

STATE OF MICHIGAN
COURT OF APPEALS

MARTIN FAMATIGA and HEATHER
KERCHEN-FAMATIGA,

UNPUBLISHED
March 19, 2013

Plaintiffs-Appellants,

v

No. 304726
Livingston Circuit Court
LC No. 09-024909-CK

MORTGAGE ELECTRONIC REGISTRATION
SYSTEMS INC., US BANK NATIONAL
ASSOCIATION, and AMERICA'S SERVICING
CO.,

Defendants-Appellees,

and

IT MORTGAGE and BNC MORTGAGE,

Defendants.

Before: BORRELLO, P.J., and M. J. KELLY and BOONSTRA, JJ.

PER CURIAM.

Plaintiffs Martin Famatiga and Heather Kerchen-Famatiga (collectively the Famatigas) appeal by right the trial court's order denying their motion for reconsideration after it dismissed their claims against defendants Mortgage Electronic Registration Systems, Inc. (MERS), US Bank National Association, and America's Servicing Company. Because we conclude that there were no errors warranting relief, we affirm.

I. BASIC FACTS

The Famatigas purchased a home with funds borrowed from BNC Mortgage. In March 2005, they executed a promissory note in BNC Mortgage's favor that was secured by a mortgage on the property in favor of BNC Mortgage's nominee, MERS. MERS later assigned the mortgage to US Bank as the trustee for the Structured Asset Investment Loan Trust, 2005-5. American Servicing began servicing the loan in July 2005.

In November 2009, after the Famatigas defaulted on their note, US Bank foreclosed the mortgage. Shortly before the scheduled sheriff's sale, the Famatigas sued MERS, US Bank, American Servicing, IT Mortgage, and BNC Mortgage¹ on a variety of grounds. MERS, US Bank, and American Servicing removed the suit to federal court. The federal court concluded that it had jurisdiction over five claims and eventually granted summary judgment in favor of MERS, US Bank, and American Servicing on those claims.² The federal court then remanded the remaining claims back to the circuit court.

Following remand, the Famatigas filed an amended complaint addressing their remaining claims. MERS, US Bank, and American Servicing moved for summary disposition under MCR 2.116(C)(5), (7), and (10). The trial court granted the motion as to all claims under MCR 2.116(C)(5) and (10).

This appeal followed.

II. SUMMARY DISPOSITION

A. STANDARD OF REVIEW

On appeal, the Famatigas present a variety of arguments addressing their standing to sue and the validity of their underlying claims.³ Although they do not specifically address the trial court's decision to grant summary disposition under MCR 2.116(C)(10), we shall address their issues to the extent that they can be understood as arguments that the trial court erred when it dismissed their claims under MCR 2.116(C)(10). This Court reviews de novo whether the trial court properly granted summary disposition. *Barnard Mfg Co, Inc v Gates Performance Engineering, Inc*, 285 Mich App 362, 369; 775 NW2d 618 (2009).

B. ANALYSIS

The Famatigas first argue that the mortgage was unenforceable because there was no mutuality of agreement, no consideration, and because it violated the Truth in Lending Act (TILA), 15 USC 1601 *et seq.*, and the Real Estate Settlement Procedures Act (RESPA), 12 USC 2601 *et seq.* In their amended complaint, the Famatigas asked the trial court to void their mortgage, but they did not seek its rescission on these grounds. Rather, they merely alleged that MERS, US Bank, and American Servicing engaged in predatory lending and unfair and

¹ BNC Mortgage filed a notice of bankruptcy and the proceedings against it were stayed. IT Mortgage was later dismissed for non-service.

² *Famatiga v Mortgage Electronic Registration Sys*, unpublished opinion of the United States District Court for the Eastern District of Michigan, issued August 2, 2011 (Docket No. 10-10937).

³ Because we conclude that the trial court did not err when it dismissed the Famatigas claims under MCR 2.116(C)(10), we decline to address whether they had standing to bring the claims in the first place.

deceptive practices and violated the Michigan Consumer Protection Act, MCL 445.901 *et seq.*, and breached their fiduciary duties.⁴ Because the Famatigas did not present these issues to the trial court, they have waived any claim that the trial court erred by failing to address them. *Walters v Nadell*, 481 Mich 377, 387; 751 NW2d 431 (2008) (“Michigan generally follows the ‘raise or waive’ rule of appellate review.”). Even considering these claims to the extent that they implicate the trial court’s decision to grant summary disposition, we conclude that summary disposition was appropriate.

The Famatigas contend that there was no mutuality of assent, see *Eerdmans v Maki*, 226 Mich App 360, 364; 573 NW2d 329 (1997), because defendants failed to inform them that the documents violated federal law and failed to account for the down payment and builder concessions. However, they admit that they signed the documents and they do not allege or argue—let alone present evidence establishing a question of fact—that they did not understand or agree to the terms actually contained in the promissory note and mortgage. “[O]ne who signs an agreement, in the absence of coercion, mistake, or fraud, is presumed to know the nature of the document and to understand its contents, even if he or she has not read the agreement.” *Lease Acceptance Corp v Adams*, 272 Mich App 209, 221; 724 NW2d 724 (2006).⁵ Moreover, even if the documents violated federal law, the violations would not undermine the assent element of contract formation. Rather, the violations would constitute a defense against enforcement. See *Meek v Wilson*, 283 Mich 679, 688; 278 NW 731 (1938).

In addition, the Famatigas claims premised on TILA and RESPA were previously litigated in federal court. The dismissal of a complaint on statute of limitations grounds is an “an adjudication on the merits” for the purpose of res judicata. *Washington v Sinai Hosp of Greater Detroit*, 478 Mich 412, 417, 419; 733 NW2d 755 (2007); *Nathan v Rowan*, 651 F2d 1223, 1226 (CA 6, 1981). Therefore, to the extent that the Famatigas have raised claims under TILA and RESPA, those claims are barred under the doctrine of res judicata.

The Famatigas also claim that there was no consideration for the contract. Consideration is a bargained-for exchange; there must be a benefit to, detriment suffered by, or service done by one party. *Prentis Family Foundation, Inc v Barbara Ann Karmanos Cancer Institute*, 266 Mich App 39, 58; 698 NW2d 900 (2005). The undisputed evidence showed that the Famatigas purchased their home with \$280,000 obtained in exchange for their promise to repay and a security interest in the property. They nevertheless maintain that the consideration was

⁴ The Famatigas claims premised on fraud, misrepresentation, and the Mortgage Brokers, Lenders, and Servicers Licensing Act, were asserted against BNC Mortgage and IT Mortgage, who are not before this Court on appeal. Therefore, we decline to address those claims.

⁵ The Famatigas assert on appeal that they were fraudulently induced to sign the agreements with a higher interest rate (without discussing the difference between an actual interest rate and APR and without analyzing the evidence that they believe supports those claims), but do so in the context that the contracts at issue violated TILA and RESPA. However, as noted, the federal court already determined that the Famatigas would not be entitled to any relief under those laws because their claims were untimely.

“incomplete” because they did not receive an additional \$20,500. However, the promissory note did not govern the additional disbursements; and there is no evidence that the Famatigas did not receive exactly what was bargained for in the promissory note.

The Famatigas also argue that the assignment from MERS to US Bank was fraudulent and invalid. They cite several alleged irregularities in the assignment, but those alleged irregularities are irrelevant because the Famatigas were not parties to the assignment. Because they were not parties to the assignment, the Famatigas may not challenge it, except under limited circumstances not relevant here. See *Livonia Props Holdings, LLC v Farmington Rd Holdings, LLC*, 399 Fed Appx 97, 102-103 (CA 6, 2010).

The Famatigas also raise a number of arguments in relation to the Pooling Service Agreement. They argue that the mortgage assignment violated the Pooling Service Agreement, as did the terms of their note. These alleged violations are all premised on the terms of the Pooling Service Agreement and a Congressional report. However, neither document is contained in the lower court record. Therefore, we cannot consider the merits of these claims. *Barnard Mfg*, 285 Mich App at 380-381.

After reviewing the record and the claims on appeal, we conclude that there were no errors warranting relief.

Affirmed.

/s/ Stephen L. Borrello
/s/ Michael J. Kelly
/s/ Mark T. Boonstra