STATE OF MICHIGAN

COURT OF APPEALS

CITIMORTGAGE INC, f/k/a ABN AMRO MORTGAGE GROUP INC,

Plaintiff-Appellee/Cross-Appellant,

v

TERRY L STAMPER,

Defendant-Appellant/Cross-Appellee,

and

RBS CITIZENS NA and CITY OF TROY,

Defendants.

UNPUBLISHED
March 11, 2014

No. 311716
Oakland Circuit Court
LC No. 2011-119801-CH

Before: MURPHY, C.J., and M. J. KELLY and RONAYNE KRAUSE, JJ.

PER CURIAM.

Defendant Terry L. Stamper (Stamper) appeals by right an order dismissing all claims with prejudice but explicitly permitting CitiMortgage, Inc (CitiMortgage) to exercise certain foreclosure rights. The trial court subsequently denied Stamper's motion for costs and attorney fees. This matter arises out of several mortgages Stamper granted between 1998 and 2003, including to CitiMortgage and to defendant RBS Citizens N.A. (RBS); several conveyances he subsequently made from his property parcel, including to defendant the City of Troy (Troy); and ultimately a priority contest between CitiMortgage and RBS. We affirm, but because we conclude that the implications of the trial court's order require additional clarification, we also remand for an amendment to the trial court's order.

The history of the property at issue is somewhat complex due to the number of shifting entities involved. Briefly, Stamper acquired title to a parent parcel in 1979. In 1998, he granted "the Standard Mortgage" in favor of CitiMortgage's predecessor for $260,000.00. In 2000, he granted "the Charter Mortgage" in favor of RBS's predecessor. In 2003, he refinanced the Standard Mortgage and granted "the ABN Mortgage" in favor of CitiMortgage's predecessor. Among other conditions of the ABN Mortgage, Stamper agreed "that he would promptly discharge any lien which has priority over the ABN Mortgage." Stamper contends that the

Charter Mortgage was disclosed, but for one reason or another, no subordination agreement or recognition of priority was obtained from RBS recognizing CitiMortgage's mortgage. Stamper subsequently subdivided the parent parcel; most of the resulting smaller parcels are not at issue here. Insofar as we can determine from the record, it appears that the only parcel remaining at issue and still owned by Stamper is "Parcel 064."[1] In 2010, RBS foreclosed the Charter Mortgage, and on February 1, 2011, it received a sheriff's deed pursuant to a mortgage sale. CitiMortgage commenced the instant suit on June 16, 2011, seeking to establish that the ABN Mortgage was superior to the Charter Mortgage and the sheriff's deed, and also seeking money damages for breach of the mortgage contract.

CitiMortgage moved for partial summary disposition, for a preliminary injunction to toll the redemption period, and to be allowed to tender a redemption of the property from the Charter Mortgage foreclosure into escrow. The trial court denied the latter two motions. On August 1, 2011, CitiMortgage redeemed the property, and the next day it withdrew its motion for summary disposition. CitiMortgage then filed a motion for leave to file an amended complaint and join First American Title Insurance Company as a plaintiff. CitiMortgage argued that it had redeemed the property through First American, and although CitiMortgage no longer had a valid claim for damages against Stamper, First American did and sought to subrogate to CitiMortgage's interest in order to pursue that claim. CitiMortgage also contended that Stamper had recorded an affidavit that constituted slander of title. Stamper contended his affidavit merely gave notice of the instant litigation. Stamper asserted that CitiMortgage filed its motion for leave after all scheduling deadlines, even though it was on notice of all of the allegedly changed circumstances well before those deadlines, and he would be prejudiced because CitiMortgage had refused to produce discovery and Stamper had no prior notice of any claims from First America. The trial court denied the motion.

CitiMortgage again moved for summary disposition, noting that it was no longer pursuing an award of money damages and seeking to dismiss that claim without prejudice. CitiMortgage contended, however, that Stamper's affidavit was unauthorized and its contention that foreclosure by advertisement was now precluded was not supported by MCL 600.3204(1)(b) and MCL 565.451a as it claimed. CitiMortgage concluded that although it wished simply to dismiss its claims against Stamper, the affidavit precluded it from doing so because it needed a recordable order to "neutralize the inaccurate statements made therein." A scheduled hearing on the motion was inexplicably not held; instead, the parties apparently went to case evaluation. Stamper contends, and CitiMortgage tacitly concedes, that the case evaluation had been $500 in favor of CitiMortgage, and Stamper had accepted it but CitiMortgage had not.

[1] Although another parcel, referred to as "the City Property," was initially mentioned as possibly also being at issue, we note that subsequent to the filing of the complaint, CitiMortgage appears to tacitly drop any assertions regarding parcels other than Parcel 064; furthermore, although CitiMortgage requested an adjudication of the parties' respective rights to several parcels, it only requested quieting title in itself to Parcel 064. We presume this to be intentional and therefore presume that only Parcel 064 remains at issue.

Stamper thereafter contended that CitiMortgage's claims had been frivolous from the outset and its claims should be dismissed with prejudice, with the result being that CitiMortgage would then be unable to seek foreclosure by advertisement. CitiMortgage contended that Stamper had ambushed it by asserting unpleaded affirmative defenses and that Stamper was seeking a windfall. The trial court agreed with CitiMortgage that Stamper was essentially attempting to add additional affirmative defenses a week before trial. However, the trial court concluded that on balance, it would grant Stamper's request to dismiss with prejudice but explicitly carve out an allowance for CitiMortgage to be able to foreclose the ABN Mortgage. Stamper moved for attorney fees and costs, asserting that CitiMortgage had not improved its position over the case evaluation award. CitiMortgage argued that the case evaluation award would have placed it in a worse practical position for a nominal sum, so it had in fact improved its position; furthermore, it argued that Stamper incurred no significant attorney fees until after CitiMortgage had stated that it would no longer pursue any claims against him. The trial court denied the motion for attorney fees and costs. This appeal followed.

The ultimate question disputed in this issue is whether the trial court erred by specifically permitting CitiMortgage to pursue foreclosure of the ABN Mortgage. However, resolving that question entails examining the propriety of the dismissal itself. "Under MCR 2.504(A)(2), an action may not be dismissed at the plaintiff's request except by order of the court on terms and conditions the court deems proper." *Walbridge Aldinger Co v Walcon Corp*, 207 Mich App 566, 570; 525 NW2d 489 (1994). The trial court's decision whether to grant a voluntary dismissal is reviewed "to see whether the decision was without justification." *Id*., 570-571. This is nominally an abuse of discretion standard, but with some constraints on the exercise of that discretion. See *African Methodist Episcopal Church v Shoulders*, 38 Mich App 210, 212; 196 NW2d 16 (1972). In particular, "such a motion should be granted unless defendant will be legally prejudiced as a result" and "to protect defendant from the abusive practice of dismissal after much time and effort has been put into a lawsuit, any dismissal should be on terms and conditions which protect defendant." *Id*. In such a circumstance, particularly where much or all of the claim was meritless or where the defendants have a valid defense, the defendants may be entitled to an adjudication of the suit irrespective of whether they have filed a counterclaim. *Id*., 212-213. "An abuse of discretion occurs when the trial court's decision is outside the range of reasonable and principled outcomes." *Maldonado v Ford Motor Co*, 476 Mich 372, 388; 719 NW2d 809 (2006), cert den 549 US 1206; 127 S Ct 1261; 167 L Ed 2d 76 (2007).[2]

As an initial matter, the trial court erred in deeming Stamper's argument that he was entitled to dismissal of all claims with prejudice to be an unpleaded affirmative defense. It is simply not a "defense" at all. "Defense is defined as that which is alleged by the party proceeded against in a suit as a reason why plaintiff should not recover or establish what he seeks." *Gelman Sciences, Inc v Fireman's Fund Ins Cos*, 183 Mich App 445, 448; 455 NW2d 328 (1990), citing Black's Law Dictionary (5th ed), p 377. Inherently, therefore, a "defense" is a

[2] The "palpably and grossly violative of fact and logic" test for an abuse of discretion from *Spalding v Spalding*, 355 Mich 382, 384-385; 94 NW2d 810 (1959), has now been explicitly rejected and overruled by our Supreme Court. *Maldonado*, 476 Mich at 388.

proffered reason why a plaintiff's claim should fail. Here, in contrast, Stamper argued that he was entitled to a particular kind of relief in order to preclude some anticipated future action he expects CitiMortgage to take but that CitiMortgage has not yet made a claim to accomplish. Whether or not Stamper has a right to the kind of relief he seeks, his argument that he was entitled to dismissal of all of CitiMortgage's claims with prejudice as opposed to without prejudice is not, itself, an argument why those claims should fail in the first place.

A significant part of Stamper's argument for why he is entitled to dismissal with prejudice and without any "carve-out" is his contention that CitiMortgage's claims against him were meritless or even frivolous. If for whatever reason, Stamper would necessarily have prevailed had the matter gone to trial, he would indeed be entitled to dismissal with prejudice rather than without, because otherwise he would conceivably be subject to harassing subsequent suits on the same basis. See *McLean v McElhaney*, 269 Mich App 196, 202-203; 711 NW2d 775 (2005), reversed on other grounds 480 Mich 978 (2007), citing *African M E Church*, 38 Mich App at 212. It seems to us unfair to deny formal vindication to a party with a clearly meritorious position if that denial could subject the party to further inconvenience.

However, as CitiMortgage points out, the purpose of the above rule is to preclude harassment through repeated litigation of the same claim or issue. Consequently, the statement that a motion by a plaintiff to voluntarily dismiss a claim without prejudice "should be granted unless defendant will be legally prejudiced as a result," *African M E Church*, 38 Mich App at 212, should be considered in context. It may be inappropriate to dismiss a case without prejudice where it appears likely that the defendant would prevail on the merits or, as in *African M E Church*, where the defendants would need to commence a lawsuit as plaintiffs to return themselves to the status quo prior to the lawsuit. *Id*. at 212-213.

With that principle in mind, we conclude that Stamper has one indisputably meritorious issue that must be clarified. Specifically, Stamper should be entitled to a clear and unambiguous vindication of any liability for costs arising out of the Charter Mortgage foreclosure. Stamper asserts that without such vindication, CitiMortgage might add what it—or a party in privity with it—paid to redeem the Charter Mortgage foreclosure to the amount that would be due to redeem a foreclosure of the ABN Mortgage. Presuming that to be otherwise permissible, CitiMortgage makes the vast majority of its arguments on the premise that it "discontinued" its breach of contract claim based on the Charter Mortgage. Indeed, while not directly addressing Stamper's concern, CitiMortgage explicitly concedes that Stamper's liability for the redemption payment has been resolved. Should CitiMortgage, or any party in privity with CitiMortgage, seek to hold Stamper responsible for the amount of the redemption payment or any other costs incurred as a result of his default on the Charter Mortgage, that *would* constitute repeated litigation of an issue that purportedly has been resolved in the instant litigation. We therefore order that the prejudicial effect of the order of dismissal extends to any liability Stamper may have to any party on the basis of the Charter Mortgage default.

However, we otherwise disagree that CitiMortgage's claims were frivolous from the outset. Stamper appears to believe that CitiMortgage's references to parcels other than Parcel 064 and the possibility of other parties in interest either demonstrates bad faith or makes the claim meritless. Nothing appears to be inherently meritless about the claim; CitiMortgage contended that the sheriff's deed jeopardized its interests in the properties, and it joined all

parties with an interest in the properties affected. Stamper is correct that by the day of trial, the claim essentially no longer existed: CitiMortgage sought to establish that its mortgage had priority over RBS's mortgage, which became moot upon CitiMortgage's redemption of the Charter Mortgage foreclosure.

Stamper contends that Count II was frivolous because CitiMortgage's ABN Mortgage would always have retained its priority over the Charter Mortgage on the basis of equitable subrogation unless CitiMortgage itself engaged in some inequitable behavior, relying generally on *CitiMortgage, Inc v Mortgage Electronic Registration Systems, Inc*, 295 Mich App 72; 813 NW2d 332 (2011). Consequently, Stamper argues, it is logically impossible for him to have caused CitiMortgage any actual damages as a result of his alleged breach of the ABN Mortgage contract. CitiMortgage points out, however, that "the application of equitable subrogation should and must proceed on the case-by-case analysis characteristic of equity jurisprudence." *Atlanda Int'l Ins Co v Bell*, 438 Mich 512, 516 n 1; 475 NW2d 294 (1991). In the meantime, "[t]he law in Michigan does not allow an equitable extension of the period to redeem from a statutory foreclosure sale in connection with a mortgage foreclosed by advertisement and posting of notice in the absence of a clear showing of fraud, or irregularity." *Schulthies v Barron*, 16 Mich App 246, 247-248; 167 NW2d 784 (1969). CitiMortgage argues that it was therefore obligated to either obtain a judgment setting aside the sheriff's deed or pay to redeem the property prior to the expiration of the redemption period.

CitiMortgage is mostly incorrect but accurately asserts that equitable subrogation is "not self-executing." Pursuant to MCL 600.3236,[3] a senior mortgage is unaffected by foreclosure of a junior mortgage, even after the expiration of the redemption period. *In re Receivership of 11910 South Francis Rd*, 492 Mich 208, 225; 821 NW2d 503 (2012). Moreover, case law so holding was in effect when CitiMortgage commenced the instant suit. *Ameriquest Mortgage Co v Alton*, 271 Mich App 660, 683; 726 NW2d 424 (2006), vacated in part on other grounds by order 271 Mich App 801 (2006). CitiMortgage is correct that it would require a court order confirming its priority, but no case law suggests that such a court order must enter prior to the expiration of the redemption period, and the fact that *CitiMortgage*, 295 Mich App 72, was not rendered moot by the time of its appeal unambiguously indicates that such an order can enter at any time.

Nonetheless, CitiMortgage *would* have needed a court order *eventually*, and it would have expended some money pursuing a suit to obtain such an order. CitiMortgage is therefore

[3] "Unless the premises described in such deed shall be redeemed within the time limited for such redemption as hereinafter provided, such deed shall thereupon become operative, and shall vest in the grantee therein named, his heirs or assigns, all the right, title, and interest which the mortgagor had at the time of the execution of the mortgage, or at any time thereafter, except as to any parcel or parcels which may have been redeemed and canceled, as hereinafter provided; and the record thereof shall thereafter, for all purposes be deemed a valid record of said deed without being re-recorded, *but no person having any valid subsisting lien upon the mortgaged premises, or any part thereof, created before the lien of such mortgage took effect, shall be prejudiced by any such sale, nor shall his rights or interests be in any way affected thereby*." (Emphasis added).

not entirely without damages necessarily flowing from Stamper's default. However, CitiMortgage's complaint specifically asserts that Stamper breached covenants to "pay all taxes, assessments, charges, fines and impositions attributable to the Property which can attain priority of [sic] the ABN Mortgage" and to "promptly discharge any lien which has priority over the ABN Mortgage." Because the ABN Mortgage retains its priority through equitable subrogation, Stamper technically did *not* fail to pay or discharge any lien or other obligation that would take priority over the ABN Mortgage. Therefore, while CitiMortgage may have damages from the default, Stamper did not violate the ABN Mortgage contract pursuant to the allegations in the Complaint. Nonetheless, we do not believe CitiMortgage's arguments were devoid of even arguable merit. MCL 600.2591(3)(a)(iii).

Finally, we conclude that the "carve-out" in the trial court's order merely clarifies the effect of the dismissal rather than constituting an independent directive. In relevant part, MCL 600.3204(1)(b) provides that "a party may foreclose a mortgage by advertisement if all of the following circumstances exist: . . . [a]n 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 . . . " Neither the statute nor the Court Rules define "discontinued." In the absence of a statutory definition, words should be given their plain and ordinary meaning in context, and a dictionary may be used to ascertain that meaning. *Krohn v Home-Owners Ins Co*, 490 Mich 145, 156; 802 NW2d 281 (2011). According to Random House Webster's College Dictionary (2001), "discontinue" means "put an end to; stop; terminate" or otherwise to stop or cease or abandon. The phrasing in the passive voice, rather than active voice, suggests that it is immaterial how the claim came to be discontinued or whether it was discontinued by an act of any particular party, or even the court. And the simple fact is that Count II is no longer active and Count I is moot. For whatever reason, CitiMortgage's claims are "discontinued." Consequently, all other issues being equal, MCL 600.3204(1)(b) no longer precludes foreclosure by advertisement of the ABN Mortgage.

Furthermore, because Count II was a claim for damages arising out of a breach of the ABN Mortgage contract premised on Stamper's default on the Charter Mortgage, its resolution in Stamper's favor would not have any res judicata or collateral estoppel effect on a breach of contract claim for some *other* breach; for example, defaulting on the mortgage itself. Apparently, at the time the suit was filed, Stamper was not yet in default on the ABN Mortgage, so CitiMortgage could not have brought a claim to foreclose the ABN Mortgage at that time. The specific issue, default of the ABN Mortgage, has not been addressed and therefore cannot have a collateral estoppel effect. *Leahy v Orion Twp*, 269 Mich App 527, 530; 711 NW2d 438 (2006). Furthermore, because it could not have been brought at the time the instant suit was filed, and would be based on a different transaction in any event, it could not have any res judicata effect. *Duncan v Michigan*, 300 Mich App 176, 194; 832 NW2d 761 (2013). Consequently, CitiMortgage is not in fact precluded from electing to foreclose on the ABN Mortgage by advertisement, and the trial court's "carve out" merely explains that fact, it does not create it.

We consequently need not address any of the other issues raised on appeal.

The trial court's order is affirmed. However, we remand to the trial court to amend its order to add an additional explicit clarification that Stamper may not be held directly or

indirectly responsible by CitiMortgage or its privies for the cost of the redemption of the Charter Mortgage or any expenses incurred in the instant matter. We do not retain jurisdiction. No costs, neither party having prevailed in full.

/s/ William B. Murphy
/s/ Michael J. Kelly
/s/ Amy Ronayne Krause