STATE OF MICHIGAN

COURT OF APPEALS

ANTONEIO MOTTA,

Plaintiff-Appellant,

and

REGINA M. MOTTA,

Plaintiff,

v

UNIVERSAL MORTGAGE CORPORATION,

Defendant,

and

US BANK HOME MORTGAGE,

Defendant-Appellee.

UNPUBLISHED
January 29, 2013

No. 306038
Wayne Circuit Court
LC No. 10-012278-CH

Before: RONAYNE KRAUSE, P.J., and CAVANAGH and BOONSTRA, JJ.

PER CURIAM.

Plaintiffs appeal as of right an order granting summary disposition in favor of defendant, US Bank Home Mortgage (US Bank),[1] dismissing their complaint challenging foreclosure proceedings. We affirm.

On October 21, 2005, plaintiffs executed a mortgage in favor of Universal Mortgage Corporation (Universal Mortgage) regarding property located on Lonyo Street in the City of Detroit. It appears from the record that the last mortgage payment plaintiffs made on the subject

[1] It appears from the record that Universal Mortgage Corporation (Universal Mortgage) is no longer in business and never responded to plaintiffs' complaint; thus, we refer to US Bank as "defendant."

property was on October 5, 2009. By letter dated October 13, 2009, Universal Mortgage notified plaintiffs that they were in default on their mortgage in the amount of $4,328.85 and "ONLY THE FULL AMOUNT OF THE DELINQUENCY WILL CURE THE DEFAULT." Apparently plaintiffs requested information on "FNMA Loss Mitigation Programs" and, by letter dated November 9, 2009, Universal Mortgage detailed the necessary information required for processing a request for such relief. Subsequently, plaintiffs were notified by Universal Mortgage, by letter dated February 2, 2010, that "[u]pon review, we have determined we are unable to offer you any relief under these programs" because "[y]our income is insufficient to support a repayment plan under the Formal Forbearance Program, nor support a regular monthly payment under the Home Saver Advance." The letter also stated: "At this time, we are preparing your loan for legal action."

On February 16, 2010, plaintiffs were notified by Universal Mortgage's debt collector that "the creditor has elected to accelerate the total indebtedness." However, the letter advised, reinstatement of the mortgage was "possible" if past due payments and other costs and fees were received before the sheriff's sale. Apparently plaintiffs requested a reinstatement amount and, by letter dated February 19, 2010, Universal Mortgage's debt collector responded detailing the necessary actions required for reinstatement. Subsequently, by letter dated March 16, 2010, Universal Mortgage notified plaintiffs that "[a]fter reviewing your loss mitigation package you have qualified for FNMA's Home Saver Advance program." Plaintiffs were advised to sign and return the Truth-In-Lending Disclosure Statement and Promissory Note, as well as to remit $1,650.67 for outstanding fees and costs by March 29, 2010. However, it appears that plaintiffs mailed a check dated April 1, 2010, to Universal Mortgage in the amount of $1,119.43. Thus, the check was neither timely nor for the correct amount. And there is no record evidence that the necessary documents were forwarded to Universal Mortgage.

Subsequently, plaintiffs' uncashed check was returned and Universal Mortgage notified plaintiffs that "due to the fact that we have not received the properly signed documents from you we have no other option but to terminate this agreement" and "we have no other option than to continue with the foreclosure process on your property." On April 21, 2010, the property on Lonyo was sold at a sheriff's sale to Universal Mortgage. On April 29, 2010, Universal Mortgage quitclaimed the property to Federal National Mortgage Association ("Fannie Mae"). Defendant became the servicer of the loan effective June 1, 2010. The redemption period expired on October 21, 2010, without plaintiffs redeeming the property.

Instead, on October 21, 2010, plaintiffs filed their five count complaint against defendants US Bank and Universal Mortgage. Count I was a claim for specific performance and Count II was a breach of contract claim regarding the Home Saver Advance loan "contract." In Counts III and IV, plaintiffs alleged a violation of the Michigan Anti-Lock Out statute, MCL 600.5711, and common-law trespass because, in August 2010, during the statutory six month redemption period, defendant changed the locks on the Lonyo property. Count V was an action to quiet title and set aside the sheriff's sale on the ground that the foreclosure proceeding was illegal because, as a consequence of the Home Saver Advance loan "contract," plaintiffs' property was not in default at the time of the sheriff's sale.

On October 25, 2010, Fannie Mae initiated eviction proceedings against plaintiffs in the 36th District Court and, after plaintiffs failed to appear, on November 16, 2010, the court ordered their eviction by November 30, 2010.

Thereafter, on May 2, 2011, defendant sought the summary dismissal of this action pursuant to MCR 2.116(C)(7), (C)(8), and (C)(10). Defendant argued that this action was barred by res judicata because the judgment rendered in the eviction action by the 36th District Court barred these claims alleging improper foreclosure and eviction which could have been raised in the eviction action. Further, defendant argued that it could not be held liable for Universal Mortgage's alleged breach of a loan modification "agreement." Finally, defendant argued that plaintiffs lacked standing to challenge the foreclosure proceeding because they did not redeem the property and their rights were determined in the eviction action.

Plaintiffs responded to defendant's motion for summary disposition, arguing that their action was not barred by res judicata. Plaintiffs also argued that defendant was in privity with Universal Mortgage as its successor; thus, it could be held liable for plaintiffs' breach of contract claim. Finally, plaintiffs argued that they had standing to pursue their quiet title claim even after the redemption period expired.

On August 17, 2011, at a hearing on the motion for summary disposition, the trial court held that plaintiffs could have raised their claims in the district court eviction action; thus, res judicata applied and barred this case. The trial court also held that defendant was not liable on plaintiffs' breach of contract claim against Universal Mortgage, even if privity existed, and that plaintiffs lacked standing to challenge the mortgage foreclosure. Accordingly, defendant's motion for summary disposition was granted and an order consistent with the ruling from the bench was entered. This appeal followed.

Plaintiffs argue that their breach of contract claim was not barred by res judicata, that privity existed between Universal Mortgage and defendant, and that they had standing to pursue their claims; thus, the trial court's decision should be reversed. After de novo review, we agree with the trial court that defendant was entitled to summary disposition. See *Auto Club Group Ins Co v Burchell*, 249 Mich App 468, 479; 642 NW2d 406 (2001).

In summarily dismissing this action, it appears that the circuit court properly looked beyond the face of plaintiffs' pleadings to determine the gravamen or gist of the cause of action plaintiffs raised in their complaint. See *Adams v Adams*, 276 Mich App 704, 710-711; 742 NW2d 399 (2007); *Electrolines, Inc v Prudential Assurance Co, Ltd*, 260 Mich App 144, 159; 677 NW2d 874 (2003) (citation omitted). Clearly the nature of plaintiffs' claim was that the foreclosure action was improper because they had been notified by Universal Mortgage that they qualified for a Home Saver Advance loan. Plaintiffs have construed this notification as a "contract" which prevented the foreclosure proceeding.

A contract does not exist unless there has been an offer and acceptance of the offer. However, acceptance of the offer must be unambiguous and in strict conformance with the offer; otherwise no contract is formed. *Pakideh v Franklin Commercial Mortgage Group, Inc*, 213 Mich App 636, 640; 540 NW2d 777 (1995). Here, even if Universal Mortgage's notification is considered an "offer," the record evidence is plain that plaintiffs did not accept the offer because

their check was neither timely nor written in the correct amount. Further, the undisputed record evidence indicates that plaintiffs did not submit the required "properly signed documents." Accordingly, no contract was formed. Thus, it appears that the trial court's holding that defendant was not liable on plaintiffs' breach of contract claim against Universal Mortgage, even if privity existed, was premised on the fact that no contract existed. We agree with that conclusion. Accordingly, Counts I, II, and V of plaintiffs' complaint were properly dismissed because they were premised on this purported "contract." Plaintiffs do not challenge the trial court's dismissal of Counts III and IV on appeal; thus, any such objections are deemed waived and the trial court's dismissal of these claims is affirmed. And in light of the trial court's proper resolution of the dispositive contract issue, we need not consider the trial court's alternate reasons for dismissing this action, i.e., that res judicata barred this action and that plaintiffs lacked standing.

Affirmed.

/s/ Amy Ronayne Krause
/s/ Mark J. Cavanagh
/s/ Mark T. Boonstra