# STATE OF MICHIGAN

# COURT OF APPEALS

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| JOSEPH SALEH and MARY SALEH,<br><br>Plaintiffs-Appellants, | UNPUBLISHED<br>May 16, 2013 |
| v<br><br>AURORA LOAN SERVICES,<br><br>Defendant-Appellee,<br>and<br><br>MONEY ELECTRONIC REGISTRATION SYSTEMS,<br><br>Defendant. | No. 308611<br>Wayne Circuit Court<br>LC No. 10-013500-CH |

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

PER CURIAM.

In this dispute over a mortgage foreclosure, plaintiffs Joseph Saleh and Mary Saleh appeal by right the trial court's opinion and order dismissing their claims against defendant Aurora Loan Services, LLC[1] under MCR 2.116(C)(10) and MCR 2.116(C)(8). Because the trial court did not err when it dismissed plaintiffs' claims, we affirm.

## I. BASIC FACTS

In August 2007, plaintiffs purchased a home using funds borrowed from Lehman Brothers Bank, FSB. Plaintiffs granted a mortgage to Lehman Brothers to secure repayment of the note. Plaintiffs eventually defaulted on their note; they made their last payment in November 2008.

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[1] Plaintiffs misidentified defendant Aurora Loan Services, LLC and defendant Mortgage Electronic Registration Systems, Inc. in their caption.

In November 2009, Mortgage Electronic Registrations Systems, Inc., as the nominee for Lehman Brothers, transferred plaintiffs' note and mortgage to Aurora, which company had served as the note's servicer. Aurora foreclosed against plaintiffs' home and purchased it at a sheriff's sale in May 2010. Aurora then quitclaimed the property to the Federal National Mortgage Association (commonly known as Fannie Mae) in that same month. After the redemption period expired in November 2010, Fannie Mae's interest became vested.

Plaintiffs sued Aurora for allegedly improperly foreclosing on their home in November 2010. In their amended complaint, plaintiffs asserted nine claims: wrongful foreclosure, injunctive relief, quiet title, unjust enrichment, innocent misrepresentation, fraud, constructive trust, violation of MCL 600.3205, and deceptive or unfair trade practice.

In July 2011, Aurora moved for summary disposition under MCR 2.116(C)(8) and MCR 2.116(C)(10). The trial court granted Aurora's motion in an opinion and order entered on November 1, 2011.

Plaintiffs now appeal.

## II. SUMMARY DISPOSITION

### A. STANDARD OF REVIEW

This Court reviews de novo a trial court's decision on a motion for summary disposition. *Barnard Mfg Co, Inc v Gates Performance Engineering, Inc*, 285 Mich App 362, 369; 775 NW2d 618 (2009).

### B. ANALYSIS

A motion under MCR 2.116(C)(8) tests the legal sufficiency of the plaintiff's complaint. *Maiden v Rozwood*, 461 Mich 109, 119; 597 NW2d 817 (1999). This Court reviews a motion under MCR 2.116(C)(8) by considering the pleadings alone. *Id.* at 120. This Court accepts the plaintiff's well-pleaded allegation as true and construes them in the light most favorable to the non-movant. *Id.* at 119. A court should grant summary disposition under MCR 2.116(C)(8) only if the alleged claim is so clearly unenforceable as a matter of law that no factual development could possibly justify recovery. *Id.*

A motion under MCR 2.116(C)(10) tests the factual sufficiency of a plaintiff's claims. *Id.* at 120. Under that rule, Aurora had the initial burden to come forward with evidence that showed that there was no genuine issue of material fact as to plaintiffs' claims and that it was entitled to judgment as a matter of law. *Barnard Mfg*, 285 Mich App at 369-370. If Aurora did not meet this initial burden with regard to one or more of plaintiffs' claims, then plaintiffs would have had no obligation to respond and the trial court should have denied Aurora's motion with respect to those claims. *Id.* at 370.

In their complaint, plaintiffs alleged claims for wrongful foreclosure (count I) and the violation of MCL 600.3205c (count VIII). Specifically, plaintiffs alleged that Aurora's foreclosure was invalid because Aurora purportedly failed to comply with the notice requirements provided under MCL 600.3220, failed to offer "home retention services" or otherwise make a "good faith" effort to work with plaintiffs, and did not comply with the requirements stated under MCL 600.3205c by failing to complete the loan modification process.

In its motion for summary disposition, Aurora argued that Michigan law does not recognize a cause of action to invalidate a foreclosure proceeding premised on a failure to offer home retention services or otherwise make a good faith effort to work with defaulted debtors. Even if that were the case, Aurora presented evidence that it proposed a workout agreement with plaintiffs, which would govern any such claim. It also argued that the undisputed evidence showed that it complied with the notice requirements provided under MCL 600.3220 and properly supported that argument with affidavits. With regard to the claim that it failed to comply with MCL 600.3205c, Aurora argued that the evidence showed that it provided all the notices required under that statute and that, in any event, plaintiffs' only remedy would be to have their foreclosure converted as provided under MCL 600.3205c(8).

In response to Aurora's motion on both claims, plaintiffs proffered a one-sentence argument and analysis: they stated that summary disposition was inappropriate because, after proffering a loan modification agreement, Aurora "raised the payments from $1,007 to over $3,000, per month which is a violation of the good faith standard of MCL 600.3205." Plaintiffs did not identify any evidence to support this assertion and did not meaningfully discuss the relevant statutory provisions addressing a lender's duties to debtors in default. See, e.g., MCL 600.3205b(3); MCL 600.3205c(7). Plaintiffs also failed to identify any evidence that might be used to establish a question of fact as to whether Aurora complied with the requirements stated under MCL 600.3220 or MCL 600.3205c. Therefore, the trial court did not err when it dismissed plaintiffs' wrongful foreclosure and statutory claims under MCR 2.116(C)(8) and MCR 2.116(C)(10). See *Barnard Mfg*, 285 Mich App at 374-375 (stating that, once the moving party has made a properly supported motion for summary disposition, the non-movant has the burden to identify evidence that establishes a question of fact); *Lawsuit Financial, LLC v Curry*, 261 Mich App 579, 592; 683 NW2d 233 (2004) ("A mere statement of a pleader's conclusions, unsupported by allegations of fact, will not suffice to state a cause of action.").

Aurora also asked the trial court to dismiss plaintiffs' request for injunctive relief (count II) because that request had become moot. In their reply brief, plaintiffs conceded that this claim had become moot. Accordingly, the trial court properly dismissed it.

Plaintiffs also pleaded a claim for quiet title (count III). They argued that Aurora failed to negotiate a loan modification in compliance with MCL 600.3205c, engaged in improper "robo-signing", and did not comply with MCL 600.3204, which provides that only the owner or servicer of a note may foreclose by advertisement. On the basis of these purported violations, plaintiffs claimed that they were entitled to have title to the property quieted in their name.

Aurora argued that this claim too failed as a matter of law because there was no evidence that plaintiffs complied with MCL 600.3205b(1) or otherwise took steps to participate in the modification process described under MCL 600.3205 *et seq.* They also argued that, even if it had violated MCL 600.3205c, the statute provides that the sole remedy was to have the foreclosure proceeding converted to a judicial foreclosure. See MCL 600.3205c(8). Aurora noted further that it was in fact the owner of the note and, as such, could foreclose by advertisement under MCL 600.3204 and argued that plaintiffs' bare reference to robo-signing without alleging facts to establish a violation of law that would invalidate the foreclosure was insufficient to state a claim.

Plaintiffs responded to these arguments by referring the trial court to their one-sentence argument in reply to Aurora's motion to dismiss their wrongful foreclosure claim. That argument, however, did not address whether Aurora owned the note, did not address any issues involving Aurora's handling of the documentation used in the foreclosure proceeding, and did not address the limitation on the remedies for a violation of MCL 600.3205c. And, as already discussed, plaintiffs did not identify any evidence that might establish a question of fact as to whether Aurora violated any statutory provision. Given these deficiencies, the trial court did not err when it concluded that this claim too should be dismissed under MCR 2.116(C)(8) and MCR 2.116(C)(10).

Aurora argued that plaintiffs' claim for unjust enrichment (count IV) should be dismissed because plaintiffs merely alleged that Aurora mishandled the foreclosure without pleading facts to establish that Aurora or Fannie Mae unjustly obtained a benefit from the default and foreclosure. It also noted that courts will not imply a contract under an unjust enrichment theory when there is an express agreement covering the same subject. Because the default and foreclosure were governed by the parties' note and mortgage, Aurora maintained that plaintiffs could not assert a claim for unjust enrichment.

As Aurora correctly stated, plaintiffs failed to allege any facts to show that Aurora or Fannie Mae obtained an inequitable benefit from plaintiffs' default and the foreclosure. See *Belle Isle Grill Corp v Detroit*, 256 Mich App 463, 478; 666 NW2d 271 (2003). Moreover, plaintiffs response—which did not include a reference to any evidence—that the "inequities to the Plaintiffs are obvious" given that they "no longer have title to the subject property and may be forced to move" was inadequate to redress this deficiency. Plaintiffs also did not address the fact that the note and mortgage governed the parties' rights and obligations and that, under that agreement, Aurora had the right to foreclosure after default. See *Prime Financial Services, LLC v Vinton*, 279 Mich App 245, 275; 761 NW2d 694 (2008) (holding that a secured party's lawful disposition of collateral after a default does not result in an inequity); *Morris Pumps v Centerline Piping, Inc*, 273 Mich App 187, 194; 729 NW2d 898 (2006) (stating that courts will not imply a contract for restitution under an unjust enrichment theory where there is an express contract governing the rights and obligations between the parties on the same subject matter). They also ignored the evidence that Aurora did delay foreclosing for a significant period of time and offered plaintiffs a loan modification agreement. As the trial court aptly noted, the record evidence actually supports the conclusion that Aurora suffered an inequity: "Defendants attempted to modify the loan, even going so far as to adjourn the sheriff's sale for 19 weeks. Plaintiffs did not pay required escrow payments and have been living in the property without

paying rent since November 2008. If any party can claim inequity, it would be defendant." The trial court did not err when it dismissed this claim under MCR 2.116(C)(8).

Aurora argued that the trial court had to dismiss plaintiffs' claims of misrepresentation (count V) and fraud (count VI) because plaintiffs failed to allege who made the underlying misrepresentations, failed to allege when they were made, and failed to allege the substance of the misrepresentations. Moreover, Aurora argued that, because the alleged misrepresentations concerned a promise to make a financial accommodation, the claim would be barred unless the promises were in writing. See MCL 566.132(2). Because plaintiffs did not support their misrepresentation and fraud claims with a written agreement, Aurora argued that the claims must be dismissed.

Plaintiffs replied that Aurora misrepresented whether it would go forward with the sheriff's sale and, had they known that Aurora intended to proceed with the sale, they would have filed for bankruptcy. They further argued that this representation was not an accommodation within the meaning of MCL 566.132 and, for that reason, the statute of frauds did not apply.

Even disregarding plaintiffs' failure to properly plead fraud, see MCR 2.112(B(1), we conclude that a promise to forego a remedy specifically permitted by the parties' agreement—such as foreclosure—is a type of financial accommodation within the meaning of MCL 566.132. Accordingly, plaintiffs could not rely on an oral promise to forego foreclosure. *Crown Technology Park v D&N Bank, FSB*, 242 Mich App 538, 550; 619 NW2d 66 (2000) (stating that the statute is unambiguous and plainly precludes a party "from bringing a claim—no matter its label—against a financial institution to enforce the terms of an oral promise to waive a loan provision."). Because plaintiffs failed to reply to Aurora's motion by identifying a written agreement to forego foreclosure, Aurora was entitled to have plaintiffs' misrepresentation and fraud claims dismissed. Moreover, because plaintiffs' claim for a constructive trust (count VII) was premised on their properly dismissed claims for misrepresentation, fraud, and unjust enrichment, it failed as a matter of law as well. See *Kent v Klein*, 352 Mich 652, 657-658; 91 NW2d 11 (1958) (explaining that courts sitting in equity use constructive trusts as a remedy to alleviate the inequity that results when a person acquires property through fraud or otherwise obtains a windfall resulting from his or her unjust enrichment).

Finally, Aurora argued that plaintiffs' claim premised on deceptive or unfair practices (count IX) should also be dismissed. In that claim, plaintiffs generally alleged that Aurora submitted "affidavits" or other documents that had procedural defects. However, plaintiffs only identified one affidavit as defective. With regard to that affidavit, plaintiffs did not allege that any of the facts were inaccurate, but rather alleged that the affiant must not have had personal knowledge of the facts in the affidavit because, if she had such knowledge, she would have known that Aurora violated MCL 600.3205c and that the same affiant "may" have improperly signed the affidavit outside the presence of a notary. As Aurora correctly stated, these allegations were insufficient to identify any grounds for relief. Plaintiffs allegations—even when read in the light most favorable to plaintiffs—were nothing more than speculation that the documents that Aurora submitted during the foreclosure proceedings were somehow defective. Even for the affidavit that the plaintiffs specifically identified, they did not allege that the affidavit was actually defective; instead, they speculated that it might be defective on the basis of

their own conjecture. But allegations that plaintiffs have a hunch that Aurora did something wrong are insufficient to state a claim. *Lawsuit Financial*, 261 Mich App at 592. Plaintiffs also did not allege how the submission of this affidavit constituted a violation of law that would entitle them to relief. Given these deficiencies, the trial court did not err when it determined that plaintiffs failed to state a claim on this count. MCR 2.116(C)(8).

## III. CONCLUSION

Aurora minimally established that each of plaintiffs' nine claims either failed to state a claim upon which relief could be granted, MCR 2.116(C)(8), or that there were no material factual disputes and it was entitled to judgment in its favor as a matter of law, MCR 2.116(C)(10). In response to Aurora's motion, plaintiffs failed to establish how they might be able to correct the deficiencies in their pleadings and failed to adduce or identify any record evidence to support the substance of their claims. For these reasons, the trial court did not err when it dismissed plaintiffs' claims under MCR 2.116(C)(8) and MCR 2.116(C)(10). Because the trial court did not err when it dismissed plaintiffs' claims, we decline to address the alternate bases for dismissal that were raised and considered by the trial court.

Affirmed. As the prevailing party, Aurora may tax its costs. MCR 7.219(A).

/s/ Jane M. Beckering
/s/ Kathleen Jansen
/s/ Michael J. Kelly