STATE OF MICHIGAN

COURT OF APPEALS

ALLEN BAKRI,

Plaintiff-Appellant,

v

MORTGAGE ELECTRONIC REGISTRATION SYSTEM, MERSCORP INC, BANK OF NEW YORK MELLON, f/k/a BANK OF NEW YORK, and TROTT & TROTT PC,

Defendants-Appellees.

UNPUBLISHED
August 9, 2011

No. 297962
Wayne Circuit Court
LC No. 09-030482-CH

Before: BORRELLO, P.J., and METER and SHAPIRO, JJ.

PER CURIAM.

Plaintiff appeals as of right from the trial court's order granting summary disposition in favor of defendants. For the reasons set forth in this opinion, we reverse.

I. BACKGROUND

This case involves an action to quiet title for property commonly known as 5037 Curtis in Dearborn, Michigan. On March 17, 2004, plaintiff borrowed $225,000 from America's Wholesale Lender to purchase the property. On that same date, plaintiff granted defendant Mortgage Electronic Registration System (MERS) a mortgage to the property as security for the loan. The mortgage was recorded on April 15, 2004. On October 14, 2009, defendant MERS assigned the mortgage to defendant Bank of New York Mellon. Plaintiff defaulted, and on November 11, 2009, defendant Trott & Trott, P.C., prepared and served a Notice of Mortgage Foreclosure Sale, thus commencing non-judicial foreclosure by advertisement under MCL 600.3201 *et seq*. The notice stated that the foreclosure sale would occur on December 9, 2009. The sale of the property was adjourned, however, and, to date, has not occurred.

On December 11, 2009, plaintiff filed an action seeking, in relevant part, to quiet title to the property. Essentially, plaintiff sought to invalidate the mortgage that it granted to defendant MERS. Plaintiff's complaint asserted that defendant MERS purported to assign the mortgage to defendant Bank of New York Mellon, which then recorded the mortgage on July 11, 2009, and scheduled a sheriff's sale. According to the complaint, the mortgage plaintiff granted to defendant MERS was invalid because defendant MERS did not loan plaintiff "any money or anything of value and, therefore, has no right to collect any money from Plaintiff whether under

such Mortgage or any other document." Plaintiff further asserted that defendant "MERS has no interest in whether the Mortgage is enforced by foreclosure or not, because MERS is not entitled to any proceeds of the sale of the subject property under MCL 600.3252." According to plaintiff, defendant Bank of New York Mellon stood in the shoes of defendant MERS and had no more right to enforce the mortgage than defendant MERS. Plaintiff sought to have both the mortgage and the assignment of the mortgage to defendant Bank of New York Mellon declared void and unenforceable.

On March 31, 2010, defendants filed a joint motion for summary disposition pursuant to MCR 2.116(C)(8) and (10). Defendants contended that they were entitled to summary disposition because plaintiff executed the mortgage and the terms of the mortgage specifically grant defendant MERS the right to exercise the lender's interest in the mortgage, including the right to sell or foreclose on the property. Defendants also asserted that the assignment of the mortgage to defendant Bank of New York Mellon was proper because the mortgage authorizes defendant MERS to assign the mortgage. According to defendants, defendant MERS acted within the scope of its powers under the terms of the mortgage.

Plaintiff argued, in relevant part, that defendants' motion was premature, noting that the cutoff date for discovery was July 23, 2010, that plaintiff had title to the property, that defendants did not identify a genuine issue of any material fact in making their motion and that the mortgage did not create an agency relationship between defendant MERS and the lender. The only documentary evidence plaintiff attached to his response to defendants' motion was a document titled "Notice of Revocation of Appointment of Nominee and/or Agency Status," dated March 26, 2010, and signed by plaintiff, in which plaintiff asserted that the lender did not authorize plaintiff "to appoint MERS to act in any agency or trust relationship concerning the promissory note issued by . . . [plaintiff]" and purporting to revoke such authorization if it was determined that such authorization existed.

The trial court granted defendants' motion, finding that plaintiff did not support his contention that the mortgage was invalid with documentary evidence: "There is [sic] no affidavits. There are no documents. There is nothing that I have in my hand by way of response that counters what defendant's [sic] position is." Plaintiff appeals as of right.

II. ANALYSIS

Plaintiff first argues that the trial court erred in denying him the opportunity to amend his first amended complaint under MCR 2.116(I)(5).

We review a trial court's decision on a motion to amend pleadings for an abuse of discretion. *Weymers v Khera*, 454 Mich 639, 654; 563 NW2d 647 (1997). The abuse of discretion standard recognizes "'that there will be circumstances in which . . . there will be more than one reasonable and principled outcome.'" *Maldonado v Ford Motor Co*, 476 Mich 372, 388; 719 NW2d 809 (2006), quoting *People v Babcock*, 469 Mich 247, 269; 666 NW2d 231 (2003). Under this standard, "[a]n abuse of discretion occurs when the decision results in an outcome falling outside the principled range of outcomes." *Woodard v Custer*, 476 Mich 545, 557; 719 NW2d 842 (2006).

Under MCR 2.116(I)(5), if the trial court grants summary disposition pursuant to MCR 2.116(C)(8), (9) or (10), "the court shall give the parties an opportunity to amend their pleadings as provided by MCR 2.118, unless the evidence then before the court shows that amendment would not be justified." MCR 2.118(A)(2) provides that leave to amend pleadings "shall be freely given when justice so requires." A motion to amend pleadings should ordinarily be denied only for particularized reasons, including undue delay, bad faith or dilatory motive, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice or futility. *Wormsbacher v Phillip R Seaver Title Co, Inc*, 284 Mich App 1, 8; 772 NW2d 827 (2009).

The trial court addressed plaintiff's motion to amend his first amended complaint at the hearing on defendants' motion for summary disposition. At the hearing, counsel for plaintiff stated: "Your honor, my motion is a motion to amend the pleadings. The discovery is not—will be cut-off on July 23rd of this year. And we need interrogatories answered and requests for admissions." Counsel for defendants responded: "I didn't receive any type of a proposed complaint. I tried to get one from the court it looked like there wasn't one filed, so I am not sure what claims are being added. I have no notice of what the amendments would be." The trial court responded similarly, stating: "I am kind of in the same posture you are as well." There was no further discussion regarding plaintiff's motion to amend on the record until after the trial court granted defendants' motion for summary disposition and stated: "And the motion to amend is denied or moot actually so it is dismissed."

The lower court record does not contain plaintiff's written motion to amend his first amended complaint, a brief in support of the motion or a proposed amended complaint. We note that plaintiff has attached to his brief on appeal a copy of a motion to amend his complaint, as well as a proposed Second Amended Complaint. It is unclear whether the motion and proposed amended complaint were actually filed with the trial court, as they appear to have date and time stamps, but plaintiff did not dispute the trial court's and counsel for defendants' assertions, made on the record at the hearing on defendants' motion for summary disposition, that they did not have a copy of the proposed amendments. In any event, we observe that on appeal, plaintiff fails to argue whether and how the amendment would be justified under MCR 2.118(A)(2) and whether particularized reasons, such as undue delay, bad faith or dilatory motive, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice or futility, existed to deny the amendment. *Wormsbacher*, 284 Mich App at 8. It is not enough for a party to simply assert an error and then leave it up to this Court to discover and rationalize the basis for their claims, elaborate and unravel their arguments for them, and then search for authority to sustain or reject their position. *Yee v Shiawassee Co Bd of Comm'rs*, 251 Mich App 379, 406; 651 NW2d 756 (2002). We therefore decline to address this unpreserved error.

Plaintiff next argues that the trial court erred in granting defendants' motion for summary disposition. Defendants moved for summary disposition under MCR 2.116(C)(8) and (10). The trial court did not state on the record or in its order granting summary disposition on what basis or bases summary disposition was proper. However, the trial court appears to have relied on documentary evidence in granting defendants' motion. Thus, we will treat the motion as having been granted under MCR 2.116(C)(10). This Court's review of a trial court's grant of summary disposition pursuant to MCR 2.116(C)(10) is as follows:

> This Court reviews de novo a trial court's grant or denial of summary disposition under MCR 2.116(C)(10). *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998). A motion brought under MCR 2.116(C)(10) tests the factual support for a claim. *Downey v Charlevoix Co Rd Comm'rs*, 227 Mich App 621, 625; 576 NW2d 712 (1998). The pleadings, affidavits, depositions, admissions, and any other documentary evidence submitted by the parties must be considered by the court when ruling on a motion brought under MCR 2.116(C)(10). *Downey*, *supra* at 626; MCR 2.116(G)(5). When reviewing a decision on a motion for summary disposition under MCR 2.116(C)(10), this Court "must consider the documentary evidence presented to the trial court 'in the light most favorable to the nonmoving party.'" *DeBrow v Century 21 Great Lakes, Inc (After Remand)*, 463 Mich 534, 539; 620 NW2d 836 (2001), quoting *Harts v Farmers Ins Exchange*, 461 Mich 1, 5; 597 NW2d 47 (1999). A trial court has properly granted a motion for summary disposition under MCR 2.116(C)(10) "if the affidavits or other documentary evidence show that there is no genuine issue in respect to any material fact, and the moving party is entitled to judgment as a matter of law." *Quinto v Cross & Peters Co*, 451 Mich 358, 362; 547 NW2d 314 (1996). [*Clerc v Chippewa Co War Mem Hosp*, 267 Mich App 597, 601; 705 NW2d 703 (2005), remanded in part 477 Mich 1067 (2007).]

Plaintiff essentially challenges the validity of the mortgage. According to plaintiff, summary disposition was improper because defendant MERS's assignment of the mortgage to defendant Bank of New York Mellon was null and void because defendant MERS was not the lender and therefore assigned the mortgage to defendant Bank of New York Mellon without the promissory note. Thus, plaintiff contends, defendant Bank of New York Mellon has no interest in the underlying debt and has no right to foreclose on the property.

The mortgage plaintiff granted to defendant MERS stated that defendant MERS was acting "as nominee for Lender and Lender's successors and assigns[.]" The mortgage also recognized that MERS had the power to assign the mortgage and that MERS and its assigns had the power to sell the property: "Borrower does hereby mortgage, warrant, grant and convey to MERS . . . and to the successors and assigns of MERS, with the power of sale, the following described property . . . COMMONLY KNOWN AS: 5037 Curtis[.]" The mortgage further provided that defendant MERS could foreclose on the property:

> MERS holds only legal title to the interests granted by Borrower in this Security Instrument, but, if necessary to comply with law or custom, MERS (as nominee for Lender and Lender's successors and assigns) has the right: to exercise any or all of those interests, including, but not limited to, the right to foreclose and sell the Property; and to take any action required of Lender including, but not limited to, releasing and canceling this Security Instrument.

Because plaintiff granted defendant MERS the power to assign the mortgage, the assignment of the mortgage to defendant Bank of New York Mellon was valid. Furthermore, because the mortgage specifically granted defendant MERS the power to foreclose on and sell the property as nominee for the lender, defendant Bank of New York Mellon, as assignee of the mortgage, also had the power to foreclose on and sell the property.

Although we find that the trial court properly concluded that defendant MERS had the right to assign the mortgage to defendant Bank of New York Mellon and that defendant Bank of New York Mellon had the power to foreclose on and sell the property, our inquiry does not end there. There is another layer to the analysis, which involves an issue not raised by the parties, but decided in our recent decision in *Residential Funding Co, LLC v Saurman*, ___ Mich App ___; ___ NW2d ___ (Docket Nos. 290248 & 291443; April 21, 2011) (Shapiro, J.). In *Saurman*, the issue was whether a mortgagee who was not the note holder could foreclose by advertisement under MCL 600.3204(1)(d). *Saurman*, slip op pp 7-8. We held that under MCL 600.3204(1)(d), the Legislature has limited foreclosure by advertisement to those parties with ownership of an interest in the note and that because the mortgagee was not "the owner . . . of an interest in the indebtedness secured by the mortgage[,]" MCL 600.3204(1)(d), it lacked the authority to foreclose by advertisement:

> Applying these considerations to the present case, it becomes obvious that MERS did not have the authority to foreclose by advertisement on defendants' properties. Pursuant to the mortgages, defendants were the mortgagors and MERS was the mortgagee. However, it was the plaintiff lenders that lent defendants money pursuant to the terms of the notes. MERS, as mortgagee, only held an interest in the *property* as security for the note, not an interest in the note itself. MERS could not attempt to enforce the notes nor could it obtain any payment on the loans on its own behalf or on behalf of the lender. Moreover, the mortgage specifically clarified that, although MERS was the mortgagee, MERS held "only legal title to the interest granted" by defendants in the *mortgage*. Consequently, the interest in the mortgage represented, at most, an interest in defendants' properties. MERS was not referred to in any way in the notes and only Homecomings held the notes. The record evidence establishes that MERS owned neither the notes, nor an interest, legal share, or right in the notes. The only interest MERS possessed was in the properties through the mortgages. Given that the notes and mortgages are separate documents, evidencing separate obligations and interests, MERS' interest in the mortgage did not give it an interest in the debt. [*Saurman*, slip op pp 10-11 (emphasis in original; footnote omitted).]

In this case, defendant Bank of New York Mellon commenced non-judicial foreclosure by advertisement when it filed its Notice of Mortgage Foreclosure Sale. However, although the mortgage was properly assigned to defendant Bank of New York Mellon, Bank of New York Mellon did not purchase the note from America's Wholesale Lender. Moreover, like in *Saurman*, the mortgage in this case specified that defendant "holds only legal title to the interests granted by Borrower in this Security Instrument." Under *Saurman*, the mortgagee in this case, defendant Bank of New York Mellon, as assignee of the mortgage, only held an interest in the property as security for the note, but did not hold an interest in the note. Therefore, because defendant Bank of New York Mellon did not possess an interest in the indebtedness, it was not authorized to foreclose by advertisement on plaintiff's property. *Id.*, slip op pp 7-11. Instead, defendant Bank of New York Mellon must seek to foreclose by judicial process. *Id.*, slip op p 1.

Our conclusion that summary disposition in favor of defendants was improper in light of *Saurman* renders it unnecessary to address plaintiff's remaining arguments on appeal.

Reversed. No costs, a public question having been involved. MCR 7.219.

/s/ Stephen L. Borrello
/s/ Patrick M. Meter
/s/ Douglas B. Shapiro