STATE OF MICHIGAN

COURT OF APPEALS

BANK OF NEW YORK MELLON TRUST COMPANY, NATIONAL ASSOCIATION, f/k/a BANK OF NEW YORK TRUST COMPANY, N.A.,

Plaintiff/Counter-Defendant-Appellee,

v

RAUL A. MONSIVAES, JR.,

Defendant/Counter-Plaintiff-Appellant.

UNPUBLISHED
June 11, 2013

No. 310696
St. Joseph Circuit Court
LC No. 11-000831-CH

Before: MURPHY, C.J., and FITZGERALD and HOEKSTRA, JJ.

PER CURIAM.

Defendant/counter-plaintiff Raul A. Mosivaes, Jr., appeals as of right the trial court order granting plaintiff/counter-defendant Bank of New York Mellon Trust Company, National Association, f/k/a Bank of New York Trust Company, N.A., (the bank) as successor to JP Morgan Chase Bank, N.A., as Trustee's (Chase)[1] motion for summary disposition pursuant to MCR 2.116(C)(9), and granting summary disposition of defendant's counterclaim pursuant to MCR 2.116 (C)(8) in favor of the bank. We affirm.

On July 24, 2003,[2] defendant granted a mortgage to Classic Mortgage Corporation in order to secure financing in the amount of $137,275.00 to finance the purchase of a home at 521 West Main Street in Centreville, Michigan. The mortgage was recorded on July 24, 2003. On that same date, Classic Mortgage Corporation assigned the mortgage to Homecomings Financial

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[1] Although not relevant to this appeal, the trial court also granted defendant the opportunity to amend his complaint with regard to non-party GMAC.

[2] Although the mortgage documents refer to the date of July 24, 2000, the mortgage was signed by defendant on July 24, 2003, on a form that has a revision date of January 2001. Thus, it appears that the typed date of July 24, 2000, in the mortgage document is a typographical error.

Network, Inc., by an assignment of mortgage. The assignment was recorded on the same date. Homecomings Financial Network assigned the mortgage to Chase by an assignment of mortgage recorded on February 12, 2004.

Defendant defaulted on the mortgage by failing to make the required payments. Notice of the foreclosure sale was provided by publication on September 10, September 17, September 24, and October 1, 2010. On September 15, 2010, notice of the foreclosure sale was posted upon the premises. A sheriff's sale was held on October 14, 2010. The bank was the successful high bidder. A six-month statutory redemption expired on April 14, 2011, without having been redeemed.

On May 2, 2011, the bank filed a summary eviction proceeding to obtain possession of the property pursuant to MCL 600.5714(g). On July 1, 2011, defendant filed a counterclaim seeking to challenge the validity of the foreclosure and asserting that the bank lacked standing to foreclose.[3]

The bank filed a motion for summary disposition pursuant to MCR 2.116(C)(10), asserting that defendant failed to state a valid defense to the claim of possession and that no material questions of fact existed. The bank also moved for summary disposition of defendant's counterclaim pursuant to MCR 2.116(C)(8). Defendant also filed a motion for summary disposition. Following a hearing on the competing motions, the trial court granted summary disposition pursuant to MCR 2.116(C)(9) in favor of the bank on its claim for possession and granted summary disposition pursuant to MCR 21.116(C)(8) in favor of the bank on defendant's counterclaim.

We review de novo a trial court's decision on a motion for summary disposition. *Latham v Barton Malow Co*, 480 Mich 105, 111; 746 NW2d 868 (2008). The trial court granted summary disposition pursuant to MCR 2.116(C)(8) and (9).

"A motion for summary disposition under MCR 2.116(C)(8) tests the legal sufficiency of the complaint." *Johnson v Pastoriza*, 491 Mich 417, 435; 818 NW2d 279 (2012). All well-pleaded factual allegations must be accepted as true and viewed in the light most favorable to the non-moving party. *Id.* "A court may only grant a motion pursuant to MCR 2.116(C)(8) where the claims are so clearly unenforceable as a matter of law that no factual development could possibly justify recovery." *Wade v Dep't of Corrections*, 439 Mich 158, 163; 483 NW2d 26 (1992), mod on other grounds by *Patterson v Kleiman*, 447 Mich 429, 433–435; 526 NW2d 879 (1994).

Summary disposition may be granted under MCR 2.116(C)(9) when "[t]he opposing party has failed to state a valid defense to the claim asserted against him or her." Summary disposition under MCR 2.116(C)(9) is proper if a defendant fails to plead a valid defense to a

[3] The counterclaim also alleged loan modification fraud, breach of contract, violations of the Mortgage Brokers, Lenders, and Servicers Act, violations of the Michigan Collections Act, and violations of the Fair Debt Collection Practices Act.

claim. *Nicita v Detroit (After Remand)*, 216 Mich App 746, 750; 550 NW2d 269 (1996). A motion under MCR 2.116(C)(9) tests the sufficiency of a defendant's pleadings by accepting all well-pleaded allegations as true. *Lepp v Cheboygan Area Schools*, 190 Mich App 726, 730; 476 NW2d 506 (1991). If the defenses are "'so clearly untenable as a matter of law that no factual development could possibly deny plaintiff's right to recovery,'" then summary disposition under this rule is proper. *Id*., quoting *Domako v Rowe*, 184 Mich App 137, 142; 457 NW2d 107 (1990).

Every mortgage of real estate, which contains a power of sale, upon default made in any condition of such mortgage, may be foreclosed by advertisement, in the cases and in the manner specified in this chapter . . . . MCL 600.3201; see *Cheff v Edwards*, 203 Mich App 557, 560; 513 NW2d 439 (1994). Under MCR 600.3204(1)(d), the party foreclosing the mortgage must be "either the owner of the indebtedness or of an interest in the indebtedness secured by the mortgage or the servicing agent of the mortgage." And, pursuant to MCL 600.3204(3), "If the party foreclosing a mortgage by assignment is not the original mortgagee, a record chain of title shall exist prior to the date of sale under section 3216 evidencing the assignment of the mortgage to the party foreclosing the mortgage."

The Supreme Court has long held that the mortgagor may hold over after foreclosure by advertisement and test the validity of the sale in the summary proceeding. *Reid v Rylander*, 270 Mich 263, 267; 258 NW2d 630 (1935); *Manufacturers Hanover Mortgage Corp v Snell*, 142 Mich App 548, 553; 370 NW2d 401 (1985). The mortgagor may raise whatever defenses are available in a summary eviction proceeding. Thus, defendant contends that he can challenge the foreclosure sale because the bank lacked standing to foreclose by advertisement under MCL 600.3201, *et seq*., because the bank was not "the owner of the indebtedness or of an interest in the indebtedness" under MCL 600.3204(1)(d). We disagree.

Subject to exceptions which do not apply in this case, a party may foreclose on a mortgage by advertisement if the party is the owner of the indebtedness secured by the mortgage, and can establish a record chain of title:

> (1) ..[A] party may foreclose a mortgage by advertisement if ...
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> * * *
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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.
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> * * *
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> (3) If 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.

The Michigan Supreme Court has clarified that a mortgagee can be an owner in the indebtedness -- even though it does not have an ownership interest in the promissory note -- because the

mortgagee owns the "legal title to a security lien whose existence is wholly contingent on the satisfaction of the indebtedness [.]" *Residential Funding Co, LLC v Saurman*, 490 Mich 909, 909; 805 NW2d 183 (2011). A mortgagee has an interest in the indebtedness because the mortgagee has a lien on the land which secures the mortgagor's debt. *Id.* at 909-910.

Here, the uncontroverted documentary evidence established that Classic Mortgage Company was the mortgagee; as the mortgagee, Classic Mortgage Company had a lien on defendant's land to secure its debt; therefore, it was an owner of an interest in defendant's indebtedness. The uncontroverted evidence also established that Classic Mortgage Company assigned its interest in the mortgage to Homecomings Financial Network, Inc., which then assigned its interest in the mortgage to JP Morgan Chase Bank, N.A., as Trustee.[4] The bank is the successor to Chase as the result of a merger prior to the sale.[5] Thus, the bank became the owner of an interest in defendant's indebtedness. We conclude that the trial court did not err when it determined that there was no question of fact whether the bank was the owner of an interest in the indebtedness under MCL 600.3204.

Affirmed.

/s/ William B. Murphy
/s/ E. Thomas Fitzgerald
/s/ Joel P. Hoekstra

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[4] Defendant contends that the assignment to Chase as trustee was invalid because it constituted a naked or passive trust. However, because he was not a party to the assignment, he 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).

[5] See, e.g., 12 USC § 215a(e) ("All rights, franchises, and interests of the individual merging banks or banking associations in and to every type of property (real, personal, and mixed) and choses in action shall be transferred to and vested in the receiving association by virtue of such merger without any deed or other transfer."); MCL 450.1724(1)(b) "When a merger takes effect, ... the title to all real estate and other property and rights owned by each corporation party to the merger are vested in the surviving corporation without reversion or impairment.").