STATE OF MICHIGAN

COURT OF APPEALS

FANNIE MAE,

Plaintiff/Cross-Defendant-Appellee,

v

RONALD WILLIS and BRENDA WILLIS,

Defendants/Cross-Plaintiffs-Appellants.

UNPUBLISHED
July 15, 2014

No. 315256
Wayne Circuit Court
LC No. 12-000734-CZ

Before: BECKERING, P.J., and HOEKSTRA and GLEICHER, JJ.

PER CURIAM.

Defendants/counter-plaintiffs Brenda and Ronald Willis owned a home in the city of Detroit, over which Bank of America, N.A. (BANA) serviced a mortgage. After several years of mortgage and tax payment shortfalls, tax repayment plans, and leniency on the mortgage servicer's part, BANA foreclosed on the property, purchased it at the sheriff's sale, and transferred it to Fannie Mae. On appeal, the Willises take issue with the circuit court's resolution of their challenges to the foreclosure. Because the foreclosure was properly taken after the Willises failed to remedy their defaults, we affirm.

I. BACKGROUND

On October 16, 2001, the Willises executed a mortgage in favor of Mortgage Electronic Registration Systems, Inc. ("MERS"), to secure a loan to purchase residential property in Detroit. The Willises promised to make monthly loan payments to the mortgage servicer (most currently BANA), which managed the mortgage on MERS's behalf.[1] The Willises decided to forego an escrow account and to pay their property taxes and homeowners insurance directly. But the Willises neglected to pay their tax liability, resulting in a $12,000 debt by 2005. To protect its interest, BANA supplied the funds necessary to extinguish the tax delinquency and entered into a three-year repayment plan with the Willises. BANA also created an escrow

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[1] The mortgage servicing contract changed hands several times after the Willises purchased their home. We refer only to those entities having an interest when the mortgage was actually foreclosed upon.

account and mandated the Willises' monthly contribution to ensure timely and full payment of all future tax assessments.

In 2006, the Willises modified the tax structure of their property, by applying for and receiving a Neighborhood Enterprise Zone (NEZ) homestead certificate under the Neighborhood Enterprise Zone Act (NEZA), MCL 207.771 *et seq*. The real property was divided into two interests, each with its own tax identification number. The house retained the original tax identification number and was subject to de minimis taxation. The land was assigned a new tax identification number and continued to be assessed property taxes on its full value. The Willises enjoyed an overall savings as a result. However, the Willises failed to notify BANA of this change.

The Willises continued to experience financial difficulty. By July 2007, they were three months behind on their mortgage payments, and had a negative escrow balance of nearly $6,000. BANA initiated a foreclosure by advertisement, but cancelled the proceeding after reaching a mortgage modification agreement with the Willises.

Shortly thereafter, BANA greatly reduced the Willises' required escrow payment. BANA made this alteration on the mistaken assumption that the city had nearly eliminated the Willises' tax liability. BANA did not discover at that time that the reduced tax liability was due to the Willises' restructuring of the property for tax purposes. Neither the city nor the Willises provided the bank with assessments connected to the newly assigned tax identification number covering the land. Although the Willises received these new tax bills, they failed to remit payment.

In February 2009, the city informed BANA of the accumulated tax liability on the property. BANA initially believed that it caused the shortfall by failing to remit the proper payments due and so did not charge the penalty and interest portion to the Willises' escrow account. Once it learned of the Willises' failure to notify it of the tax split, however, BANA charged the Willises for these additional fees.

Once again, the Willises fell behind in their mortgage payments. On August 17, 2009, BANA offered the Willises a six-month forbearance agreement. Under this agreement, BANA suspended foreclosure proceedings and allowed the Willises to make reduced mortgage payments, along with increased escrow payments to cover the tax deficiency. The Willises timely mailed each check for the mortgage payment during the forbearance period, but not until the eve of the due date. As a result, no payment was actually posted to the Willises' account on time.[2] And following the forbearance period, the Willises made a mortgage payment with insufficient funds to cover their check. BANA thereafter cancelled the forbearance agreement.

[2] An addendum to the mortgage loan note warned the Willises that their payments must be *received* by the loan servicer by the due date and it was the Willises' duty to ensure timely receipt.

In September 2010, MERS assigned the mortgage interest to BANA and BANA initiated foreclosure proceedings. BANA acquired the property at the sheriff's sale and transferred the property to Fannie Mae. Even after the foreclosure sale, the Willises attempted to modify their loan under the federal Home Affordable Modification Program (HAMP), but were rejected as ineligible.

At the close of the statutory redemption period, Fannie Mae instituted eviction proceedings in district court. After the Willises filed a cross-complaint, alleging counts of breach of contract, promissory estoppel and wrongful foreclosure, and seeking exemplary damages, the actions were transferred to circuit court. The circuit court summarily dismissed the Willises' claims and ordered their eviction. This appeal followed.[3]

II. JUDICIAL NOTICE

The Willises first contend that the circuit court should have taken judicial notice of a consent order, entered on April 13, 2011, between BANA and the Board of Governors of the Federal Reserve System. The consent order essentially required BANA to create a written plan to improve its measures to assist homeowners in avoiding foreclosure and in complying with federal regulations of the residential mortgage servicing industry. The Willises assert that the circuit court should have denied Fannie Mae's summary disposition motion because BANA "voluntarily entered into a federal consent agreement that includes compensation and remedial action of a specific time-period for potential violations that could render the foreclosure void including the [Willises'] mortgage."

Under MRE 201(b), a court may take judicial notice of certain facts. To be judicially noticed, the fact must be "one not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." MRE 201(b). The decision to take judicial notice is discretionary. MRE 201(c). See also *Lenawee Co v Wagley*, 301 Mich App 134, 149; 836 NW2d 193 (2013).

There is no record indication that the circuit court did not take judicial notice of the existence of the consent order when rendering its ruling. Rather, the court implied that it acknowledged the existence of the consent order but found it irrelevant because it was not entered until three months after the foreclosure sale in this case: "Well, I still can't get over the -- the argument that they were in foreclosure when this [the federal consent order] happened."

The Willises would have been better served challenging the circuit court's interpretation of the legal effect of the consent judgment. Even that argument would fail, however. The

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[3] Fannie Mae urges us not to consider several of the Willises' arguments on appeal, claiming they were not raised below. It appears from the record that these arguments were at least mentioned in the circuit court. As "all the relevant facts are available," we will review the Willises' appellate claims. See *Vushaj v Farm Bureau Gen Ins Co of Mich*, 284 Mich App 513, 521; 773 NW2d 758 (2009).

consent order, by its express terms, does not give "to any person or entity, other than the parties hereto, and their successors hereunder, any benefit or any legal or equitable right, remedy, or claim under this Order." While the order requires BANA to address weaknesses in its loan servicing practices, it does not mandate that any particular action be taken to relieve those who had already lost their homes to foreclosure. The consent order also does not call into question any particular actions taken by BANA that required censure or remedy. Accordingly, nothing in the consent order evidences the impropriety of BANA's particular actions in this case.[4]

III. WRONGFUL FORECLOSURE

The Willises next argue that the circuit court should have set aside the foreclosure sale based on various defects and irregularities in the foreclosure process. The circuit court summarily dismissed the Willises' action in this regard and we discern no error in that ruling.

We consider de novo a lower court's resolution of a summary disposition motion. *Walters v Nadell*, 481 Mich 377, 382; 751 NW2d 431 (2008). Because the circuit court looked beyond the pleadings in ruling on Fannie Mae's motion, we review the motion as granted under MCR 2.116(C)(10). *Cuddington v United Health Servs, Inc*, 298 Mich App 264, 270; 826 NW2d 519 (2012). As our Supreme Court explained in *Maiden v Rozwood*, 461 Mich 109, 120; 597 NW2d 817 (1999):

> A motion under MCR 2.116(C)(10) tests the factual sufficiency of the complaint. In evaluating a motion for summary disposition brought under this subsection, a trial court considers affidavits, pleadings, depositions, admissions, and other evidence submitted by the parties, MCR 2.116(G)(5), in the light most favorable to the party opposing the motion. Where the proffered evidence fails to establish a genuine issue regarding any material fact, the moving party is entitled to judgment as a matter of law.

"The reviewing court should evaluate a motion for summary disposition under MCR 2.116(C)(10) by considering the substantively admissible evidence actually proffered in opposition to the motion." *Id.* at 121.

In Michigan, foreclosures by advertisement are governed by MCL 600.3201 *et seq*. Once a sheriff's sale is complete, MCL 600.3240 creates a right of redemption in the mortgagor. If the mortgagor remits the amount paid for the property at the sheriff's sale, along with interest and other fees, within six months of the sale, the sheriff's deed becomes void. MCL 600.3240(1), (2), and (8). However, if the mortgagor does not exercise his or her redemption right within the statutory period, MCL 600.3236 provides that the sheriff's deed "become[s] operative" and vests the property interest in the sheriff's sale purchaser. Thus, if a mortgagor does not redeem the

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[4] Fannie Mae notes on appeal that it was not a party to the federal consent judgment and that the Willises did not attempt to join BANA in this litigation. As the consent judgment creates no liability in this case, we need not consider whether Fannie Mae inherited any duties or liabilities from its predecessor-in-interest in this regard.

property within the six-month period, all of the mortgagor's rights, title, and interest in the property are extinguished. See *Piotrowski v State Land Office Bd*, 302 Mich 179, 187; 4 NW2d 514 (1942) (Because the plaintiffs "did not avail themselves of their right of redemption in the foreclosure proceedings . . . all plaintiffs' rights in and to the property were extinguished.").

However, Michigan law allows equitable tolling of the redemption period, such that a suit challenging the foreclosure remains viable upon "a clear showing of fraud[] or irregularity." *Schulthies v Barron*, 16 Mich App 246, 247-248; 167 NW2d 784 (1969). See also *Freeman v Wozniak*, 241 Mich App 633, 637; 617 NW2d 46 (2000) (when challenging a foreclosure, "in the absence of fraud, accident or mistake, the possibility of injustice is not enough to tamper with the strict statutory requirements"). More recently, our Supreme Court held that "defects or irregularities in a foreclosure proceeding result in a foreclosure that is voidable . . . ." *Kim v JPMorgan Chase Bank, NA*, 493 Mich 98, 115; 825 NW2d 329 (2012). Because the foreclosure is rendered voidable, not void *ab initio*, the mortgagor must also demonstrate prejudice caused by the alleged defect or irregularity before the foreclosure may be set aside. *Id.* at 115. "To demonstrate such prejudice, [the challenging party] must show that they would have been in a better position to preserve their interest in the property . . . ." *Id.* at 115-116. "[S]tatutory foreclosures will only be set aside if 'very good reasons' exist for doing so," however. *Kubicki v Mortgage Electronic Registration Sys*, 292 Mich App 287, 288; 807 NW2d 433 (2011) (citation omitted).

In their attempt to void the foreclosure, the Willises allege that various irregularities and defects plagued the foreclosure process. Overall, they complain that BANA had been working with them on a loan modification program and proceeded to foreclosure despite their compliance with terms during the review process. They also challenge BANA's failure to pay the proper amount of property taxes following the NEZ certification of their property, resulting in steep penalties that drove their payments too high to be affordable.

First, we reject the Willises' claim that BANA acted improperly in failing to fully pay their property tax liability following the 2006 property tax split. There simply is no evidence that BANA was aware of the split until 2009. The mortgage demands, "Borrower shall promptly furnish to Lender all notices of amounts to be paid under" the "funds for escrow items" provision. In her deposition, Brenda Willis admitted that she and her husband failed to notify BANA of the division of the property into two tax identification numbers. Accordingly, until the city notified BANA, it was completely unaware that it was not paying the full tax liability on the property. And no documents from BANA or its predecessors-in-interest cited the second property tax identification number until its February 2009 notice that taxes were delinquent for that parcel.

The Willises complain that the circuit court made a factual finding that they took affirmative action to apply for NEZ status. Fannie Mae provided with its summary disposition motion an affidavit from a city of Detroit tax incentive specialist avowing that the Willises "filed an application for" the NEZ certificate. The Willises presented no evidence to disprove this statement. In fact, Brenda Willis testified that she and her husband "had that put together. We had that homesteaded." And the NEZA specifically provides that a landowner must file an application for a NEZ certificate, MCL 207.774(1), which will be considered by the "qualified assessing authority" to determine if the NEZ tax status is applicable. MCL 207.776. It is clear

that in order to receive the tax benefits associated with NEZ certification, the Willises were required to affirmatively apply, and the circuit court did not err in accepting Fannie Mae's explanation of the NEZ program.

Ultimately, the Willises' act of securing the division of the property into two tax identification numbers and failing to notify BANA of this new tax structure caused the accumulation of unpaid property taxes. Accordingly, the Willises' current claim that the bank caused this error is unavailing.

Moreover, the record contradicts the Willises' claim that the sudden increase in their escrow obligation in 2009 to cover the new property tax delinquency was the catalyst for their default. The Willises had been in default on their mortgage and in arrears on their property taxes repeatedly since 2005. They had not remitted their mortgage loan payments for an eight-month period before BANA increased their escrow obligations. As a result, the Willises cannot establish the necessary prejudice to merit relief on this ground.

The Willises contend that BANA violated the 2009 loan forbearance agreement and cite this as another irregularity in the foreclosure procedure. The forbearance agreement provided that the Willises would make six payments over a seven-month period "on or before each of the . . . due dates." The Willises breached this promise by waiting until the eve of the due dates to remit their checks, causing each payment to arrive late. The Willises also breached the forbearance agreement by failing to make required payments into the escrow account so that it would "contain a sufficient balance so that payments for property taxes . . . may be timely." As a result of the Willises' breaches, BANA was not required to "offer to modify [the] loan," and continue the "suspen[sion of] of any scheduled foreclosure sale" as promised in the agreement.[5]

And the Willises' reliance on federal HAMP guidelines is unavailing. As noted by a handbook provided by the Willises on appeal, a mortgage servicer is not permitted to proceed with foreclosure proceedings while the borrower's HAMP application is under review. However, the Willises admit in their appellate brief, "It should be noted, all mortgage review for modification and transfer of the account has taken place after the sheriff's sale," and they did not speak to bank representatives about HAMP eligibility until after the foreclosure sale. Accordingly, the Willises' challenge on this ground is completely without merit.

Finally, the Willises contend that BANA violated MCL 600.3204 in pursuing foreclosure as it had breached the forbearance agreement, failed to review the Willises' loan for modification, overcharged property taxes, and improperly increased the Willises' escrow payments. MCL 600.3204(1)(a) requires as a precondition for instituting foreclosure proceedings that "[a] default in a condition of the mortgage has occurred, by which the power to sell became operative." As noted above, the Willises defaulted on the mortgage by failing to

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[5] Given that the Willises breached the forbearance agreement, negating any duty on BANA's part, their claim that the circuit court erred in summarily dismissing their separate breach of contract count is meritless. As this count lacked substantive merit, we need not consider whether Fannie Mae could be held liable for such a breach committed by its predecessor-in-interest.

make timely and complete loan and escrow payments. And the defenses raised by the Willises fail to void the foreclosure. Accordingly, the Willises can establish no statutory violation.

IV. EXEMPLARY DAMAGES

The Willises challenge the circuit court's dismissal of their claim for exemplary damages. Under MCL 600.2907a(1)(c), "A person who violates [MCL 565.25] by encumbering property through the recording of a document without lawful cause with the intent to harass or intimidate any person is liable for . . . [e]xemplary damages." As discussed at length in this opinion, however, the foreclosure proceedings were not undertaken without lawful cause. BANA proceeded to foreclosure after enduring nearly six years of unpaid and belated property tax and loan payments, and unsuccessful attempts to assist the Willises in paying in full in a timely fashion. As the circuit court did not err in dismissing the Willises' challenges to the foreclosure process, it did not err in dismissing the Willises' statutory claim for exemplary damages.

The Willises further argue that they are entitled to exemplary damages under the common law. To recover exemplary damages under the common law, a claimant must demonstrate "intangible injuries or injuries to feelings" and seek compensation for "the humiliation, sense of outrage, and indignity resulting from injuries maliciously, wilfully and wantonly inflicted by the defendant." *Unibar Maintenance Servs, Inc v Saigh*, 283 Mich App 609, 630-631; 769 NW2d 911 (2009) (quotation marks and citations omitted). In her deposition, Brenda Willis specifically testified that "[t]here's no physical pain or suffering." The Willises also presented no evidence of emotional suffering and made no factual allegations to support such a recovery. With no supporting evidence or allegations, the circuit court was bound to dismiss this claim.

We affirm.

/s/ Jane M. Beckering
/s/ Joel P. Hoekstra
/s/ Elizabeth L. Gleicher