STATE OF MICHIGAN

COURT OF APPEALS

EVERBANK, Plaintiff-Appellee,	UNPUBLISHED May 24, 2012
v	No. 302239 Oakland Circuit Court
HIKMAT ZEER, Defendant-Appellant.	LC No. 2010-108614-CH

Before: SERVITTO, P.J., and CAVANAGH and FORT HOOD, JJ.

PER CURIAM.

Defendant appeals as of right an order granting summary disposition in plaintiff's favor pursuant to MCR 2.116(C)(10) in this mortgage deficiency action. Because plaintiff did not have a mortgage interest when it initiated foreclosure proceedings, and therefore, the foreclosure proceedings are void *ab initio*, we reverse and remand for further proceedings consistent with this opinion.

On April 19, 1999, defendant borrowed $650,000.00 from First Chicago NBD Mortgage Company. The loan was secured by a mortgage, executed by defendant and two others, encumbering a home in West Bloomfield, Michigan. It is undisputed that defendant defaulted on the loan and that foreclosure proceedings were initiated by plaintiff, who claimed an interest in the property as an assignee of the mortgage, in August 2009. Plaintiff's assignment was the last of several assignments of the subject mortgage, the first of which appeared in recorded form from NetBank to MERS. At the foreclosure sale on January 12, 2010, the property was acquired by plaintiff for the sum of $300,000.00. Because the balance of the mortgage note was approximately $600,000.00 on the date of the foreclosure sale, plaintiff initiated the instant proceedings to recover a deficiency judgment against defendant for the remaining balance owed on the mortgage note. Plaintiff moved for summary disposition pursuant to MCR 2.116(C)(10) and the trial court granted the motion. On reconsideration, defendant argued for the first time that at the time it initiated foreclosure proceedings, plaintiff did not have an interest in the subject property. Specifically, defendant provided a chain of title concerning the subject property indicating that there was not a recorded assignment of the mortgage from the initial mortgagor, First Chicago NBD Mortgage Company, to another entity until after plaintiff had already initiated foreclosure proceedings. Until then, only subsequent assignments appeared, including the one to EverBank. On September 16, 2009, First Chicago NBD Mortgage Company's successor, JPMorgan Chase Bank, N.A. recorded an "Assignment of Mortgage to

Fix Break in Chain of Title" assigning the mortgage to NetBank for the first time. Defendant thus contended that because EverBank did not have an interest in the subject property when it began foreclosure proceedings or when the foreclosure sale was conducted, the foreclosure sale was a nullity. The trial court denied the motion for reconsideration on the grounds that defendant raised an issue that could have been presented in response to plaintiff's motion for summary disposition. This appeal followed.

On appeal, defendant first argues that, because plaintiff did not acquire a mortgage interest until after it initiated foreclosure proceedings, it lacked standing to foreclose, and therefore, the foreclosure is void. We agree.

Generally, for an issue to be preserved for appeal, it must be raised, addressed, and decided by the trial court. *Hines v Volkswagen of America, Inc*, 265 Mich App 432, 443; 695 NW2d 84 (2005). "Where an issue is first presented in a motion for reconsideration, it is not properly preserved." *Vushaj v Farm Bureau Gen Ins Co of Michigan*, 284 Mich App 513, 519; 773 NW2d 758 (2009). However, "[t]his Court may review an unpreserved issue if it is an issue of law for which all the relevant facts are available." *Id*., citing *Brown v Loveman*, 260 Mich App 576, 599; 680 NW2d 432 (2004). Moreover, this Court may review unpreserved issues where doing so is "necessary to a proper determination of a case." *Klooster v City of Charlevoix*, 488 Mich 289, 310; 795 NW2d 578 (2011) (internal citations omitted).

Here, whether plaintiff had the right to foreclose was raised for the first time in the motion for reconsideration, and was not raised or decided by the trial court at the summary disposition stage; accordingly, it is unpreserved. However, the relevant facts regarding this issue were presented after the trial court ruled on plaintiff's summary disposition motion, and accordingly, we are within our discretion to review this unpreserved issue, as doing so is necessary for a proper determination of the case.

"This Court reviews the grant or denial of summary disposition de novo. . ." *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999). A motion for summary disposition brought pursuant to MCR 2.116(C)(10) tests the factual support for a claim. Thus, summary disposition under MCR 2.116(C)(10) is appropriate "if the affidavits and other documentary evidence show that there is no genuine issue concerning any material fact and that the moving party is entitled to judgment as a matter of law." *Innovative Adult Foster Care, Inc v Ragin*, 285 Mich App 466, 475; 776 NW2d 398 (2009). This Court reviews a trial court's decision regarding a motion for reconsideration for an abuse of discretion. *Churchman v Rickerson*, 240 Mich App 223, 233; 611 NW2d 333 (2000).

Two statutory provisions are applicable to the facts of this case: MCL 600.3204(1)(d), and MCL 600.3204(3). MCL 600.3204(1)(d) states that, as a condition precedent of initiating foreclosure proceedings by advertisement, the foreclosing party must show that it "is either the owner of the indebtedness or of an interest in the indebtedness secured by the mortgage or the servicing agent of the mortgage." MCL 600.3204(3) states that "if the party foreclosing a mortgage by advertisement is not the original mortgagee, a record chain of title shall exist prior to the date of sale under section 3216 evidencing the assignment of the mortgage to the party foreclosing the mortgage."

This Court addressed these two provisions in *Davenport v HSBC Bank*, 275 Mich App 344; 739 NW2d 383 (2007). In *Davenport*, the defendant bank was assigned a mortgage interest in real property on October 31, 2005, by which point the plaintiff was in default on the mortgage. *Id*. at 345. The defendant bank published its first notice of foreclosure on October 27, 2005. *Id*. A foreclose sale followed at some time later. *Id*. In other words, in *Davenport*, the defendant bank did not have a mortgage interest in the property at the time it initiated foreclosure proceedings by advertisement, but did have a mortgage interest in the property at the time of the foreclosure sale. The defendant bank "admit[ed] that it did not own the mortgage at the time of publication on October 27, 2005, but . . . argue[d] that having fulfilled the requirements of MCL 600.3204(3), it was not obliged to follow MCL 600.3204(1)(d)." *Id*. at 346. This Court disagreed, holding:

> [w]e do not read subsection 3 as allowing a successor mortgagee to disregard the requirements of subsection 1 for foreclosing by advertisement simply because the successor expects to have achieved a perfect chain of title by the time of sale. Subsection 1(d) plainly requires that a party own the indebtedness or an interest in the indebtedness before undertaking to foreclose a mortgage by advertisement. Accordingly, defendant was not eligible to commence the foreclosure when it did so because it did not yet own the indebtedness. [*Id.* at 346-347.]

In short, under *Davenport*, to satisfy the requirements of MCL 600.3204, a foreclosing entity must establish that it has a mortgage interest in the property at the time it initiates foreclosure by advertisement, *and* at the time of the mortgage sale.[1]

Here, as in *Davenport*, plaintiff did not have a mortgage interest when it initiated foreclosure proceedings, and therefore, the "foreclosure proceedings [are] void *ab initio*." *Id*. at 348. Plaintiff initiated foreclosure proceedings on August 12, 2009. It was not until September 1, 2009, two weeks later, that MERS made an assignment to plaintiff. And, MERS' assignment

[1] A recent case, *Kim v JP Morgan Chase Bank*, ___ Mich App ___; ___NW2d___ (Docket No. 302528, issued January 12, 2012), addressed a direct application of MCL 600.3204(3), but not MCL 600.3204(1)(d). In *Kim*, the original mortgagee was closed by the federal Office of Thrift Supervision, who appointed the FDIC as receiver. The defendant bank later acquired all of the original mortgagee's loans and loan commitments through a purchase and assumption agreement with the FDIC. *Id*., slip op at 1. The defendant bank foreclosed on a property by advertisement, having never recorded an assignment of the mortgage. *Id*. The defendant bank argued "that the recording provision of MCL 600.3204(3) is inapplicable because it acquired its interest in the mortgage by operation of law." *Id*., slip op at 3. This Court rejected the defendant bank's argument, holding that "pursuant to the plain language of MCL 600.3204(3), defendant was required to record its mortgage interest before the sheriff's sale. Because defendant failed to do so, it was not statutorily authorized to proceed with the sale." *Id*., slip op at 5. Although the *Kim* Court did not rely on *Davenport*, because *Kim* dealt with a direct application of MCL 600.3204(3), the *Davenport* rule persists after *Kim*: A mortgagee must have record title to a mortgage both at the time of foreclosure by advertisement, and at the time of the foreclosure sale.

to plaintiff conveyed nothing because NetBank, who made the assignment to MERS, had not, as of September 1, 2009, acquired anything from Chase, the successor in interest to the original mortgagee. It was not until September 25, 2009, six weeks after foreclosure proceeding had begun, that Chase assigned its interest to NetBank, "fixing" the defect in chain of title.

Regarding the assignment from Chase to NetBank, plaintiff claims, in the fact section of its appellate brief, that "[i]n late 2005, Chase sold its interest . . . to Net Bank, [sic]" but simultaneously admits that "no formal assignment of the mortgage involved in this lawsuit was filed with the Oakland County Registrar of Deeds." Plaintiff also admits that when its counsel originally ordered a title commitment, "the title company believed there was a 'gap' in the chain-of-title, namely from Chase to Net Bank [sic]" which was "fixed" via the September 25, 2009, assignment. In other words, plaintiff admits that it knew that it did not own an interest in the mortgage when it initiated foreclosure proceedings, yet initiated those proceedings anyway.

Regarding the assignment from MERS to plaintiff, plaintiff claims, in the fact section of its appellate brief, that, after the 2007 assignment from NetBank to MERS, "EverBank . . . serviced the loan for itself." However, the documentary evidence indicates that the mortgage was not assigned to plaintiff until September 1, 2009, over two weeks after it initiated foreclosure proceedings. Moreover, even assuming, arguendo, that the September 1, 2009, assignment actually conveyed an interest to plaintiff (which it did not), the foreclosure still would have been void, because plaintiff initiated foreclosure proceedings on August 12, 2009, two weeks before MERS conveyed to plaintiff.

Defendant also argues that the note securing the mortgage was not assigned to MERS, and "because the note and the mortgage are inseparable, the attempt of MERS to assign the Mortgage [sic] without transfer of the debt did not pass the mortgage interest to [plaintiff]." This argument, standing alone, is insufficient to warrant reversal. The Michigan Supreme Court recently held that if an entity is the "record-holder of the mortgage, [that entity] own[s] a security lien on the properties, the continued existence of which [is] contingent upon the satisfaction of the indebtedness." *Residential Funding Co, LLC v Saurman*, 490 Mich 909; 805 NW2d 183 (2011). In other words, an entity has standing to foreclose upon properties for which it is the record-holder of the mortgage, even if it does not own the underlying debt. Therefore, if plaintiff had been the record-holder of the mortgage at the time of foreclosure, this Court could not hold the foreclosure invalid solely on the basis that it did not own the underlying debt. But, as discussed, plaintiff was not the record-holder of the mortgage at the time it initiated foreclosure proceedings. Plaintiff's lack of standing to foreclose is based on the fact that it did not have a mortgage interest in the property, not on the fact that it did not own the debt.

Reversed and remanded for further proceedings. We do not retain jurisdiction.

/s/ Deborah A. Servitto
/s/ Mark J. Cavanagh
/s/ Karen M. Fort Hood