on two mortgages executed by plaintiff in favor of defendant. We affirm.

On December 1, 2005, plaintiff, a limited liability company, executed two promissory notes in favor of defendant for commercial loans in the amounts of $3,740,000 and $3,135,000. Mark Canvasser (hereinafter referred to as Canvasser), plaintiff's sole member, signed the notes on behalf of plaintiff. Each note was secured by a separate mortgage in favor of defendant on property in a real-estate development known as the Reserve at Heritage Village. On the same date, Canvasser, individually and as trustee of the Canvasser Revocable Living Trust, also executed two separate guaranties of the obligations and debts evidenced by the two promissory notes.

After plaintiff defaulted on the two notes, defendant brought an action in the Oakland Circuit Court against Canvasser, individually and as trustee of the trust, to recover under the guaranties. On February 10, 2010, the court granted defendant's motion for summary disposition in that case, rejecting Canvasser's argument that defendant failed to mitigate its damages by failing to foreclose on the mortgages that secured the notes. The court noted that the guaranties

specifically provided that defendant was not required to foreclose on the collateral before pursuing the guaranties.

In three other actions involving the property, three construction-lien creditors brought actions against plaintiff in the Macomb Circuit Court for failure to pay for work performed on the property. In those actions, which were consolidated in the circuit court, the construction creditors alleged the superiority of their construction liens against all other liens and encumbrances on the property and, therefore, named defendant, as a mortgagee, in the lawsuits. Defendant filed a cross-claim and a counterclaim in which it requested a declaratory ruling that its mortgage on the property had priority over the construction-lien holders' claims. Defendant did not assert any claim against plaintiff. On November 15, 2010, the court dismissed with prejudice "the claims, counterclaims and cross-claims" in the consolidated construction-lien actions.

Plaintiff thereafter brought the instant action in the Macomb Circuit Court in which it sought to enjoin defendant from foreclosing. Plaintiff maintained that MCL 600.3204(1)(b) prohibited foreclosure by advertisement because defendant's Oakland County action was an action to recover the debt secured by the "mortgage."[1] Plaintiff also sought a declaratory ruling that the "mortgage" had been extinguished and an order requiring defendant to discharge the "mortgage."

Defendant moved for summary disposition of plaintiff's complaint under MCR 2.116(C)(8) and (10). Defendant argued that the Oakland County action did not prohibit it from foreclosing by advertisement because a lawsuit for breach of a guaranty is not a lawsuit on the *underlying* debt. Defendant also argued that dismissal of its cross-claim in the construction-lien actions did not affect the enforceability of the mortgages because it did not allege any claim against plaintiff in those actions, but rather only sought a declaratory ruling that its mortgages were superior to the construction liens. The trial court granted summary disposition to defendant with respect to plaintiff's claims, finding that the prior action on the guaranties in Oakland County and the prior Macomb County construction-lien actions did not prohibit defendant from seeking foreclosure by advertisement.

This Court reviews de novo a trial court's decision concerning a motion for summary disposition. *Ligon v Detroit*, 276 Mich App 120, 124; 739 NW2d 900 (2007). The interpretation of statutes and the application of the doctrine of res judicata are questions of law that are reviewed de novo, *Estes v Titus*, 481 Mich 573, 578-579; 751 NW2d 493 (2008), as are issues of contract interpretation, *Archambo v Lawyers Title Ins Corp*, 466 Mich 402, 408; 646 NW2d 170 (2002).

MCL 600.3204(1) provides, in pertinent part:

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[1] Plaintiff referred below and refers on appeal to a singular "mortgage."

> Subject to subsection (4),[2] a party may foreclose a mortgage by advertisement if all of the following circumstances exist:
>
> (a) A default in a condition of the mortgage has occurred, by which the power to sell became operative.
>
> (b) *An action or proceeding has not been instituted, at law, to recover the debt secured by the mortgage or any part of the mortgage*; or, if an action or proceeding has been instituted, the action or proceeding has been discontinued; or an execution on a judgment rendered in an action or proceeding has been returned unsatisfied, in whole or in part.
>
> (c) The mortgage containing the power of sale has been properly recorded.
>
> (d) The party foreclosing the mortgage is either the owner of the indebtedness or of an interest in the indebtedness secured by the mortgage or the servicing agent of the mortgage. [Emphasis added.]

Plaintiff argues that subsection (b) prohibits defendant from foreclosing by advertisement because the Oakland Circuit Court action against Canvasser and the trust to enforce rights under the guaranty documents amounted to an action "to recover the debt secured by the mortgage or any part of the mortgage."

"The primary goal of statutory interpretation is to give effect to the intent of the Legislature as expressed in the statute." *Brightwell v Fifth Third Bank*, 487 Mich 151, 157; 790 NW2d 591 (2010). A guaranty is "'an independent, collateral agreement by which [the guarantor] undertakes to pay the obligation if the primary payor fails to do so.'" *First Nat'l Bank & Trust Co v Dolph*, 287 Mich 219, 225; 283 NW 35 (1938), quoting *In re Kelley's Estate*, 173 Mich 492, 498; 139 NW 250 (1913). A guaranty contract is "an enforceable undertaking or promise by one person collateral to a primary or principal obligation of another which binds the person making the promise to performance of the primary obligation in the event of nonperformance; the secondary party thus becomes primarily responsible for performance." *Angelo Iafrate Co v M & K Dev Co*, 80 Mich App 508, 514; 264 NW2d 45 (1978). Therefore, "[u]nder Michigan law, a creditor generally may simultaneously proceed against a guarantor and foreclose on a mortgaged property because the guaranty is an obligation separate from the mortgage note." *Greenville Lafayette, LLC v Elgin State Bank*, 296 Mich App 284, 288; 818 NW2d 460 (2012).

This case is factually similar to *United States v Leslie*, 421 F2d 763 (CA 6, 1970).[3] In *Leslie*, the defendants, the Leslies, "were unconditional guarantors of payment of a negotiable

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[2] Subsection 4 contains further restrictions on foreclosure proceedings against certain property claimed as a principal residence. It is not relevant to this appeal.

promissory note" that had been executed and delivered by Leslie Motors, Inc., a family-owned corporation, to a bank. *Id*. at 764. The corporation also executed a mortgage on its real property to secure payment of the note. *Id*. Following the corporation's default on the note, the bank endorsed the note and assigned the mortgage and guaranty contracts to the Small Business Administration (SBA), which first brought an action against the defendants on the guaranty contracts, seeking to recover the full amount due, and the next day brought an action for foreclosure by advertisement on the mortgage. *Id*. at 764-765. The court rejected the defendants' argument that MCL 600.3204 precluded the government/SBA from maintaining its action against the guarantors once foreclosure was instituted. *Leslie*, 421 F2d at 765-766. The court stated:

> In the case before us, the debtor-mortgagor is Leslie Motors, Inc., not the defendants individually. No action was maintained against Leslie Motors on the debt. The action in the District Court was brought against the defendants in their capacity as guarantors. The guaranty is an obligation separate from the mortgage note. It is simply not the "debt" to which the statute refers. Because the obligation of guaranty is distinct from the debt, the Government was not maintaining an action against the debtor "to recover the debt then remaining secured . . . ." [*Id*. at 766.]

In *Greenville Lafayette*, similar to the present case, the plaintiff was a limited liability company and the guarantors were individuals, Avi Banker and Ahren Shulman. *Greenville Lafayette*, 296 Mich App at 286. The defendant first brought an action against the guarantors and, shortly thereafter, while that action was pending, sent a notice to the plaintiff of its intent to foreclose by advertisement. *Id*. The plaintiff brought an action to enjoin the foreclosure action and for a declaratory judgment that MCL 600.3204(1)(b) barred the defendant's foreclosure sale. *Greenville Lafayette*, 296 Mich App at 286. The trial court found that *Leslie* was persuasive and granted summary disposition to the defendant, finding as a matter of law that the defendant could foreclose by advertisement while pursuing an action against the guarantors. *Id*. at 286, 288.

This Court reversed, finding that *Leslie* was distinguishable because of language in the parties' mortgage in *Greenville Lafayette*. *Id*. at 291. The mortgage stated that it was "'given to secure'" payment of the "'indebtedness'" and defined indebtedness to include "'expenses payable under the Note or Related Documents . . . .'" *Id*. at 290. "'Related Documents'" was defined in the mortgage to mean "'all promissory notes, credit agreements, loan agreements, environmental agreements, *guaranties*, security agreements, mortgages, deeds of trust, security deeds, collateral mortgages, and all other instruments, agreements and documents, whether now or hereafter existing, executed in connection with Indebtedness.'" *Id*. at 290-291 (emphasis in original). Because "the plain language of the mortgage contract specifically include[d] guaranties in the indebtedness secured by the mortgage," and therefore the guaranties were "not obligations that [were] separate from the mortgage note" as in *Leslie*, this Court reversed the trial court's grant of summary disposition to the defendant. *Id*. at 291.

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[3] Decisions of the federal courts of appeal are not binding on state courts, but may be persuasive. *Abela v Gen Motors Corp*, 469 Mich 603, 607; 677 NW2d 325 (2004).

Here, defendant brought a prior action against the guarantors, Canvasser and the trust, in which the Oakland Circuit Court granted it summary disposition on the guaranties. The first mortgage contains no mention of the guaranties. The mortgage specially states that, in the event of default, defendant is entitled to pursue all remedies "given by this mortgage or otherwise permitted by law." Among the enumerated remedies is "[t]o foreclose this mortgage by action under applicable law." If the property is sold at public sale, the mortgage requires the bank to pay any surplus funds to the mortgagor.

We note that the second mortgage contains a paragraph entitled "Indebtedness Secured by this Mortgage," which defines the "Indebtedness," in pertinent part, as follows:

> 1. Payment of all amounts advanced under the revolving credit commitment of $3,135,000.00, as described in the Revolving Construction Loan Agreement . . . including without limitation, any obligations under any promissory notes(s) executed pursuant to the Loan Agreement, *guaranty(ies)*, loan and/or letter of credit agreement(s), . . . and any and all such extensions, renewals, modifications, substitutions or replacements thereof, together with interest, costs and all other sums on each amount. [Emphasis added.]

The second mortgage also contains specific language providing for the remedy of foreclosure by advertisement in the event of default.

Unlike the plaintiff in *Greenville Lafayette*, plaintiff here does not rely on appeal (and did not rely below) on the pertinent language from the second mortgage document to argue that the Oakland County action was an action "to recover the debt secured by the mortgage or any part of the mortgage." See MCL 600.3204(1)(b); see also *Greenville Lafayette*, 296 Mich App at 290. Instead, plaintiff refers to one singular "mortgage" and merely argues that "[i]t is beyond reasonable dispute that both the Oakland County Action and the earlier Macomb County Action were actions to recover the debt secured by [the] mortgage" and that "[t]here is no legitimate question that [the] allegations" in the Oakland County action "evidence an attempt by Fifth Third Bank to recover the debt secured by the mortgage . . . ."

Under these circumstances, we conclude that this case is not controlled by *Greenville Lafayette*. Rather, we are persuaded by the rationale in *Leslie*. Michigan courts generally recognize the principle that separate entities will be respected. *Wells v Firestone Tire & Rubber Co*, 421 Mich 641, 650; 364 NW2d 670 (1984). Further, a member of a limited liability company "is not liable for the acts, debts, or obligations of the limited liability company." MCL 450.4501(4). Because Canvasser and the trust were not parties to the mortgages, it is arguable that the "guaranties" mentioned in the second mortgage document are not the guaranties executed by Canvasser and the trust. Regardless, plaintiff has not argued that the guaranties were specifically included as part of the indebtedness secured by a mortgage, the guaranties are *not* specifically mentioned in the first mortgage, and plaintiff makes no attempt on appeal to differentiate between the two mortgages.

We conclude, given the unique factual circumstances, that we are not bound by *Greenville Lafayette* in this case, and we agree with the court's observation in *Leslie* that guaranties are "obligation[s] separate from . . . mortgage note[s]." *Leslie*, 421 F2d at 766.[4] Plaintiff has not adequately demonstrated, by way of its arguments, that the action against the guarantors was an action "to recover the debt secured by the mortgage[s] or any part of the mortgage[s]." MCL 600.3204(1)(b). Therefore, the trial court did not err in finding that defendant was not prohibited from pursuing foreclosure by advertisement because of the prior action against the guarantors.

Plaintiff also argues that foreclose by advertisement is barred by the doctrine of res judicata because the issue of collection upon indebtedness could have been fully litigated in the earlier Macomb County action.[5] We disagree. The doctrine of res judicata bars a subsequent action when (1) a prior action was decided on the merits, (2) the matter contested was or could have been resolved in the prior action, and (3) both actions involve the same parties or their privies. *Estes*, 481 Mich at 585. "The doctrine bars all matters that with due diligence should have been raised in the earlier action." *Id*.

Here, plaintiff and defendant were not adversaries in the construction-lien lawsuits. The construction-lien holders were claiming that their liens were primary, and defendant was named as a party only because of its status as a mortgagee of the property. Due diligence did not require defendant to raise any claims against plaintiff in its counterclaims against the other lien holders, which concerned only the priority of competing liens.

Furthermore, because defendant did not bring any action against plaintiff to enforce its contractual obligations and has not sought to judicially foreclose on the property, there is no "subsequent action" against which res judicata may operate.[6] As defendant notes, foreclosure by advertisement is a procedure controlled by the contract between the mortgagor and the mortgagee; it is not a judicial action. *Cheff v Edwards*, 203 Mich App 557, 560; 513 NW2d 439 (1994). Both mortgages contain specific language that allows foreclosure by advertisement in the event of a default, plaintiff specifically agreed to the remedy defendant is pursuing, and our holding today indicates that MCL 600.3204(1)(b) does not bar the remedy.

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[4] We are unpersuaded by plaintiff's argument that defendant has somehow admitted, by way of the language of the guaranties, that the guaranty actions were actions on the mortgages.

[5] Plaintiff mentions the Oakland County action but focuses its argument on the Macomb County action. At any rate, even if the Oakland County action were at issue, no relief would be warranted because of the lack of a "subsequent action," as explained *infra*.

[6] As noted, this matter was brought by plaintiff, who sought a declaratory judgment that defendant could not foreclose by advertisement because of MCL 600.3204(1)(b).

Affirmed.

/s/ Karen M. Fort Hood
/s/ Patrick M. Meter
/s/ Christopher M. Murray