STATE OF MICHIGAN

COURT OF APPEALS

MARK D. MITCHELL and CAROL MITCHELL,

Plaintiffs-Appellants,

v

PHH MORTGAGE CORPORATION, MORTGAGE ELECTRONIC REGISTRATION SYSTEMS, INC, FEDERAL HOME LOAN MORTGAGE CORPORATION, TROTT & TROTT, PC, and FEDERAL NATIONAL MORTGAGE ASSOCIATION,

Defendants-Appellees,

and

DEFERRAL NATIONAL MORTGAGE,

Defendant.

UNPUBLISHED
January 29, 2013

No. 306633
Oakland Circuit Court
LC No. 2011-119194-CK

Before: HOEKSTRA, P.J., and K. F. KELLY and BECKERING, JJ.

PER CURIAM.

In this case challenging the validity of a foreclosure by advertisement, plaintiffs Mark and Carol Mitchell appeal by right the trial court's order granting summary disposition in favor of defendants PHH Mortgage Corporation ("PHH"), Mortgage Electronic Registration Systems, Inc. ("MERS"), Trott & Trott, PC ("Trott"), and Federal National Mortgage Association[1] (a.k.a. "Fannie Mae" but referred to herein as "FNMA"). We affirm.

[1] We note that the trial court dismissed defendant Federal Home Loan Mortgage Corporation ("Freddie Mac") with prejudice before defendants moved the trial court for summary disposition. Nevertheless, defendants' motion for summary disposition lists Freddie Mac—not FNMA—as a moving party, while referring to Freddie Mac with the acronym "FNMA." Subsequent documents filed in the trial court—including the court's final order—list Freddie Mac and not

I. PERTINENT FACTS AND PROCEDURAL HISTORY

On June 19, 2006, plaintiffs executed a mortgage with Merrill Lynch Credit Corporation ("Merrill Lynch") acting as the lender and MERS acting as the mortgagee and the nominee of Merrill Lynch and Merrill Lynch's successors and assigns. The mortgage was a security instrument for a $327,500 loan by Merrill Lynch to plaintiffs for the property at issue in this case. The mortgage states that "Borrower does hereby mortgage, warrant, grant and convey to MERS (solely as nominee for Lender and Lender's successors and assigns) and to the successors and assigns of MERS, with power of sale, the [the property at issue in this case.]" The mortgage further stated that "Borrower understands and agrees that MERS holds only legal title to the interests granted by Borrower in this Security Instrument, but, if necessary to comply with law or custom, MERS (as nominee for Lender and Lender's successors and assigns) has the right: to exercise any or all of those interests, including, but not limited to, the right to foreclose and sell the Property . . . ." The mortgage contains a power of sale provision and was recorded on September 5, 2006. A letter from Merrill Lynch to plaintiffs informed plaintiffs that PHH would "be handling the servicing of [their] loan" and payments were to be made to PHH. On August 4, 2010, MERS assigned its interest in the mortgage to PHH. The assignment was recorded on August 20, 2010.

The parties agree that plaintiffs defaulted on their mortgage and that PHH retained the services of Trott to facilitate the foreclosure process. Trott published notice of foreclosure in the Oakland County Legal News on the following days in 2010: August 10, November 15, November 22, November 29, and December 6. On December 14, 2010, the property was the subject of a sheriff's sale and foreclosed upon. PHH bid $351,235.69 on the property and acquired it by sheriff's deed as the highest bidder. Ownership of the property was later conveyed to FNMA by a quit claim deed dated December 16, 2010.

Plaintiffs filed their second amended complaint on June 10, 2011, alleging several counts: (1) breach of contract by PHH; (2) breach of contract by MERS; (3) breach of a duty of care by Trott by failing to provide a proper legal analysis of the mortgage, creating faulty foreclosure documentation, and representing PHH in the foreclosure process; (4) breach of a duty of care by MERS in preparing for and participating in the handling of the mortgage; and (5) conspiracy to commit slander of title by PHH, MERS, and Trott. Plaintiffs requested that the trial court "[e]nter a judgment clearing title to Defendant, TROTT's entry of the . . . sheriff's deed" and

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FNMA in the caption. Defendants argue on appeal that Freddie Mac is not a proper appellee because it was dismissed from the case. In light of these facts, we find that both the parties' and the trial court's use of Freddie Mac instead of FNMA after the dismissal of Freddie Mac from this case constituted typographical errors. Therefore, under MCR 7.216(A)(1) and (3), we amend the record to reflect that FNMA, not Freddie Mac who the trial court had dismissed, moved the trial court for summary disposition and that the court granted summary disposition in favor of FNMA, not Freddie Mac. Furthermore, for the reasons provided in this opinion, FNMA is entitled to summary disposition under MCR 2.116(C)(10). See MCR 7.216(A)(7) (stating that this Court may, in its discretion, enter any judgment or order or grant further or different relief as a case may require).

award any necessary injunctive relief against further sheriff sales, money damages, interest, costs, and attorney fees.

The last day for plaintiffs to redeem the property was June 14, 2011. They did not do so. On June 16, 2011, plaintiffs filed a notice to dismiss Federal Home Loan Mortgage Corporation ("Freddie Mac") with prejudice, which the trial court ordered.

On July 26, 2011, defendants (PHH, MERS, Trott, and FNMA) moved the trial court for summary disposition under MCR 2.116(C)(8) and (C)(10). Defendants argued that MERS, as a nominee, validly assigned its rights as mortgagee to PHH and that PHH validly foreclosed on the property as both the mortgagee and the servicing agent of the mortgage. In response, plaintiffs argued that MERS gave no consideration for any right that it received and that MERS's inclusion as a party to the mortgage was illusory. Relying on this Court's decision in *Residential Funding Co v Saurman*, 292 Mich App 321; 807 NW2d 412 (2011), rev'd 490 Mich 909 (2011), plaintiffs asserted that Michigan courts have held that MERS cannot foreclose by advertisement in Michigan because it owns no interest in the indebtedness and cannot transfer such an interest to an assignee. Thus, plaintiffs argued that defendants violated MCL 600.3204.

During a hearing to address defendants' motion, the trial court emphasized that the parties agreed that PHH was the servicing agent of the mortgage. Thus, the court concluded that the foreclosure-by-advertisement statute authorized PHH to foreclose on the property and granted defendants' motion for summary disposition. Plaintiffs appeal the court's order as of right.

II. ANALYSIS

A. SUMMARY DISPOSITION

Plaintiffs contend that the trial court erred by granting summary disposition in favor of defendants because the foreclosure sale was invalid for several reasons. We disagree.

We review de novo a trial court's summary-disposition ruling. See *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999). Defendants in this case moved the trial court for summary disposition under MCR 2.116(C)(8) and (C)(10). "Where a motion for summary disposition is brought under both MCR 2.116(C)(8) and (C)(10), but the parties and the trial court relied on matters outside the pleadings, as is the case here, MCR 2.116(C)(10) is the appropriate basis for review." *Silberstein v Pro-Golf of America, Inc*, 278 Mich App 446, 457; 750 NW2d 615 (2008). When reviewing a motion brought under MCR 2.116(C)(10), this Court considers the pleadings, affidavits, depositions, admissions, and any other documentary evidence submitted by the parties in a light most favorable to the nonmoving party. *The Cadle Co v City of Kentwood*, 285 Mich App 240, 247; 776 NW2d 145 (2009). A motion for summary disposition under MCR 2.116(C)(10) may be granted where there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. *Campbell v Dep't of Human Servs*, 286 Mich App 230, 235; 780 NW2d 586 (2009). "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).

Under MCL 600.3201, every mortgage of real estate that contains a power of sale may be foreclosed by advertisement upon default. Once a mortgagee elects to foreclose a mortgage by advertisement, MCL 600.3201 *et seq.* governs "the prerequisites of the sale, notice of foreclosure and publication, mechanisms of the sale, and redemption." *Senters v Ottawa Savings Bank, FSB*, 443 Mich 45, 50; 503 NW2d 639 (1993), citing MCL 600.3201 *et seq*. MCL 600.3204(1) requires that the following circumstances exist before a party may foreclose by advertisement:

> (a) A default in a condition of the mortgage has occurred, by which the power to sell became operative.
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> (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.
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> (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. [MCL 600.3204(1)(a)-(d).]

Additionally, MCL 600.3204(3) provides that, "[i]f the party foreclosing a mortgage by advertisement is not the original mortgagee, a record chain of title shall exist prior to the date of sale under [MCL 600.3216] evidencing the assignment of the mortgage to the party foreclosing the mortgage."

We conclude that the foreclosure in this case satisfied the requirements of MCL 600.3204(1). The parties agree that plaintiffs defaulted on their mortgage obligation and that the power of sale became operative. There is no evidence that an action or proceeding was instituted at law to recover the debt secured by the mortgage. The mortgage was recorded on September 5, 2006, and plaintiffs do not assert that it was improperly recorded. Finally, PHH, the party foreclosing on the mortgage, is both the owner of an interest in the indebtedness secured by the mortgage and the servicing agent of the mortgage. More specifically, the Merrill Lynch letter states that PHH would "be handling the servicing of [plaintiffs'] loan." And, the mortgage in this case expressly provides that MERS is the mortgagee and Merrill Lynch's nominee, MERS "holds . . . legal title to the interests granted by Borrower in this Security Instrument," and MERS has the power to foreclose. MERS assigned its interest in the mortgage to PHH. "It is well established that an assignee stands in the shoes of an assignor, acquiring the same rights and being subject to the same defenses as the assignor." *Coventry Parkhomes Condo Ass'n v Fed Nat'l Mtg Ass'n*, ___Mich App___; ___NW2d___ (Docket No. 304188, issued October 25, 2012), slip op at 2. Pursuant to our Supreme Court's decision in *Residential Funding Co v Saurman*, 490 Mich 909; 805 NW2d 183 (2011), PHH's "ownership of legal title to a security lien whose existence is wholly contingent on the satisfaction of the indebtedness" is an interest in the indebtedness secured by the mortgage. Therefore, PHH was authorized to foreclose by advertisement under MCL 600.3204(1).

With respect to MCL 600.3204(3), PHH is not the original mortgagee. However, MCL 600.3204(3) was satisfied in this case because "a record chain of title [existed] prior to the date of sale . . . evidencing the assignment of the mortgage to the party foreclosing the mortgage." More specifically, the assignment of the mortgage from MERS to PHH was recorded on August 20, 2010, several months before the sheriff's sale.

Plaintiffs argue that the foreclosure sale was invalid because they did not consent to the "MERS securitization process." We reject this argument. Plaintiffs expressly agreed in the mortgage that MERS was both the mortgagee and Merrill Lynch's nominee. A mortgagee of record is entitled to foreclose by advertisement under MCL 600.3204(1)(d). *Residential Funding*, 490 Mich at 910. Furthermore, the mortgage states that MERS had the right to foreclose. MERS was free to assign its interest as mortgagee to PHH. See *Arnold v DMR Fin Servs, Inc*, 448 Mich 671, 673 n 2; 532 NW2d 852 (1995) ("[A] mortgagee's interests under a mortgage is a property interest that may be assigned."); see also *Densmore v Savage*, 110 Mich 27, 30; 67 NW 1103 (1896) ("It has been repeatedly held that the right of a mortgagee may be transferred either by a legal or an equitable assignment, and either will suffice.").

Plaintiffs also argue that the foreclosure sale was invalid because MERS's only interest in this case was its interest as mortgagee, the right to a mortgage note does not pass by transfer of a mortgage, MERS's assignment of the mortgage to PHH was a nullity because MERS could not transfer the mortgage separately from the underlying note, and, therefore, the mortgage note in this case was improperly severed from the mortgage. We reject this argument. In *Residential Funding*, our Supreme Court held that MERS could foreclose by advertisement because it was the owner of an interest in the indebtedness—even though MERS's status did "not equate to an ownership interest in the note." *Residential Funding*, 490 Mich at 909; see also *Richard v Schneiderman & Sherman, PC (On Remand)*, 297 Mich App 271, 272-273; ___NW2d___ (2012) (explaining that MERS was authorized by MCL 600.3204(1)(d) to conduct a foreclosure by advertisement as the listed record holder of the mortgage, even though it did not make the underlying loan and was not designated as the lender on either the underlying note or the mortgage). The Court opined that "'[i]t has never been necessary that the mortgage should be given directly to the beneficiaries. The security is always made in trust to secure obligations, and the trust and the beneficial interest need not be in the same hands . . . . The choice of a mortgagee is a matter of convenience.'" *Residential Funding*, 490 Mich at 910, quoting *Adams v Niemann*, 46 Mich 135, 137; 8 NW 719 (1881). In this case, PHH could foreclose by advertisement under MCL 600.3204(1)(d), regardless of whether it had an ownership interest in the note, given its status as both an owner of an interest in the indebtedness secured by the mortgage and as the servicing agent of the mortgage. See *id.* at 909.

Plaintiffs also argue that the foreclosure statute was not satisfied because the affidavits evidencing compliance with the statute were "possibly faulty," "highly suspect[,] and likely error-prone." We conclude that plaintiffs have abandoned this argument by presenting it in a cursory fashion, providing little or no citation to supporting legal authority, and failing to articulate a factual basis for their position. See *Ykimoff v WA Foote Mem Hosp*, 285 Mich App 80, 106; 776 NW2d 114 (2009) ("An appellant may not merely announce his position and leave it to this Court to discover and rationalize the basis for his claims, nor may he give issues cursory treatment with little or no citation of supporting authority."). Regardless, plaintiffs' argument lacks merit. MCL 600.3256(1) addresses a party's procurement of an affidavit of publication of

the notice of sale, an affidavit of fact of a sale, and an affidavit setting forth the time, manner, and place of the posting of a copy of the notice of sale made by the person posting the notice. MCL 600.3256(1)(a)-(c). Significantly, however, MCL 600.3256(1) is permissive because it provides that any party *may* procure affidavits evidencing compliance with the foreclosure-by-advertisement statute. See also generally *Lee v Clary*, 38 Mich 223, 228 (1878) ("There is nothing in any statute requiring the proof of sale to be perpetuated in the records."). Thus, the foreclosure was not invalid on this basis.

Plaintiffs generally argue for the first time on appeal that defendants have unclean hands. We decline to address this unpreserved issue because plaintiffs have presented it in a cursory fashion with little or no citation to supporting legal authority. See *Ykimoff*, 285 Mich App at 106. Plaintiffs also argue for the first time on appeal that the foreclosure sale was invalid because an allonge was never presented as evidence. Although plaintiffs do not present this issue in a cursory manner, they do not provide any citation to legal authority for their position, and they do not adequately explain why the absence of evidence of an allonge in this case is legally significant. Thus, we decline to address this unpreserved issue as well. See *id.*

Accordingly, we conclude that the trial court did not err by granting summary disposition in favor of defendants.

B. SANCTIONS FOR VEXATIOUS APPEAL

At several points in their appellate brief, defendants request that this Court grant them attorney fees and costs on the basis that this appeal is vexatious. In *Prentis Family Foundation v Barbara Ann Karmanos Cancer Institute*, 266 Mich App 39, 60; 698 NW2d 900 (2005), we declined a request for sanctions on the basis of a vexatious appeal, opining as follows:

> Sanctions requested for a vexatious appeal are governed by MCR 7.216(C)(1). MCR 7.216(C)(1) indicates that a motion for sanctions must be filed pursuant to MCR 7.211(C)(8). And MCR 7.211(C)(8) provides that a request for sanctions must be made by motion; a brief on appeal is insufficient to request sanctions. There is no indication that HMSC has separately filed a motion for sanctions at the appellate level. Moreover, no appropriate legal authority was cited to support sanctions.

Similarly, defendants in this case have not requested sanctions for a vexatious appeal in a motion to this Court. Moreover, defendants fail to cite legal authority as a basis for this Court to award sanctions for a vexatious appeal. Therefore, we deny defendants' request for sanctions. See *id.*

Affirmed.

/s/ Joel P. Hoekstra
/s/ Kirsten Frank Kelly
/s/ Jane M. Beckering