

STATE OF MICHIGAN
COURT OF APPEALS

DIME, LLC,

Plaintiff-Appellee,

v

GRISWOLD BUILDING, LLC; GRISWOLD
PROPERTIES, LLC; COLASSAE, LLC; and
WAAD NADHIR,

Defendants-Appellants.

UNPUBLISHED
July 29, 2014

No. 314752
Oakland Circuit Court
LC No. 2009-106478-CK

Before: MARKEY, P.J., and OWENS and FORT HOOD, JJ.

PER CURIAM.

Defendants appeal by right the final judgment entered against them on November 21, 2012, regarding various commercial loans and guarantees. Defendants argue that the trial court erred by ruling as part of a June 24, 2010 order denying plaintiff's motion for partial summary disposition that plaintiff possessed standing and the right by assignment to enforce the terms of the parties' loan agreements.¹ Defendants present the same argument regarding the trial court's January 24, 2013 opinion and order denying their motion for new trial. We affirm.

On December 7, 2004, defendants, Griswold Building, LLC, Griswold Properties, LLC, and Colossae, LLC, (collectively, the borrowers) entered into a commercial loan and mortgage agreement (the credit agreement) with lenders Wells Fargo Bank, NA, and Fifth Third Bank, to borrow the aggregate principal amount of \$39,882,000, with each lender providing 50% of the loaned funds. Borrowers executed various promissory notes and mortgages while lenders nominated Wells Fargo to act as "administrative agent" for the purpose of administering, on behalf of the lenders, the terms of the credit agreement and the provisions of the various loan

¹ This Court denied defendant Nadhir's application for leave to file an interlocutory appeal of the trial court's June 24, 2010 order because of "failure to persuade the Court for immediate appellate review." *Dime LLC v Griswold Building LLC*, unpublished order of the Court of Appeals, entered December 2, 2010 (Docket No. 300665).

documents. Defendant Nadhir, as well as Basim Binno and Jalal Shallal,² executed personal guarantees to secure the borrowers' obligations under the loan documents.

The borrowers failed to pay the loans by an extended due date of October 1, 2008. On February 4, 2009, before commencing foreclosure proceedings, Wells Fargo, as administrative agent, gave written notice to all lenders, borrowers, and defendant Nadhir, that it intended to appoint Dime LLC as successor administrative agent by assigning its rights and duties under the credit agreement to Dime, its affiliate. The letter notice read, in pertinent part, as follows:

This letter serves as written notice under Section 12.14 of the Credit Agreement that the Administrative Agent will be assigning its rights and duties under the Loan Documents and the Other Related Documents to the Successor Administrative Agent. As the Successor Administrative Agent is an Affiliate of the Administrative Agent, the Credit Agreement allows such an assignment upon prior written notice to, and without requiring the consent of, the Lenders and Borrowers.

Section 12.14 of the credit agreement on which Wells Fargo relied reads:

12.14 **SUCCESSOR ADMINISTRATIVE AGENT.** Administrative Agent may resign at any time as Administrative Agent under the Loan Documents and Other Related Documents by giving written notice thereof to the Lenders and the Borrower. Upon any such resignation, the Requisite Lenders shall have the right to appoint a successor Administrative Agent which appointment shall, provided no Default or Potential Default exists, be subject to the Borrowers' approval, which approval shall not be unreasonably withheld or delayed (except that the Borrowers shall, in all events, be deemed to have approved each Lender and any of its Affiliates as a successor Administrative Agent). If no successor Administrative Agent shall have been so appointed in accordance with the immediately preceding sentence, and shall have accepted such appointment, within thirty (30) days after the current Administrative Agent's giving of notice of resignation, then the current Administrative Agent may, on behalf of the Lenders, appoint a successor Administrative Agent, which shall be a Lender, if any Lender shall be willing to serve, and otherwise shall be an Eligible Assignee. Upon the acceptance of any appointment s Administrative Agent hereunder by a successor Administrative Agent, such successor Administrative Agent shall thereupon succeed to and become vested with the rights, powers, privileges and duties of the current Administrative Agent, and the current Administrative Agent shall be discharged from its duties and obligations under the Loan Documents and Other Related Documents. After any Administrative Agent's resignation hereunder as Administrative Agent, the provisions of this Article 12 shall continue to inure to

² Although judgment was entered against Binno and Shallal in lower court file No. 09-106477, they have apparently not appealed.

its benefit as to any actions taken or omitted to be taken by it while it was Administrative Agent under the Loan Document and the Other Related Documents. *Notwithstanding anything contained herein to the contrary, the Administrative Agent may assign its rights and duties under the Loan Documents and the Other Related Documents to any of its Affiliates by giving the Borrowers and each Lender prior written notice.* [Emphasis added.]

On February 9, 2009, Wells Fargo, as administrative agent, executed mortgage assignments “to Dime, LLC, . . . as successor Administrative Agent,” conveying “all of Assignor’s right, title and interest in and to” each mortgage. Additionally, on February 9, 2009, Wells Fargo, as administrative agent, executed an “assignment of claims,” to “Dime, LLC . . . as successor Administrative Agent (the “Assignee”) . . . any and all of Assignor’s Claims against [the borrowers] or any other Person. . . .” On the same day, Wells Fargo, as administrative agent, executed a general assignment to Dime, as successor administrative agent, “all right, title and interest of Assignor, in, to, and under . . . the Credit Agreement . . . and all other loan documents securing or related to the Loans, . . . and grants and delegates to the Assignee all of the duties and obligations of Assignor, if any, under the Loan Documents”

It is not disputed that Dime, as a subsidiary of Wells Fargo, is an “affiliate” of Wells Fargo as that term is defined in the credit agreement. Defendant argued below and argues on appeal that Dime was not properly appointed successor administrative agent because Wells Fargo did not first resign as administrative agent; the procedures otherwise outlined in § 12.14 for appointing a successor administrative agent were not followed, and Dime is not eligible to serve as successor administrative agent because it is not a commercial bank or trust company. Defendants also argue that under § 12.1 of the credit agreement, only the administrative agent or lenders have the power to enforce the loan documents.

After Wells Fargo’s assignments, Dime initiated foreclosure by advertisement of defendants’ various mortgages. Defendants initiated multiple lawsuits to prevent foreclosure. In March 2009, defendants filed an action in Oakland Circuit Court against Wells Fargo and Fifth Third Bank seeking injunctive relief to stay foreclosure alleging claims of fraud, breach of contract, and other claims. On April 30, 2009, the circuit court denied defendants’ motion for a preliminary injunction to enjoin the foreclosure sale. Thereafter, the circuit court granted lenders summary disposition on most of defendants’ claims. On January 14, 2010, the circuit court entered an order of dismissal with prejudice as to defendants’ remaining claims.

While defendants’ circuit court action for injunctive relief was pending, defendants filed on June 3, 2009 a petition for reorganization with the United States Bankruptcy Court for the Eastern District of Michigan. The bankruptcy court held hearings on defendants’/debtors’ plan for reorganization and also on lenders’ objections thereto. The court issued a lengthy opinion denying confirmation of debtors’ plan for reorganization on December 9, 2009. The bankruptcy court also granted relief from the automatic stay as of December 21, 2009. As a result, the foreclosure sale of the mortgage property was held on December 23, 2009.

Dime initiated the instant action against defendants seeking judgment for post-foreclosure deficiencies based on the promissory notes and also to enforce the personal guaranties. Defendants did not assert in their answer or affirmative defenses the claim that Wells Fargo’s

assignments to Dime were invalid or that Dime otherwise lacked standing to enforce the credit agreement or the guarantees. On March 25, 2010, Dime filed a motion for partial summary disposition. Defendant Nanhir raised for the first time the issue of Dime's status as administrative agent under the credit agreement in his response. While the trial court denied the motion without prejudice pending further discovery, the trial court in its June 24, 2010 opinion and order, rejected defendants' claims that Dime lacked standing, opining in part:

. . . In this case, the plaintiff has a written assignment of the claims of the predecessor administrative agent. That is sufficient to give the plaintiff standing.

To the extent that the predecessor administrative agent did not strictly follow the contractual procedure for assigning its rights to a successor administrative agent, the defendants have not shown a material breach of the note by the administrative agent that would excuse the debt or their guarantee. The defendants have not identified any manner in which they or the borrowers have been harmed by the manner in which the debt was assigned to Dime LLC.

Two days before the redemption period regarding the foreclosed properties was to expire, defendants filed another complaint for injunctive relief to stay foreclosure in Wayne County. Circuit Judge John D. O'Hair held a hearing on the complaint on June 22, 2010, and issued an opinion and order denying relief that same day. Judge O'Hair ruled that defendants should have raised their claim regarding alleged deficiency in the appointment of Dime as successor administrative agent in their March 2009 Oakland County lawsuit. Citing MCR 2.203(A), MCR 3.310(G), and principles of res judicata, Judge O'Hair ruled that defendants' "assertion of a new theory that there was mistake or irregularity in the selection of Dime as a successor administrative agent is not on its face totally devoid of merit, but it is a matter that should have been raised and pled in the Oakland County action. In not having done so, [defendants] are precluded from raising it now." On this basis, Judge O'Hair denied relief.

In the present case, the trial court granted a motion for partial summary disposition in favor of Dime on March 14, 2011, regarding the personal guarantees of Nanhir, Binno, and Shallal. The trial court entered separate orders regarding rents, taxes, and utilities during the redemption period. The case proceeded to trial over multiple days in 2011 and 2012, with the parties presenting closing arguments on July 20, 2012. Defendants continued to argue that the appointment of Dime as successor administrative agent was defective. The trial court issued a "trial opinion" on November 6, 2012, which did not directly address defendants' argument again but stated, in summarizing the facts, that Wells Fargo assigned its right in the notes to plaintiff on February 9, 2009. Subsequently, judgment was entered against defendants on November 21, 2012. Thereafter, defendants moved for new trial, raising as an issue the purported defective assignment to Dime. The trial court issued an opinion and order denying the motion on January 24, 2013, and after noting that its predecessor had repeatedly ruled that Wells Fargo's assignments gave Dime standing, opined:

. . . Defendants have never offered any law suggesting that an assignee loses its rights under an assignment of a loan if the assignor assigned the loan in a manner different from the manner specified in the contract with the borrower. The Court

finds that Defendants have failed to establish that Plaintiff Dime does not have standing or is not the real party in interest by virtue of the assignment.

On appeal, defendants continue to argue that Wells Fargo's assignments to Dime were ineffective, and therefore Dime lacked standing to enforce the parties' credit agreement and was not the real party in interest.

I. CONTRACT ISSUES

A. STANDARD OF REVIEW

Defendants first raised this issue of contract interpretation in response to plaintiff's motion for summary disposition. When a party files a motion for summary disposition, a trial court may instead grant summary disposition to the opposing party under MCR 2.116(I)(2) if it determines that the opposing party, rather than the moving party, is entitled to judgment. *Jaguar Trading Ltd Partnership v Presler*, 289 Mich App 319, 322; 808 NW2d 495 (2010). This Court reviews de novo a trial court's decision on a motion for summary disposition. *DaimlerChrysler Corp v Wesco Distribution, Inc*, 281 Mich App 240, 244-245; 760 NW2d 828 (2008).

This Court also reviews de novo questions of contract interpretation. *Burkhardt v Bailey*, 260 Mich App 636, 656; 680 NW2d 453 (2004). Courts will enforce contracts according to their terms, giving the words used in the contract their plain and ordinary meanings. *Reicher v SET Enterprises, Inc*, 283 Mich App 657, 664; 770 NW2d 902 (2009). Unambiguous language in a contract reflects the parties' intent as a matter of law, and will be enforced according to its terms. *Id.*; *Wilkie v Auto-Owners Ins Co*, 469 Mich 41, 51-52; 664 NW2d 776 (2003).

Defendants last raised this issue in their motion for new trial. A trial court's decision on a motion for a new trial is reviewed for an abuse of discretion. *Zaremba Equip Inc v Harco Nat'l Ins Co*, 302 Mich App 7, 21; 837 NW2d 686 (2013). A court abuses its discretion when its decision is outside the range of principled outcomes. *Id.*

B. DISCUSSION

Defendants argue that Wells Fargo failed to properly appoint Dime as successor administrative agent because (1) Wells Fargo did not first "resign" as administrative agent; (2) the "Requisite Lenders" failed to appoint a successor administrative agent; (3) the successor administrative agent was not one of the lenders, and (4) Dime was not an "Eligible Assignee," i.e., a commercial bank or trust company. Defendants assert that Dime cannot enforce the credit agreement because only the administrative agent may and Wells Fargo never properly appointed Dime successor administrative agent.

Defendants concede that under § 12.14, Wells Fargo "could remain as Administrative Agent and assign its 'rights and duties' under the loan documents to an affiliate, like Dime." But, defendants argue, such an assignment excludes "powers and duties" of the administrative agent, so the "power" to enforce the credit agreement is not included in Wells Fargo's assignments to Dime. Therefore, defendants contend that only Wells Fargo as the administrative agent has the "power" to enforce the credit agreement. We disagree.

Defendants' contract arguments are meritless. The last sentence of § 12.14 of the credit agreement clearly and unambiguously permitted Wells Fargo to assign its rights and duties as administrative agent to Dime, without having to first resign as administrative agent and without having to follow the procedures outlined in the first part of that section. Unambiguous contracts are enforced as written. *Reicher*, 283 Mich App at 664. Because the credit agreement permitted Wells Fargo to assign its rights under the agreement to its affiliate, and Wells Fargo did so, Dime could exercise all rights under the credit agreement that Wells Fargo possessed. "An assignee stands in the position of the assignor, possessing the same rights and being subject to the same defenses." *Burkhardt*, 260 Mich App at 652-653.

Defendants' argument that there is a difference between a "right" and a "power" under the credit agreement such that Dime lacked the authority to enforce the credit agreement is not supported by the plain and ordinary meaning of those terms or by any legal authority. The credit agreement explicitly refers to commencing legal action on default as a "right" of the lenders and the administrative agent. Section 13.6 provides in part, "the Administrative Agent or any Lender, in exercising the rights, duties or liabilities of Administrative Agent [or] Lenders . . . under the Loan Documents or Other Related Documents, may, if a Default exists, commence, appear in or defend any action or proceeding purporting to affect the Property, . . . the Loan Documents or the Other Related Documents"

The credit agreement does not define the words "right" and "power," so a dictionary definition may be consulted. *Freemont Ins Co v Izenbaard*, 493 Mich 859; 820 NW2d 902 (2012). Dictionary definitions of "right" and "power" are consistent with Dime having the authority to enforce the credit agreement. Random House Webster's College Dictionary (1992), defines "right" as including, most pertinent in the context of a contract, "something that is due to anyone by just claim, legal guarantees, or moral principles," and "the interest or ownership a person, group, or business has in property." The same dictionary defines "power" as including, the "ability to do or act," or "legal ability, capacity, or authority." Black's Law Dictionary (10th ed), also defines "right" as "[s]omething that is due to anyone by just claim, legal guarantees, or moral principle," or "[a] power, privilege, or immunity secured to a person by law," or the "interest, claim, or ownership that one has in tangible or intangible property." Black's further defines "power" as "[t]he ability to act or not act" Thus, under these definitions, while "power" relates to the more general ability to act, and "right" relates to a more specific interest in a claim, property, or legal guarantee, this slight difference does not support Defendants' claim that Dime as the assignee of Wells Fargo pursuant to the authority of the last sentence § 12.14 lacks the authority as successor administrative agent to commence legal action to enforce the loan documents and guarantees. Moreover, defendants do not cite any legal authority to support the asserted distinction between "right" and "power" with respect enforcement of contract rights. The failure of defendants to cite supporting authority for this argument results in its abandonment on appeal. *Hughes v Almena Twp*, 284 Mich App 50, 72; 771 NW2d 453 (2009).

Next, defendants argue that the trial court erred by requiring that defendants must have been harmed or prejudiced before they may challenge Wells Fargo's alleged breach of contract by assigning its rights and duties to Dime. Again, we disagree.

This argument is meritless because, as we have discussed already, Wells Fargo properly assigned its rights as administrative agent under the credit agreement and loan documents to

Dime, its affiliate, pursuant to the “notwithstanding” clause of § 12.14. Moreover, even if the resignation procedures of § 12.14 applied, the only parties to the credit agreement having the contractual ability to object to the appointment of a successor administrative agent are a lender or a borrower not in default. Here, defendants (or at least borrowers) were in default at the time of the appointment of Dime by assignment as the successor administrative agent. Thus, defendants possessed no contractual right to object to Wells Fargo’s appointment of Dime as successor administrative agent. Moreover, under § 12.14, borrowers are “deemed to have approved each Lender and any of its Affiliates as a successor Administrative Agent”

It is undisputed that Dime is an affiliate of Wells Fargo, a lender. Based on the plain terms of § 12.14, defendants possessed no contractual right to object to Dime as successor administrative agent. Further, defects in the assignment in no way affect defendants’ obligations under the notes and guarantees, and may not be asserted as a defense. See *Bowles v Oakman*, 246 Mich 674, 678; 225 NW 613 (1929) (holding that the maker of a note could not assert as defense to its enforcement by the holder alleged fraud in note’s transfer from payee to holder).

In sum, the trial court correctly ruled that plaintiff had standing to enforce the notes and guarantees at issue based on the Wells Fargo’s written assignment of the claims. Moreover, the trial court correctly ruled that even if (“to the extent”) the parts of § 12.14 that defendants rely on were not strictly followed, “defendants have not shown a material breach of the note by the administrative agent that would excuse the debt or their guarantee.” In other words, for purposes of defending plaintiff’s claims, “defendants have not identified any manner in which they or the borrowers have been harmed by the manner in which the debt was assigned to Dime.”

II. STANDING

A. STANDARD OF REVIEW

This Court reviews de novo whether a plaintiff has standing. *Cadle Co v City of Kentwood*, 285 Mich App 240, 253; 776 NW2d 145 (2009). MCR 2.201(B) requires that “[a]n action must be prosecuted in the name of the real party in interest” The “real party in interest is one who is vested with a right of action in a given claim, although the beneficial interest may be with another.” *MOSES, Inc v SEMCOG*, 270 Mich App 401, 415; 716 NW2d 278 (2006) (citation omitted).

B. DISCUSSION

Defendants’ argument that Dime lacked standing and was not the real party in interest fails because it is based on the false premise that Wells Fargo improperly assigned its rights and duties as administrative agent to Dime, its affiliate. Wells Fargo properly acted under the last sentence of § 12.14 of the credit agreement by giving lenders and borrowers written notice and thereafter, assigning its rights and duties as administrative agent to Dime. Defendants’ effort to parse a difference between a “right” and a “power” under the credit agreement is unsupported by the plain and ordinary meaning of those terms, or by any legal authority. As the assignee of Wells Fargo, Dime possessed the same right to act as administrative agent to enforce payment of the loans and guarantees as Wells Fargo possessed. *Burkhardt*, 260 Mich App at 652-653.

Defendants' contention that Dime lacked standing is meritless. Standing requires that a party have a sufficient interest in the outcome of litigation to ensure vigorous advocacy and also have "in an individual or representative capacity some real interest in the cause of action, or a legal or equitable right, title, or interest in the subject matter of the controversy." *Bowie v Arder*, 441 Mich 23, 42; 490 NW2d 568 (1992)(citation omitted). And, our Supreme Court also held that a "litigant has standing whenever there is a legal cause of action." *Lansing Sch Ed Ass'n v Lansing Bd of Ed*, 487 Mich 349, 372; 792 NW2d 686 (2010). Standing exists when "the litigant has a special injury or right," or the litigant has a substantial interest that will be detrimentally affected in a manner different from the general public. *Id.* In this case, Dime received legal title to the administrative agent's interest in the loan documents and guarantees. As the successor administrative agent, Dime possessed the right to bring a legal cause of action against defendants as the borrowers responsible to pay the notes and for payment pursuant to guarantees. As such, Dime clearly had standing to bring this action. *Id.*, *Bowie*, 441 Mich at 42.

Similarly, Dime was the real party in interest. In this case, a contract was made in the name of Wells Fargo as lender and as administrative agent. Wells Fargo assigned its rights as administrative agent to its affiliate Dime, as permitted by the credit agreement. Pursuant to the assignment, under MCR 2.201(B)(1), Dime was the real party in interest to bring legal action to enforce the contract for the benefit of the lenders holding the beneficial interest in the contract. "An assignee is a real party in interest, and may sue in his own name" *Continental Nat Bank v Gustin*, 297 Mich 134, 141; 297 NW 214 (1941). Thus, Dime was the real party in interest because it was vested with a right of action by assignment from Wells Fargo and Wells Fargo and Fifth Third Bank retained the beneficial interest. *MOSES*, 270 Mich App at 415.

III. CONCLUSION

For the reasons discussed in this opinion, the trial court did not abuse its discretion in denying defendants' motion for summary disposition or in denying defendants' motion for new trial because Wells Fargo had the authority and followed the procedures of the "notwithstanding" clause of § 12.14 to properly appoint Dime, its affiliate, the successor administrative agent. Therefore, the trial court correctly ruled that Dime possessed standing and was the real party in interest to enforce the credit agreement and loan documents.

We affirm. Plaintiff, as the prevailing party, may tax costs pursuant to MCR 7.219.

/s/ Jane E. Markey

/s/ Donald S. Owens

/s/ Karen M. Fort Hood