STATE OF MICHIGAN

COURT OF APPEALS

AURORA LOAN SERVICES, LLC, Plaintiff/Counter-Defendant-Appellee,	UNPUBLISHED August 21, 2014
v	No. 313989 Wayne Circuit Court
ANGENISE JOHNSON, Defendant/Counter-Plaintiff-Appellant.	LC No. 11-011014-CH

Before: WILDER, P.J., and SAAD and K. F. KELLY, JJ.

PER CURIAM.

Defendant/counter-plaintiff Angenise Johnson appeals as of right an opinion and order granting plaintiff/counter-defendant Aurora Loan Services, LLC's motion for summary disposition, dismissing Johnson's counterclaims, and ordering a judgment of judicial foreclosure to be entered. We affirm.

I

On February 17, 2007, Johnson obtained a loan of $114,000 from Homecomings Financial, LLC (f/k/a Homecomings Financial Network, Inc.) to purchase a home at 6336 University Place, in Detroit, Michigan, and executed a mortgage in favor of Mortgage Electronic Registration Systems, Inc. (MERS), the nominee for Homecomings. The mortgage was registered in Wayne County on March 6, 2007. Johnson also signed a note that was secured by the mortgage.

Johnson defaulted by failing to make payments after May 2009. She received a letter of default from Aurora's designee in June 2010.

In July 2011, MERS assigned its interest in the mortgage to Aurora, which acted as the servicer.[1] The assignment of the mortgage was registered in Wayne County. The note, which was endorsed in blank, was in Aurora's possession at the time of the lower court proceedings. An allonge to the note also paid the note to the order of Aurora.

In September 2011, Aurora filed a complaint for judicial foreclosure of the mortgage and sale of the property to satisfy the obligation of the mortgage. In her answer, Johnson claimed that Aurora had no interest in the property, the assignment of the mortgage was no legal, she did not receive notice of default and acceleration, and Aurora's failure to act in good faith when Johnson attempted to mitigate her losses. In a countercomplaint, Johnson alleged, *inter alia*, that Aurora lacked standing because it had no interest in the loan. Johnson claimed the loan was part of a mortgage-backed security and Aurora was only the servicer. Johnson further alleged that the assignment of the mortgage was fraudulent and violated MCL 600.2907a. Johnson demanded quiet title to the property.

Aurora moved for summary disposition pursuant to MCR 2.116(C)(8), (9), and (10), and in response, Johnson requested summary disposition pursuant to MCR 2.116(I)(2). Because Johnson had defaulted and the note was endorsed to Aurora, endorsed in blank, and in Aurora's possession, the trial court concluded that Aurora made out a prima facie claim for foreclosure and granted summary disposition pursuant to MCR 2.116(C)(10). The trial court rejected Johnson's affirmative defenses, dismissed her counterclaims, and denied her request for summary disposition pursuant to MCR 2.116(I)(2). The trial court subsequently entered a judgment of foreclosure and order of sale.

II

Johnson's overarching argument on appeal is that Aurora was not the owner of any interest in the note, but rather was just the servicer with no authority to enforce the note, and that as a result, the trial court improperly granted summary disposition to Aurora. We disagree. This Court reviews de novo the trial court's decision to grant or deny a motion for summary disposition. See *Titan Ins Co v Hyten*, 491 Mich 547, 553; 817 NW2d 562 (2012).

MCL 440.3301 provides:

> "Person entitled to enforce" an instrument means (i) the holder of the instrument, (ii) a nonholder in possession of the instrument who has the rights of a holder, or (iii) a person not in possession of the instrument who is entitled to enforce the instrument pursuant to section 3309 or 3418(4). A person may be a person entitled to enforce the instrument even though the person is not the owner of the instrument or is in wrongful possession of the instrument.

[1] During the lower court proceedings, Nationstar became the servicer. But Aurora filed a notice of this change of interest pursuant to MCR 2.202(b). Although Aurora continued to litigate the action against Johnson, Aurora stated that Nationstar was entitled to any relief obtained.

A holder is defined in MCL 440.1201(2)(u) as:

> (i) A person in possession of a negotiable instrument that is payable either to bearer or to an identified person that is the person in possession.
>
> (ii) A person in possession of a negotiable tangible document of title if the goods are deliverable either to bearer or to the order of the person in possession.
>
> (iii) A person in control of a negotiable electronic document of title.

The trial court found no genuine issue of material fact that the note had been endorsed in blank to Aurora and that Aurora was the holder of the note.[2] Therefore, it was not error to conclude Aurora was entitled to enforce the note under MCL 440.3301(i). We reject Johnson's argument that enforcement was precluded because Aurora allegedly did not own an interest in the note. Regardless, MCL 440.3301expressly provides that neither ownership nor rightful possession is required to enforce the note. As the maker of the note, Johnson could not defend the action on that basis. See *Bowles v Oakman*, 246 Mich 674, 679-680; 225 NW 613 (1929) ("It is no defense to an action on a note, by an indorsee against the maker, that the note was obtained from the payee by means of fraudulent representations . . .") (citation and quotations omitted).

III

Johnson argues that the note was transferred to a mortgage-backed security and the trial court should have determined whether Aurora had rights in the collateral pursuant to MCL 440.9203. Johnson did not raise MCL 440.9203 as an affirmative defense or as a counterclaim in the trial court. Her argument is therefore unpreserved, *Hines v Volkswagen of America, Inc*, 265 Mich App 432, 443; 695 NW2d 84 (2005) ("Generally, an issue is not properly preserved if it is not raised before, and addressed and decided by, the trial court."), and this Court declines to consider it, particularly because the trial court did not make findings regarding whether the note was transferred to a mortgage-backed security and the key fact was that Aurora held the note, regardless whether it was part of a mortgage-backed security. *Autodie, LLC v City of Grand Rapids, Dep't of Treasury*, ___ Mich App ___; ___ NW2d ___ (2014) ("This Court will generally decline to address unpreserved issues unless "a miscarriage of justice will result from a failure to pass on them, or if the question is one of law and all the facts necessary for its resolution have been presented, or where necessary for a proper determination of the case.").

[2] The trial court found both that Aurora established a prima facie claim for foreclosure and, by failing to timely respond to the requests for admissions, Johnson admitted the same. The admissions included, "Aurora is the holder of the note," "Johnson defaulted under the terms of the Note," "Aurora is presently entitled to enforce the Note." On appeal, Johnson argues that the admissions should not have been considered in support of the claim for foreclosure. But Johnson failed to file a motion in the trial court to withdraw the admissions based on good cause pursuant to MCR 2.312(D)(1). Moreover, Johnson cannot establish plain error affecting her substantial rights because, even if the admissions were not considered, the record demonstrated that Aurora was the holder of the note and no evidence created a question of fact regarding that fact.

IV

Next, Johnson claims that the note was transferred to a mortgage-backed security and Aurora was not the owner of any interest in the note, so Aurora lacked any interest or standing to file the action for judicial foreclosure.[3] Again, Aurora could enforce the note as its holder under MCL 440.3301, and, in any event, Johnson waived this standing challenge. *Acorn Inv Co v Mich Basic Prop Ins Ass'n*, ___ Mich ___; ___ NW2d ___ (2014), quoting *People v Vaughn*, 491 Mich 642, 663; 821 NW2d 288 (2012) ("A 'waiver is the intentional relinquishment or abandonment of a known right."'). Before the filing of the judicial foreclosure action, Johnson recognized Aurora's interest by attempting to mitigate her losses with Aurora. Johnson requested both loan modification and a short sale from Aurora. Johnson only challenged Aurora's interest after Aurora filed the judicial foreclosure action.

V.

Next, Johnson claims that the mortgage was improperly recorded under MCL 600.2907a and MCL 565.25, entitling her to summary disposition of Aurora's judicial foreclosure complaint under MCR 2.116(I)(2).[4] We disagree. This Court reviews de novo matters of statutory interpretation. See *Titan Ins Co*, 491 Mich at 553.

MCL 600.2907a provides, in relevant part:

> (1) A person who violates section 25 of chapter 65 of the Revised Statutes of 1846, being section 565.25 of the Michigan Compiled Laws, by encumbering property through the recording of a document without lawful cause with the intent to harass or intimidate any person is liable to the owner of the property encumbered for all of the following:
>
> (a) All of the costs incurred in bringing an action under section 25 of chapter 65 of the Revised Statutes of 1846, including actual attorney fees.
>
> (b) All damages the owner of the property may have sustained as a result of the filing of the encumbrance.
>
> (c) Exemplary damages.

MCL 565.25 provides:

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[3] Standing addresses whether a litigant has an interest in an issue such that he is a proper party to pursue it. *Lansing Schools Ed Ass'n v Lansing Bd of Ed*, 487 Mich 349; 792 NW2d 686 (2010).

[4] Aurora argues Johnson did not plead a violation of MCL 565.25 and just requested damages under MCL 600.2907a. But in her countercomplaint, Johnson quoted MCL 600.2907a, which expressly includes a violation of MCL 565.25. Therefore, Aurora was informed of the nature of Johnson's claim. See MCR 2.111(B).

> (1) Except as otherwise provided in subsection (2), the recording of a levy, attachment, lien, lis pendens, sheriff's certificate, marshal's certificate, or other instrument of *encumbrance* does not perfect the instrument of encumbrance unless both of the following are found by a court of competent jurisdiction to have accompanied the instrument when it was delivered to the register under section 24(1) of this chapter:
>
> * * *
>
> (3) A person who is not exempt under subsection (2) who encumbers property through the recording of an instrument listed under subsection (1) without lawful cause with the intent to harass or intimidate any person is liable for the penalties set forth in section 2907a of the revised judicature act of 1961, 1961 PA 236, MCL 600.2907a. [Emphasis added.]

An "encumbrance" is "A claim or liability that is attached to property or some other right and that may lessen its value, such as a lien or mortgage; any property right that is not an ownership interest." As the trial court found, when Johnson executed a mortgage in favor of MERS, she encumbered or attached a claim to her real property. Neither the assignment of the mortgage by MERS to Aurora or the recording by Aurora attached any additional liability to the real property. Therefore, when Aurora recorded the assignment of mortgage, it did not "encumber[] property through the recording" under MCL 600.2907a(1).

Furthermore:

> MCL 600.2907a . . . establishes a cause of action for "[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 . . . ."
>
> "The crucial element is malice." *Gehrke v Janowitz*, 55 Mich App 643, 648; 223 NW2d 107 (1974). A slander of title claimant is required to show some act of express malice by the defendant, which "implies a desire or intention to injure." *Glieberman v Fine*, 248 Mich 8, 12; 226 NW 669 (1929). "Malice may not be inferred merely from the filing of an invalid lien; the plaintiff must show that the defendant knowingly filed an invalid lien with the intent to cause the plaintiff injury." *Stanton v Dachille*, 186 Mich App 247, 262; 463 NW2d 479 (1990). A plaintiff may not prevail on a slander of title claim if the defendant's "claim under the mortgage [or lien] was asserted in good faith, upon probable cause, or was prompted by a reasonable belief that [the defendant] had rights in the real estate in question." *Glieberman*, 248 Mich at 12. [*Fed Nat'l Mtg Ass'n v Lagoons Forest Condominium Ass'n*, ___ Mich App ___; ___ NW2d ___ (2014).]

Aurora's mere filing of the assignment of the mortgage does not establish the necessary intent under MCL 600.2907a. The facts contained in the assignment were presumptively correct, MCL 55.307, and although Johnson alleged unsound practices in the lending industry, such as robo-signing, she failed to prove any malice actually occurred in this case. The trial court correctly denied Johnson's request for summary disposition under MCR 2.116(I)(2).

VI

Johnson also argues that the trial court erred by failing to grant summary disposition of her quiet title claim in her favor. We disagree.

The plaintiff in a quiet-title action has the burden of establishing a prima facie case of title. *Special Property VI, LLC v Woodruff*, 273 Mich App 586, 590; 730 NW2d 753 (2007). The plaintiff must allege facts in the complaint that establish the superiority of the plaintiff's claim. MCR 3.411(B)(2)(c).

The trial court did not err by concluding that Johnson could not establish superior title. Johnson admitted that she did not fulfill her obligations to repay the loan. Aurora was assigned the mortgage and held the note. As we discussed in Section IV, Johnson's attempts to obtain loan modification and a short sale from Aurora prove that even Johnson thought Aurora had the power to enforce the note. Moreover, the doctrine of unclean hands would bar Johnson's claim where she failed to repay the loan according to the terms of the mortgage and the note. *McFerren v B & B Inv Group*, 253 Mich App 517, 522; 655 NW2d 779 (2002); see MCL 600.2932(5) ("A suit to quiet title or remove a cloud on a title is one in equity . . . A party seeking the aid of equity must come in with clean hands."). The trial court did not err by denying Johnson's motion for summary disposition and dismissing her quiet title claim.

Affirmed. Plaintiff, being the prevailing party, may tax costs pursuant to MCR 7.219.

/s/ Kurtis T. Wilder
/s/ Henry William Saad
/s/ Kirsten Frank Kelly