

STATE OF MICHIGAN  
COURT OF APPEALS

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LINDA BALL,

Plaintiff-Appellant,

v

BEAL BANK,

Defendant-Appellee.

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UNPUBLISHED  
February 11, 2014

No. 313260  
Oakland Circuit Court  
LC No. 2012-125656-CH

Before: JANSEN, P.J., and K. F. KELLY and SERVITTO, JJ.

PER CURIAM.

Plaintiff, Linda Ball, appeals as of right from an order granting summary disposition in favor of defendant, Beal Bank, in this quiet title and breach of contract action to enjoin defendant from continuing with its mortgage foreclosure proceeding. We affirm.

I. BASIC FACTS

Defendant, the assignee of a mortgage obtained by plaintiff on real property located in Rochester Hills, Michigan, initiated foreclosure proceedings by advertisement when plaintiff defaulted on the mortgage. In response, plaintiff filed a complaint for quiet title, breach of contract, and injunctive relief to enjoin defendant from proceeding with the foreclosure of plaintiff's property. Plaintiff argued that defendant was not entitled to foreclose on the property because the mortgage in question was never recorded. Defendant moved for summary disposition pursuant to MCR 2.116(C)(8) and (C)(10), and included a recorded copy of the mortgage, which indicated that the mortgage was recorded on March 30, 1989. The trial court thereafter granted defendant's motion for summary disposition. Plaintiff now appeals as of right.

II. ANALYSIS

This Court reviews de novo a trial court's summary disposition decision. *Spiek v Dep't of Transp*, 456 Mich 331, 337; 572 NW2d 201 (1998). While the trial court stated that it was granting defendant's motion pursuant to MCR 2.116(C)(8) and (10), the parties submitted a copy of the mortgage and other documents, and the trial court relied on those documents to find that summary disposition was appropriate. Because review of a motion under MCR 2.116(C)(8) is limited to the pleadings, and the trial court considered evidence beyond the pleadings, the motion is properly reviewed under MCR 2.116(C)(10) only. A motion under MCR 2.116(C)(10) tests the factual support for a claim. *Babula v Robertson*, 212 Mich App 45, 48; 536 NW2d 834

(1995). A reviewing court must consider the pleadings, affidavits, depositions, admissions, and other documentary evidence submitted by the parties. MCR 2.116(G)(5). Summary disposition should be granted if, except as to the amount of damages, there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Babula*, 212 Mich App at 48.

Foreclosure by advertisement is governed by MCL 600.3204, which provides, in relevant part:

(1) Subject to subsection (4), a party may foreclose a mortgage by advertisement if all of the following circumstances exist:

(a) A default in a condition of the mortgage has occurred, by which the power to sell became operative.

(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.

(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.

Plaintiff contends that defendant was not entitled to proceed with its foreclosure proceeding because the underlying mortgage was never properly recorded. Plaintiff correctly asserts that “a mortgagee cannot validly foreclose a mortgage by advertisement before the mortgage and all assignments of that mortgage are duly recorded.” *Kim v JPMorgan Chase Bank, NA*, 493 Mich 98, 106; 825 NW2d 329 (2012). In support of her argument that the mortgage was never properly recorded, plaintiff relies on a printout from a March 2012 online computer search of property tax records. The printout listed documents recorded against plaintiff’s property, but did not list the 1989 mortgage that defendant was seeking to foreclose.<sup>1</sup> Regardless, defendant submitted a recorded copy of the mortgage, which showed that it had been received and recorded by the register of deeds on March 30, 1989, after payment of a \$15 recording fee. The document reveals that it was recorded at Liber 10842, Page 307. This evidence established that the requirements for recording a mortgage in Michigan as set forth in *In re Schmiel*, 362 BR 802, 817-819 (ED Mich, 2007), were satisfied. The trial court did not err

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<sup>1</sup> We note that defendant submitted a similar printout from a search conducted in August 2012, in which the 1989 mortgage was listed. It is unclear why plaintiff’s online search of the property records did not disclose the mortgage.

in finding that there was no genuine issue of material fact regarding whether the mortgage was properly recorded.

Plaintiff also argues that she never intended for the mortgage to apply to the property in question, but rather intended for it to apply to another parcel of land that she and her husband previously owned. When interpreting a contract, such as a mortgage, the goal is to ascertain and enforce the parties' intent according to the plain language of the contract. *New Freedom Mtg Corp v Globe Mtg Corp*, 281 Mich App 63, 76; 761 NW2d 832 (2008). "Clear, unambiguous, and definite contract language must be enforced as written and courts may not write a different contract for the parties or consider extrinsic evidence to determine the parties' intent." *Wausau Underwriters Ins Co v Ajax Paving Indus, Inc*, 256 Mich App 646, 650; 671 NW2d 539 (2003). The mortgage document contains a legal description of the property subject to the mortgage, and also identifies the property by its common address. Plaintiff does not contend that either of these descriptions refer to property other than the property that defendant seeks to foreclose, or that description of the property in the mortgage is ambiguous. On the contrary, plaintiff submitted an affidavit in which she admitted that "[t]he Mortgage at issue in this litigation does reference the Property at issue in this case[.]" Thus, the trial court did not err in rejecting plaintiff's contention that the mortgage was intended to apply to other property.

While plaintiff suggests that the trial court should have denied summary disposition because discovery was not completed, she does not explain how further discovery was likely to lead to evidence to support her claim. Accordingly, she has not shown that summary disposition was premature. *Liparoto Constr, Inc v Gen Shale Brick, Inc*, 284 Mich App 25, 33-34; 772 NW2d 801 (2009).

Although defendant also addresses the dismissal of plaintiff's breach of contract claim, plaintiff has not challenged the trial court's ruling dismissing that portion of her complaint, thereby abandoning that issue. *Davis v City of Detroit Fin Review Team*, 296 Mich App 568, 585-586; 821 NW2d 896 (2012). Similarly, plaintiff has abandoned any request to amend her pleadings by also failing to address that issue.

Affirmed. As the prevailing party, defendant may tax costs. MCR 7.219.

/s/ Kathleen Jansen  
/s/ Kirsten Frank Kelly  
/s/ Deborah A. Servitto