STATE OF MICHIGAN

COURT OF APPEALS

DENISE STEPHENS BROWN,

Plaintiff-Appellant,

and

STEPHENS FAMILY LOVING TRUST,

Plaintiff,

v

WACHOVIA MORTGAGE, a division of WELLS FARGO BACK, N.A.,

Defendant-Appellee.

UNPUBLISHED
November 19, 2013

No. 307344
Wayne Circuit Court
LC No. 11-004263-CH

Before: SAWYER, P.J., and O'CONNELL and K. F. KELLY, JJ.

PER CURIAM.

Plaintiff-appellant, Denise Stephens Brown, appeals as of right from an order granting summary disposition in favor of defendant-appellee, Wachovia Mortgage a/k/a Wells Fargo Bank, in this mortgage foreclosure dispute. We affirm.

I. BASIC FACTS AND PROCEDURAL HISTORY

There were two loans on 19720 Chesterfield Rd., Detroit – a first mortgage and a home equity line of credit (HELOC). Both of those loans were obtained by the trustee of the Stephens Family Loving Trust. Plaintiff obtained her interest in the property by way of quit claim deed. She assumed the senior mortgage, but not the HELOC. Defendant later pursued foreclosure of the HELOC through the law firm of Trott & Trott. By and through her attorney, plaintiff requested a loan modification meeting pursuant to MCL 600.3205a *et seq*. Plaintiff provided financial information; the Trust did not. A meeting was held on April 22, 2010, but a resolution was not reached.

The next day, on April 23, 2010, defendant sent plaintiff a letter indicating that she did not qualify for a loan modification because "Your current financial situation does not qualify for assistance under the Temporary Payment Reduction Program" and because "your current monthly housing expense, which includes the monthly principal and interest payment on your first lien mortgage loan plus property taxes, hazard insurance and homeowner's dues (if any) is

less than or equal to 31% of your gross monthly income (your income before taxes and other deductions) which is $6,698.55. Your housing expense must be greater than 31% of your gross monthly income to be eligible . . . ." Plaintiff also received a letter from Trott & Trott dated July 29, 2010, indicating that "You did not provide the financial information necessary to determine if you are eligible for loan modification" and "as a result, the foreclosure proceedings will continue . . . ."

The home was sold at sheriff's sale on October 13, 2010. Plaintiff did not redeem the property. Instead, she brought suit against defendant on April 11, 2011. Count I of plaintiff's complaint alleged violations of MCL 600.3205a *et seq* based on defendant's refusal to effectuate a proper modification review and proceeding to sheriff's sale. Count II alleged misrepresentation "including but not limited to promising Plaintiff that his [sic] mortgage would be reviewed by Wachovia Mortgage for a potential modification or other workout arrangement when it knew they were not attempting modification and in fact had already sent Plaintiff's account to the foreclosure attorneys." By giving plaintiff a false sense that she could find a resolution, plaintiff "was losing valuable time to exercise any other legal option she may have had under the law." Count III alleged that defendant violated Michigan's Mortgage Brokers, Lenders, and Servicers Licensing Act (MBLSLA), MCL 445.1651 *et seq* by failing to conduct business in accordance with the Act and engaging in fraud and deceit by representing to plaintiff that her mortgage was under review. Count IV alleged "[v]iolation by defendant of its contractual obligation to modify plaintiffs' loan pursuant to the federal Home Affordable Modification Program and the Economic Stabilization [sic] Act of 2008." Plaintiff alleged that, in spite of the fact that she met HAMP criteria, defendant refused to properly evaluate her for a modification. Count V alleged wrongful foreclosure and quiet title, seeking to set aside the sheriff's sale based on the fact that defendant "deliberately catalyzed Plaintiff's default and subsequent sheriff's sale by failing to engage in loss mitigation efforts including a reasonable modification pursuant to applicable law under MCL 600.3205."

Defendant moved for summary disposition of plaintiff's claims pursuant to MCR 2.116(C)(8) and (C)(10). Following two hearings, the trial court issued a written opinion and order granting defendant summary disposition:

> The trial court finds that Defendant did consider Plaintiffs' request for a loan modification, but that Plaintiffs failed to submit sufficient data. The court notes that it is apparent from the correspondence between the parties that certain information was not provided with respect to the HELOC loan. . . .Accordingly, the court finds that Defendant properly considered the request for a loan modification and further finds that Defendant is entitled to summary disposition.

Plaintiff now appeals as of right.

II. JUDICIAL NOTICE OF FEDERAL CONSENT ORDERS

Plaintiff first argues that the trial court erred when it failed to take judicial notice of two federal consent orders involving defendant.

"Judicial notice is discretionary, MRE 201(c), and we review for an abuse of that discretion a trial court's decision whether to take judicial notice." *Lenawee Co v Wagley*, 301 Mich App 134; 836 NW2d 193, 201-202 (2013). "An abuse of discretion occurs when a court selects an outcome that is not within the range of reasonable and principled outcomes." *Id.* at 202, quoting *Carlson v Carlson*, 293 Mich App 203, 205; 809 NW2d 612 (2011).

Here, there is no indication that the trial court either granted or denied plaintiff's request to take judicial notice of the consent orders. The trial court's order granting defendant summary disposition is silent on the issue. Plaintiff surmises that the trial court must have failed to consider the orders, but that is not a fair assumption. It is every bit as likely that the trial court read the orders and took judicial notice of the contents. However, even if the trial court declined to take judicial notice of the consent order, the decision was not erroneous where the orders were irrelevant to plaintiff's action.

MRE 201(b)(2) permits a court to take judicial notice of facts that are "capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." The trial court would have been within its right to take judicial notice of the consent orders because there is no doubt as to their authenticity and accuracy. However, the consent orders were irrelevant to plaintiff's action. "Evidence is relevant if it has any tendency to make the existence of a fact that is of consequence to the action more probable or less probable than it would be without the evidence." MRE 401; *Dep't of Transp v VanElslander*, 460 Mich 127, 129; 594 NW2d 841 (1999). Plaintiff claims that the consent orders are proof that defendant was guilty of wrongdoing in terms of mortgage origination and foreclosure. However, these consent judgments were entered into between the financial institutions and the Federal Reserve and defendant admitted no wrongdoing.

To the extent plaintiff attempts to bolster her claim with the fact that the HELOC loan was identified as one meeting the requirement for Independent Foreclosure Review, we note that the letter explaining the process includes a statement that such a review "will not have an impact on . . . any other options you may pursue related to your foreclosure. If you filed a complaint about the foreclosure process prior to this independent review, you are still eligible to submit a Request for Review Form." Therefore, the review process under the consent judgments is an entirely different process that occurred outside of and independently to plaintiff's litigation.

Because there is no indication whether the trial court took judicial notice of the consent orders, there is nothing to review. Even if the trial court failed to take judicial notice of the orders, plaintiff failed to demonstrate how the orders were relevant to the present case.

III. SUMMARY DISPOSITION[1]

A. STANDARD OF REVIEW

[1] We decline to address defendant's claim that plaintiff lacked standing and that the doctrine of laches barred her claim. By failing to address the issues, the trial court appears to have rejected defendant's argument. As did the trial court, we will address the merits of plaintiff's claim.

This Court reviews de novo a trial court's decision on a motion for summary disposition. *Coblentz v Novi*, 475 Mich 558, 567; 719 NW2d 73 (2006).

> MCR 2.116(C)(8) tests the legal sufficiency of the claim on the pleadings alone to determine whether the plaintiff has stated a claim on which relief may be granted. The motion must be granted if no factual development could justify the plaintiffs' claim for relief. MCR 2.116(C)(10) tests the factual support of a plaintiff's claim. The court considers the affidavits, pleadings, depositions, admissions, and other documentary evidence submitted or filed in the action to determine whether a genuine issue of any material fact exists to warrant a trial. [*Spiek v Dep't of Transp*, 456 Mich 331, 337; 572 NW2d 201 (1998).]

This Court also reviews de novo a matter of statutory interpretation. *Odom v Wayne Co*, 482 Mich 459, 466; 760 NW2d 217 (2008). When construing a statute, we consider the statute's plain language and we enforce clear and unambiguous language as written. *In re Bradley Estate*, 494 Mich 367, 377; 835 NW2d 545 (2013).

B. THE MODIFICATION STATUTE

Plaintiff argues that the trial court erred by failing to determine that defendant violated MCL 600.3205c by not providing the data used to make the decision to deny plaintiff's request for a loan modification and in failing to cease further action on the foreclosure, including the sheriff's sale.[2]

In 2009, MCL 600.3205b provided[3]:

> (1) A borrower who wishes to participate in negotiations to attempt to work out a modification of a mortgage loan shall contact a housing counselor from the list provided under section 3205a within 14 days after the list is mailed to the borrower. Within 10 days after being contacted by a borrower, a housing counselor shall inform the person designated under section 3205a(1)(c) in writing of the borrower's request.
>
> (2) After being informed of a borrower's request to meet under this section, the person designated under section 3205a(1)(c) may request the borrower to provide any documents that are necessary to determine whether the borrower is eligible

[2] There is absolutely no merit to plaintiff's claim that defendant proceeded with foreclosure in violation of the 90-day "stay" provision in MCL 600.3205a(1)(e), which provides that "if the borrower requests a meeting with the person designated under subdivision (c), foreclosure proceedings will not be commenced until 90 days after the date the notice is mailed to the borrower." Here, plaintiff requested a meeting on February 4, 2010. The sheriff's sale did not take place until October 13, 2010.

[3] Although the statute was later repealed and amended, this Court applies the statute as it existed at the time plaintiff's action accrued.

for a modification under section 3205c. The borrower shall give the person designated under section 3205a(1)(c) copies of any documents requested under this section.

(3) A housing counselor contacted by a borrower under this section shall schedule a meeting between the borrower and the person designated under section 3205a(1)(c) to attempt to work out a modification of the mortgage loan. At the request of the borrower, the housing counselor will attend the meeting. The meeting and any later meetings shall be held at a time and place that is convenient to all parties, or in the county where the property is situated.

MCL 600.3205c further provided, in relevant part:

(1) If a borrower has contacted a housing counselor under section 3205b but the process has not resulted in an agreement to modify the mortgage loan, the person designated under section 3205a(1)(c) shall work with the borrower to determine whether the borrower qualifies for a loan modification. Unless the loan is described in subsection (2) or (3), in making the determination under this subsection, the person designated under section 3205a(1)(c) shall use a loan modification program or process that includes all of the following features:

(a) The loan modification program or process targets a ratio of the borrower's housing-related debt to the borrower's gross income of 38% or less, on an aggregate basis. Housing-related debt under this subdivision includes mortgage principal and interest, property taxes, insurance, and homeowner's fees.

(b) To reach the 38% target specified in subdivision (a), 1 or more of the following features:

(i) An interest rate reduction, as needed, subject to a floor of 3%, for a fixed term of at least 5 years.

(ii) An extension of the amortization period for the loan term, to 40 years or less from the date of the loan modification.

(iii) Deferral of some portion of the amount of the unpaid principal balance of 20% or less, until maturity, refinancing of the loan, or sale of the property.

(iv) Reduction or elimination of late fees.

(2) In making the determination under subsection (1), if the mortgage loan is pooled for sale to an investor that is a governmental entity, the person designated under section 3205a(1)(c) shall follow the modification guidelines dictated by the governmental entity.

(3) In making the determination under subsection (1), if the mortgage loan has been sold to a government-sponsored enterprise, the person designated under

> section 3205a(1)(c) shall follow the modification guidelines dictated by the government-sponsored enterprise.
>
> (4) This section does not prohibit a loan modification on other terms or another loss mitigation strategy instead of modification if the other modification or strategy is agreed to by the borrower and the person designated under section 3205a(1)(c).
>
> (5) *The person designated under section 3205a(1)(c) shall provide the borrower with both of the following:*
>
> *(a) A copy of any calculations made by the person under this section.*
>
> *(b) If requested by the borrower, a copy of the program, process, or guidelines under which the determination under subsection (1) was made.*
>
> (6) Subject to subsection (7**),** *if the results of the calculation under subsection (1) are that the borrower is eligible for a modification, the mortgage holder or mortgage servicer shall not foreclose the mortgage under this chapter but may proceed under chapter 31*. If the results of the calculation under subsection (1) are that the borrower is not eligible for a modification or if subsection (7) applies, the mortgage holder or mortgage lender may foreclose the mortgage under this chapter. [Emphasis added.]

While plaintiff argues that defendant violated the modification statute by failing to provide the relevant calculations and failing to grant plaintiff a loan modification, there is nothing in the statutory language itself that *requires* a lender to grant a borrower a modification, even if the borrower meets the criteria set forth. In fact, MCL 600.3205c(6) specifically authorizes a mortgagee to pursue foreclosure even if the borrower is eligible for modification. Thus, even if we were to accept plaintiff's allegations as true – that plaintiff provided all of the relevant documentation, that plaintiff qualified for a modification, and that defendant failed to provide a copy of the calculations and the guidelines used in determining whether plaintiff was qualified for a modification – plaintiff's recourse can be found in MCL 600.3205c(8), which specifically provides:

> If a mortgage holder or mortgage servicer begins foreclosure proceedings under this chapter in violation of this section, *the borrower may file an action in the circuit court for the county where the mortgaged property is situated to convert the foreclosure proceeding to a judicial foreclosure.* If a borrower files an action under this section and the court determines that the borrower participated in the process under section 3205b, a modification agreement was not reached, and the borrower is eligible for modification under subsection (1), and subsection (7) does not apply, the court shall *enjoin foreclosure of the mortgage by advertisement and order that the foreclosure proceed under chapter 31*. [Emphasis added.]

Therefore, in the face of a violation of MCL 600.3205b and c, plaintiff's remedy was to seek an immediate injunction and convert the action from a foreclosure by advertisement to a judicial foreclosure.

Plaintiff failed to avail herself of the only remedy provided by MCL 600.3205(8). The statute, in requiring that lenders consider borrowers for loan modifications prior to completing the foreclosure process, assigned new legal obligations and duties on lenders and servicers where no preexisting duties existed. As such, a borrower's only recourse is that which is found in the statute. "As a general rule, the remedies provided by statute for violation of a right having no common-law counterpart are exclusive, not cumulative." *Dudewicz v Norris-Schmid, Inc*, 443 Mich 68, 78; 503 NW2d 645 (1993) overruled in part on other grounds 478 Mich 589 (2007). There is no common law counterpart to the modification statute. As such, where plaintiff's claims arise under the alleged statutory violations, plaintiff's remedy is similarly found within the statute. Thus, to the extent plaintiff's complaint alleged violations of the mortgage modification statute, the statute provided the exclusive remedy for its violation.

Because plaintiff's only claim is that she was not properly considered for a modification and she makes no claims of irregularity as to the foreclosure sale itself (i.e., lack of notice), plaintiff's exclusive remedy was to seek to enjoin the foreclosure process and convert the foreclosure from foreclosure by advertisement to a judicial foreclosure.

C. MICHIGAN'S MORTGAGE BROKERS, LENDERS, AND SERVICERS LICENSING ACT

Count III of plaintiff's complaint alleged that defendant violated the MBLSLA by failing to conduct business in accordance with the Act and engaging in fraud and deceit by representing to plaintiff that her mortgage was under review. Plaintiff and defendant thereafter argued whether MBLSLA was applicable to defendant. Significantly, however, plaintiff fails to cite to *any* provision of the MBLSLA that was violated. Its applicability notwithstanding, plaintiff does nothing to assist the Court in ascertaining her argument. "An appellant may not merely announce its position or assert an error and leave it to this Court to discover and rationalize the basis for its claims, unravel or elaborate its argument, or search for authority for its position." *Wiley v Henry Ford Cottage Hosp*, 257 Mich App 488, 499; 668 NW2d 402 (2003). An insufficiently briefed issue may be deemed abandoned on appeal. *Blackburne & Brown Mtg Co v Ziomek*, 264 Mich App 615, 619; 692 NW2d 388 (2004). We, therefore, decline to address this issue.

D. FRAUD IN THE INDUCEMENT

Plaintiff argues that the trial court erred in granting defendant summary disposition where plaintiff properly alleged fraud in the inducement.[4]

[4] To the extent plaintiff argues that the statute of frauds does not apply, we note that any agreement by the bank to forebear taking action on a loan is a "financial accommodation" within the statute of frauds, MCL 566.132. *Barclae v Zarb*, 300 Mich App 455, 467-470; 834 NW2d 100 (2013). However, it appears that plaintiff's statement was made in error, as defendant never raised a statute of frauds defense.

At one of the hearings on defendant's motion for summary disposition, plaintiff's counsel clarified that "we claimed fraud in the inducement" which "goes to the promise of future conduct." She argued that "borrowers, specifically this plaintiff, they are relying upon the bank to act in good faith in evaluating modifications. They are expecting them, if they say send this documentation we are going to assist you with a short sale, they are relying on future representations all the way along the way" and such an inducement "precludes them from other options."

"Fraud in the inducement occurs where a party materially misrepresents future conduct under circumstances in which the assertions may reasonably be expected to be relied upon and are relied upon." *Samuel D Begola Servs, Inc v Wild Bros*, 210 Mich App 636, 639; 534 NW2d 217 (1995). To prove a claim of fraud in the inducement, a plaintiff must establish the following elements:

> (1) the defendant made a material representation; (2) the representation was false; (3) when the defendant made the representation, the defendant knew that [it] was false, or made it recklessly, without knowledge of its truth and as a positive assertion; (4) the defendant made the representation with the intention that the plaintiff would act upon it; (5) the plaintiff acted in reliance upon it; and (6) the plaintiff suffered damage. [*Rooyakker & Sitz, PLLC v Plante & Moran, PLLC*, 276 Mich App 146, 161; 742 NW2d 409 (2007) (citations and quotation marks omitted).]

Again, plaintiff's bare allegations and lack of specificity are fatal to her claims. Plaintiff complains that defendant assured her that she would be evaluated for a loan modification. There is nothing in the record that would support a finding that such a "promise" was false at the time it was made. In fact, plaintiff's loans *were* considered for modification and were rejected for two different reasons. As to the primary loan, plaintiff's income was too high to qualify for a modification. As to the HELOC, defendant was not supplied with complete financial information to consider a loan modification because the Trust did not submit any documentation. Therefore, plaintiff cannot demonstrate that a false statement was made or that defendant made the statement with knowledge that it was false. Additionally, there is nothing in the record to support a claim that defendant had anything to gain in making false statements about the loan review and, critically, plaintiff sets forth absolutely no facts to indicate that she was damaged by any alleged misrepresentations. Plaintiff merely argues that "Appellant relied upon these material representations of future conduct," but does not state what action plaintiff may have taken in the absence of assurances that the loans were being reviewed. Because plaintiff failed to meet the cursory requirements for setting forth a claim of fraudulent misrepresentation, the trial court did not err in granting defendant summary disposition.

E. THE ECONOMIC STABILIZATION ACT

Count IV of plaintiff's complaint alleged "[v]iolation by defendant of its contractual obligation to modify plaintiff's loan pursuant to the federal [HAMP] and the [ESA] of 2008."

Plaintiff alleged that, in spite of the fact that she met the criteria for HAMP, defendant refused to properly evaluate her for a modification.

Again, plaintiff's arguments are not clear. "An appellant may not merely announce its position or assert an error and leave it to this Court to discover and rationalize the basis for its claims, unravel or elaborate its argument, or search for authority for its position." *Wiley*, 257 Mich App at 499. An insufficiently briefed issue may be deemed abandoned on appeal. *Blackburne*, 264 Mich App at 619.

It appears that plaintiff claims that state law is preempted by federal law. But plaintiff cites to no state law that stands in conflict with a federal law. "[W]here there is a State provision and no comparable or analogous federal provision, or the converse is the case, there is no possibility of preemption because in the absence of anything to compare there cannot be a contrary requirement and so the stand-alone requirement—be it State or federal—is effective." *Holman v Rasak*, 486 Mich 429, 441; 785 NW2d 98 (2010) (internal quotation marks omitted).

Additionally, plaintiff does not explain how she has a private right of action for a HAMP violation. "HAMP is a federal program enacted pursuant to the Emergency Economic Stabilization Act, 12 USC 5201, et seq., which was designed to assist homeowners in avoiding foreclosure by giving lenders incentives to offer borrowers modifications with more favorable terms. See *Wigod v Wells Fargo Bank, NA*, 673 F3d 547, 556 (CA 7, 2012)." *Bonsu v Ocwen Loan Servicing, LLC*, unpublished opinion per curiam of the Court of Appeals, issued November 15, 2012 (Docket No. 307638) unpub op p 2.[5] Pursuant to HAMP, the Secretary of the Treasury negotiates Servicer Participation Agreements with servicers of mortgage loans, which require them to identify eligible homeowners who are in default or will likely soon default on payments and to modify the terms of their loans. *Wigod*, 673 F3d at 556. "Several courts have held that HAMP does not create a private right of action to enforce its regulations." *Bonsu*, unpub op p 3, n 1.

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

/s/ David H. Sawyer
/s/ Peter D. O'Connell
/s/ Kirsten Frank Kelly

[5] Unpublished cases are not binding precedent. MCR 7.215(c)(1). However, this Court may consider the cases for heir persuasive value. See *Nuculovic v Hill*, 287 Mich App 58, 68; 783 NW2d 124 (2010).