

STATE OF MICHIGAN
COURT OF APPEALS

VICTORY ESTATES, L.L.C.,

Plaintiff-Appellant,

V

NPB MORTGAGE, L.L.C.,

Defendant-Appellee.

UNPUBLISHED

November 20, 2012

No. 307457

Berrien Circuit Court

LC No. 2011-000198-CH

Before: TALBOT, P.J., and BECKERING and M. J. KELLY, JJ.

PER CURIAM.

In this conversion action, plaintiff, Victory Estates, L.L.C., appeals as of right the trial court's order granting defendant, NPB Mortgage, L.L.C.'s, motion for summary disposition pursuant to MCR 2.116(C)(10). We affirm.

In 2006, three sets of Golliday family members purchased three separate tracts of land: Stefawn Golliday purchased Parcel A, Lesley and Dorothy Golliday purchased Parcel B, and Lindsey and Nicola Golliday purchased Parcel C. To finance their purchase, each Golliday obtained a mortgage from defendant: Stefawn for \$82,400; Lesley and Dorothy for \$196,110; and Lindsey and Nicola for \$119,200. The mortgages were duly recorded. The Gollidays then formed plaintiff¹ and, in 2007, transferred ownership of their respective parcels to plaintiff by quitclaim deed for \$1 each as part of their plan to build a condominium development. Defendant approved the transfer of land to plaintiff.

At some point, the Gollidays defaulted on each of the mortgages, and defendant foreclosed by advertisement. Defendant successfully sought deficiency judgments as to Parcels B and C. This Court upheld those deficiency judgments. *NPB Mtg, LLC v Golliday*, unpublished opinion per curiam of the Court of Appeals, issued February 16, 2012 (Docket Nos. 301830, 301831).

Plaintiff then sued defendant for common-law and statutory conversion, claiming that defendant wrongfully took the proceeds of the foreclosure sale. Plaintiff alleged that defendant

¹ There is also one non-Golliday member of plaintiff.

was not entitled to the proceeds because defendant had no right to foreclose on the Gollidays because they transferred their interest to plaintiff, so plaintiff was the proper party on which to foreclose. The trial court found that no genuine issue of material fact existed, and it granted defendant's motion for summary disposition.

We review de novo a trial court's grant or denial of a motion for summary disposition. *Latham v Barton Malow Co*, 480 Mich 105, 111; 746 NW2d 868 (2008). Our review is limited to evidence presented to the trial court at the time it decided the motion. *Innovative Adult Foster Care, Inc v Ragin*, 285 Mich App 466, 475-476; 776 NW2d 398 (2009). A party is entitled to summary disposition under MCR 2.116(C)(10) if there are no genuine issues of material fact, except as to the amount of damages, and the moving party is entitled to judgment as a matter of law. *Burden v Elias Bros Big Boy Restaurants*, 240 Mich App 723, 726; 613 NW2d 378 (2000). When deciding a summary disposition motion under MCR 2.116(C)(10), the trial court should view all documentary evidence in a light most favorable to the nonmoving party. *Id.* "A genuine issue of material fact exists when the record, giving the benefit of reasonable doubt to the opposing party, leaves open an issue upon which reasonable minds might differ." *West v Gen Motors Corp*, 469 Mich 177, 183; 665 NW2d 468 (2003). "A material fact is an ultimate fact issue upon which a jury's verdict must be based." *Belmont v Forest Hills Pub Schs*, 114 Mich App 692, 696; 319 NW2d 386 (1982), citing *Partrich v Muscat*, 84 Mich App 724, 730 n 3; 270 NW2d 506 (1978). In other words, "the disputed factual issue must be material to the dispositive legal claim." *Auto Club Ins Ass'n v State Auto Mut Ins Co*, 258 Mich App 328, 333; 671 NW2d 132 (2003).

Common-law conversion is defined as "any distinct act of domain wrongfully exerted over another's personal property in denial of or inconsistent with the rights therein." *Lawsuit Fin, LLC v Curry*, 261 Mich App 579, 591; 683 NW2d 233 (2004) (quotation omitted); see also *Head v Phillips Camper Sales & Rental, Inc*, 234 Mich App 94, 111; 593 NW2d 595 (1999). Therefore, there are three elements to a common-law conversion claim: (1) a distinct act of dominion; (2) wrongfully exerted; and (3) over another's personal property. The act is wrongful when it is inconsistent with the ownership rights of another. *Check Reporting Servs, Inc v Mich Nat'l Bank-Lansing*, 191 Mich App 614, 626; 478 NW2d 893 (1991). Statutory conversion is found at MCL 600.2919a, which prohibits but does not define "conversion."² "When a statute does not define a term, we will construe the term according to its common and approved usage." *Nelson v Grays*, 209 Mich App 661, 664; 531 NW2d 826 (1995). "A legal term of art, however, must be construed in accordance with its peculiar and appropriate legal meaning." *Brackett v Focus Hope, Inc*, 482 Mich 269, 276; 753 NW2d 207 (2008). Therefore, the common-law definition defines both common-law and statutory conversion.

We conclude that defendant lawfully exerted dominion over the proceeds of the foreclosure sale. Defendant's exertion of dominion over the proceeds would be wrongful if it

² MCL 600.2919a(1)(a) states the following: "A person damaged as a result of . . . the following may recover 3 times the amount of actual damages sustained, plus costs and reasonable attorney fees: (a) Another person's . . . converting property to the other person's own use."

was inconsistent with the ownership rights of another. See *Check Reporting Servs*, 191 Mich App at 626. The option to foreclose by advertisement is a contractual remedy authorized by the mortgagor. *Church & Church Inc v A-1 Carpentry*, 281 Mich App 330, 339; 766 NW2d 30 (2008). Each mortgage in this case provided that defendant could foreclose by advertisement. The statutory requirements for foreclosure by advertisement are located at MCL 600.3201 *et seq.* These include the requisite notice: MCL 600.3205a (notice must be sent to the “borrower,” subject to certain exceptions) and MCL 600.3208 (notice must be posted on the property and published in the paper). Defendant claims that it complied with the notice requirements of the governing statute, and plaintiff does not contest that it did. Plaintiff, however, claims that, as a true party in interest, it and all of its members should have received notice. As noted above, the statute only requires notice to “borrowers” and that notice be posted and published. Therefore, it is immaterial whether plaintiff and its members received notice because defendant was not required to give it. There was no genuine issue of fact as to whether dominion was wrongfully exerted where there is no dispute as to whether defendant followed the statutory rules for foreclosure by advertisement.

Plaintiff also claims that the dominion was wrongful because defendant should have sold Parcel A in 17 separate lots per MCL 600.3224. MCL 600.3224 requires that, when a single parcel is occupied as separate individual tracts, those separate tracts be sold separately. See also *Cox v Townsend*, 90 Mich App 12, 15; 282 NW2d 223 (1979). The *Cox* Court essentially held that this is a practical inquiry, but it is unclear, on this record, whether plaintiff’s unrealized use of the property compelled 17 separate sales. See *id.* at 16. Regardless, this question of fact does not reflect on whether dominion was wrongfully exerted, i.e., whether defendant had the right to sell the property. Rather, it reflects only to the amount for which the parcel was sold. As noted above, summary disposition is proper when—except as to the amount of damages—there is no genuine issue of material fact. MCR 2.116(C)(10). Therefore, this factual issue regarding the amount received during the foreclosure sale did not preclude summary disposition on the pleaded conversion claims.

Because no genuine issue of material fact existed, the trial court did not err in finding that defendant was entitled to judgment as a matter of law.

Affirmed.

/s/ Michael J. Talbot
/s/ Jane M. Beckering
/s/ Michael J. Kelly