STATE OF MICHIGAN

COURT OF APPEALS

SHANNON L. EDGETT, Plaintiff-Appellant/Cross-Appellee,	UNPUBLISHED February 25, 2014
v	No. 311092 Oakland Circuit Court
FLAGSTAR BANK, Defendant-Appellee/Cross-Appellant.	LC No. 2012-125602-CH

Before: MURPHY, C.J., and M.J. KELLY and RONAYNE KRAUSE, JJ.

PER CURIAM.

Plaintiff filed a claim of appeal in this action in which she contested mortgage foreclosure proceedings instituted by defendant Flagstar Bank (the bank) relative to plaintiff's real property. Despite filing the claim of appeal, plaintiff never submitted an appellate brief, and this Court therefore entered an order dismissing the appeal. *Edgett v Flagstar Bank*, unpublished order of the Court of Appeals, entered February 6, 2013 (Docket No. 311092). The bank cross appeals the trial court's denial of the bank's request for attorney fees as sanctions under MCR 2.114 and MCL 600.2591. While we can certainly appreciate the desperation felt by plaintiff and others in her position who face the loss of their home, plaintiff's lawsuit epitomizes frivolousness as defined in MCR 2.114(D) and MCL 600.2591(3)(a). Plaintiff's action was clearly employed solely to cause delay in regard to eviction, and plaintiff's counsel has an extensive history of using such tactics. See *Landis v Fannie Mae*, 922 F Supp 2d 646 (ED Mich, 2013).[1] We reverse

[1] In *Landis*, 922 F Supp 2d at 646-647, Chief Judge Gerald E. Rosen observed:

> [Attorney] Greenwood appears to have made a living off distressed clients facing foreclosure of their mortgages and/or eviction from their homes. A review of the Eastern District of Michigan docket shows no fewer than 75 foreclosure cases filed by Mr. Greenwood in the last 12 months alone, virtually none of which have survived dispositive motion practice. Some were dismissed by stipulation. Some have been dismissed for failure of Mr. Greenwood to appear or respond to a dispositive motion. Others were dismissed for filing a response that was non-responsive to the dispositive motion. . . . In each of these cases, Mr. Greenwood filed essentially the same "cut and paste," cookie cutter complaint, each alleging

the trial court's order denying the bank's request for sanctions and remand for an assessment of reasonable attorney fees. We do add one caveat; for the reasons set forth below, the sanctions are to be imposed solely against plaintiff's counsel pursuant to MCR 2.114(E). We affirm in all other respects.

The following factual discussion is predicated on the documentary evidence presented by the bank in regard to its motion for summary disposition, which was based on both MCR 2.116(C)(8) and (10). We note that plaintiff failed to submit any documentary evidence in her response to the bank's summary disposition motion as required by MCR 2.116(G)(4) relative to the (C)(10) motion.

In March 2009, plaintiff refinanced her home and executed a mortgage in the amount of $156,594. The mortgage contained a power of sale clause, thereby allowing for foreclosure by advertisement upon default pursuant to MCL 600.3201 *et seq.* In a letter dated November 18, 2009, from the bank to plaintiff, the bank indicated that the mortgage payment for October 2009 was past due and that the matter needed to be resolved to prevent foreclosure efforts. The letter also notified plaintiff that she could contact the bank about possible options, including a repayment or special forbearance plan, loan modification, a short sale, or a deed in lieu of foreclosure. The letter also provided extensive information concerning how to avoid foreclosure. In a letter dated October 16, 2010, from the bank to plaintiff, the bank acknowledged that it had reviewed information submitted by plaintiff "in consideration of a loss mitigation solution for [her] mortgage loan." The bank regretfully informed her that there were "no options available for [her] at this time" for the following reason: "Incomplete package. Does not meet investor requirements."

As reflected in an affidavit of notice, executed under MCL 600.3205 by the attorney handling the matter for the bank, a written notice was served on plaintiff on December 30, 2010, which notice informed her of the default, the amount due and owing, contact information for the mortgage holder, mortgage servicer, or their designated agent, and of her rights as a borrower. An affidavit of publication also indicated that on December 30, 2010, a notice was published in the Oakland County Legal News advising plaintiff of her rights and stating that foreclosure proceedings could be commenced but not until at least 90 days from December 30, 2010. Faxed documents dated March 22, 2011, addressed to the bank's law firm regarding plaintiff's mortgage indicated that the documents contained information requested in order to schedule and engage in a "modification teleconference." In a letter dated April 15, 2011, from the bank to

---

> the very same counts, and each replete with the same spelling, typographical, and party gender and number errors. This slip shod litigation practice does not improve during the course of the lawsuits. In many of his cases—including cases assigned to this Court—Mr. Greenwood failed to timely respond to dispositive motions and instead, has acted—if at all—only when ordered to do so.
>
> Plaintiff's lawsuit here is consistent with this pattern.

plaintiff, the bank acknowledged that it had reviewed information provided by plaintiff for purposes of a loss mitigation solution as to the mortgage. The bank communicated its conclusion that, unfortunately, "there [were] no options available for [plaintiff] at this time" due to: "Excessive obligations in relation to income."

In a letter dated July 28, 2011, from the bank to plaintiff, the bank acknowledged that it had reviewed information provided by plaintiff for purposes of a loss mitigation solution. In this letter, the bank again stated that no options were available to plaintiff. However, the reason for the bank's conclusion this time was as follows: "Borrower . . . doesn't want to participate in the workout." In the affidavit of notice under MCL 600.3205 referenced by us above, the affiant averred that plaintiff "had requested a meeting pursuant to MCL 600.3205b, no agreement could be reached, [plaintiff was] not eligible for a loan modification, and 90 days from the date of . . . notice had passed." MCL 600.3205b addresses a borrower's right to participate in negotiations to attempt to arrange a mortgage loan modification.

An affidavit of publication provided that on August 10, 17, 24, and 31, 2011, a notice of default and scheduled foreclosure sale with respect to plaintiff's mortgage and home was published in the Oakland County Legal News. The foreclosure sale was set for September 13, 2011. A sheriff's deed on mortgage sale reflected that the sale had been adjourned to September 20, 2011, and that notice had been duly published and posted in a conspicuous place on the property subject to foreclosure. The sheriff's deed and evidence of sale (affidavit of auctioneer) indicated that the property was sold to the bank as highest bidder on September 20, 2011, for $182,339. An affidavit of purchaser stated that the six-month redemption period would expire on March 20, 2012.

On March 14, 2012, plaintiff filed her four-count complaint, alleging quiet title, unjust enrichment, breach of implied agreement/specific performance, and breach of MCL 600.3205c (loan modification and process). We shall discuss the contents of these counts below. Upon the bank's motion for summary disposition, the trial court granted the motion, finding that plaintiff lacked standing to pursue a quiet title action given that the redemption period had expired, that, regardless, plaintiff failed to show the requisite fraud or irregularity to set aside the sheriff's sale, that the statute of frauds barred her claims of unjust enrichment and breach of implied contract, and that the bank did not violate MCL 600.3205, as it only required the bank to consider a loan modification, which it did. The trial court, however, declined to award the bank sanctions, effectively concluding that the action and pleadings were not frivolous. Plaintiff appealed as of right, but, as noted above, the appeal has been dismissed for failure to submit a brief. But we must still address the bank's cross-appeal in which the bank argues that the court erred in denying its request for sanctions.

With respect to a request for attorney fees under MCL 600.2591 and MCR 2.114, we review for an abuse of discretion the trial court's ruling on the request. *Edge v Edge*, 299 Mich App 121, 127; 829 NW2d 276 (2012). However, the court's underlying factual findings, including a finding of frivolousness, are reviewed for clear error. *Kitchen v Kitchen*, 465 Mich 654, 661; 641 NW2d 245 (2002); *Edge*, 299 Mich App at 127. Issues regarding the interpretation of MCL 600.2591 and MCR 2.114 are reviewed de novo on appeal. *Id.*

"Upon motion of any party, if a court finds that a civil action . . . was frivolous, the court that conducts the civil action shall award to the prevailing party the costs and fees incurred by that party in connection with the civil action by assessing the costs and fees against the nonprevailing party *and* their attorney." MCL 600.2591(1) (emphasis added). The plain and unambiguous language of MCL 600.2591 mandates an award of attorney fees and costs if a suit was frivolous, and it requires assessment of the fees and costs against both the party and the party's attorney. Here, the bank initially made an open-ended request for sanctions under MCR 2.114 and MCL 600.2591 in its motion for summary disposition. However, in the bank's summary disposition reply brief, it noted that a desperate homeowner might be excused from filing a frivolous complaint, but "a repeat offender like attorney Greenwood should not be excused." The bank proceeded to request "attorney fees as sanctions against Emmett Greenwood under MCR 2.114 and MCL 600.2591," but it did not request the imposition of fees against plaintiff herself. At the hearing on the bank's motion for summary disposition, the bank wished to have the onus placed on plaintiff's counsel relative to paying attorney fees. Because MCL 600.2591 would require the imposition of attorney fees against both counsel and plaintiff, and because the bank ultimately did not pursue an award of fees against plaintiff herself, we shall conduct our review solely under MCR 2.114, which, as discussed below, allows for the imposition of fees solely against counsel.

MCR 2.114 concerns the execution of court documents and applies to all pleadings, motions, affidavits, and other papers mandated by the court rules. MCR 2.114(A). The court rule provides in pertinent part:

> (D) The signature of an attorney or party, whether or not the party is represented by an attorney, constitutes a certification by the signer that
>
> (1) he or she has read the document;
>
> (2) to the best of his or her knowledge, information, and belief formed after reasonable inquiry, the document is well grounded in fact and is warranted by existing law or a good-faith argument for the extension, modification, or reversal of existing law; and
>
> (3) the document is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation.
>
> (E) If a document is signed in violation of this rule, the court, on the motion of a party or on its own initiative, *shall impose upon the person who signed it, a represented party,* ***or*** *both, an appropriate sanction*, which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the document, including reasonable

attorney fees. The court may not assess punitive damages. [Emphasis added.][2]

Foreclosure by advertisement is controlled by statute, MCL 600.3201 *et* seq., and in *Ruby & Assocs, PC v Shore Fin Servs*, 276 Mich App 110, 117-118; 741 NW2d 72 (2007), vacated in part on other grounds 480 Mich 1107 (2008), this Court explained the general process and its impact:

> Mortgages containing a power-of-sale clause may be foreclosed upon and sold at a sheriff's sale, in the event of a default under the mortgage. See MCL 600.3201 to 600.3224. Upon such a sale, the purchaser, including potentially the mortgagee, acquires a sheriff's deed. See MCL 600.3228 and 600.3232. Mortgagors enjoy a statutory right of redemption in the event a mortgage is foreclosed upon and property is sold. See MCL 600.3240. The legal operation and effect of the sheriff's deed ultimately depends on the mortgagor's exercise of this right of redemption. "A purchaser's deed is void if the mortgagor . . . redeems" the premises by tendering amounts owing within the applicable statutory window. MCL 600.3240(1). If not redeemed within this time frame, the deed becomes "operative," vesting in the grantee "all right, title, and interest which the mortgagor had at the time of the execution of the mortgage. . . ." MCL 600.3236. [Omission in original.]

With respect to plaintiff's claim to quiet title, plaintiff alleged that the bank engaged in conduct intentionally designed to preclude her from entering into a loan modification agreement or settlement as needed to maintain possession of her home. Plaintiff also alleged that the bank foreclosed on the property without allowing plaintiff to modify the loan. Fraud, accident, mistake, or some type of irregularity must be established in order to warrant setting aside a foreclosure sale. *Senters v Ottawa Savings Bank*, 443 Mich 45, 55-57; 503 NW2d 639 (1993); *Kubicki v Mtg Electronic Registration Sys*, 292 Mich App 287, 289; 807 NW2d 433 (2011); *Sweet Air Investment, Inc v Kenney*, 275 Mich App 492, 497; 739 NW2d 656 (2007); *Freeman v*

---

[2] The question whether a claim or defense is frivolous is evaluated at the time the claim or defense was raised. *In re Costs & Attorney Fees*, 250 Mich App 89, 94; 645 NW2d 697 (2002). The objective of sanctions "is to deter parties and attorneys from filing documents or asserting claims and defenses that have not been sufficiently investigated and researched or that are intended to serve an improper purpose." *FMB-First Mich Bank v Bailey*, 232 Mich App 711, 723; 591 NW2d 676 (1998). Sanction provisions should not be construed in a manner that has a chilling effect on advocacy, that prevents a party from bringing a difficult case, or that penalizes a party whose claim initially appears viable but later becomes unpersuasive. *Louya v William Beaumont Hosp*, 190 Mich App 151, 163; 475 NW2d 434 (1991). With respect to MCR 2.114 and MCL 600.2591, "[n]ot every error in legal analysis constitutes a frivolous position" and "merely because this Court concludes that a legal position asserted by a party should be rejected does not mean that the party was acting frivolously in advocating its position[,]" especially in regard to legal issues that are complex and not easily resolved. *Kitchen*, 465 Mich at 662-663.

Wozniak, 241 Mich App 633, 637-638; 617 NW2d 46 (2000). Setting aside the foreclosure sale would be the only mechanism by which title could even conceptually be quieted in plaintiff's favor. In her response to the bank's motion for summary disposition relative to the quiet title count, plaintiff simply argued that fraud, accident, or mistake occurred where she was misled to believe that the sheriff's sale would not take place pending the outcome of the loan modification process. Plaintiff did not provide any details regarding how she was supposedly misled, nor did she provide any supporting documentary evidence necessary to create a genuine issue of material fact on the matter. Moreover, the bank's documentary evidence revealed that the bank made efforts to work with plaintiff and that, as of July 2011, plaintiff did not "want to participate in the workout." The legal notices provided by the bank plainly reflected that the bank was going to pursue the foreclosure sale. There was no evidence of fraud, mistake, accident, or any other irregularity.

Further, with respect to plaintiff's claim in the quiet title count that the bank foreclosed without allowing her to modify the loan, it is true that MCL 600.3205c provides a formula and criteria for a loan modification program whereby, if the borrower was eligible upon making the calculations under the formula and criteria, the lender was required to change course and initiate *judicial* proceedings for foreclosure under MCL 600.3101 *et seq.* MCL 600.3205c(1) and (6). If the borrower was not eligible upon making the calculations under the criteria and formula, the lender could proceed with foreclosure by advertisement. MCL 600.3205c(6). And even if the borrower were eligible, foreclosure by advertisement could nonetheless continue if the borrower failed to execute or return the associated modification agreement within 14 days of receipt. MCL 600.3205c(7). With respect to the criteria and formula of the statutory modification program referenced above, it targeted "a ratio of the borrower's housing-related debt to the borrower's gross income of 38% or less, on an aggregate basis," as calculated after contemplation of various features, such as an interest rate reduction, an extension of the amortization period, deferral of a portion of the unpaid principal balance, and/or the reduction or elimination of late fees, all within specified limits. MCL 600.3205c(1)(a) and (b). Here, in the letters sent to plaintiff by the bank, it was indicated that her package was incomplete, she did not meet investor requirements, she had "[e]xcessive obligations in relation to income," and that she did not "want to participate." It therefore appears that the bank fully complied with MCL 600.3205c, but modification could not be accomplished under the statute. And, importantly, plaintiff submitted no evidence to the contrary.

With respect to the unjust enrichment count, plaintiff made the same frivolous claims as found in her quiet title count. In her response to the bank's motion for summary disposition relative to the unjust enrichment claim, plaintiff simply argued that the bank now held title to the property and plaintiff was left with nothing, which was unfair. In order to sustain the claim of unjust enrichment, a plaintiff must establish: (1) the receipt of a benefit by the defendant from the plaintiff, and (2) an inequity resulting to the plaintiff because of the retention of the benefit by the defendant. *Belle Isle Grill Corp v Detroit*, 256 Mich App 463, 478; 666 NW2d 271 (2003). If shown, the law will imply a contract in order to prevent unjust enrichment. *Id.* However, a contract will only be implied if there was no express contract covering the same subject matter. *Id.* Here, the parties' relationship was governed by a promissory note and the mortgage, i.e., express contracts, and the mortgage provided the bank with the authority to foreclose upon default. Therefore, the unjust enrichment claim was entirely untenable.

Furthermore, there was no inequity, and if an unjust enrichment claim was sustainable under these circumstances, legitimate foreclosures would have to come to a screeching halt.

With respect to the count alleging breach of implied agreement and specific performance, plaintiff asserted that after the sheriff's sale, she attempted in good faith to continue with the loan modification process to no avail, that the redemption period had expired,[3] that she had superior title given the other counts, and that the bank was therefore required to continue to negotiate a loan modification. In response to the bank's motion for summary disposition relative to this count, plaintiff, making arguments under theories of breach of implied contract, promissory estoppel, misrepresentation, and fraud, claimed that the bank made representations and promises that the sheriff's sale would be adjourned to accommodate loan modification negotiations. First, plaintiff provided no evidentiary support whatsoever for her claim that representations and promises were made to adjourn the sheriff's sale. Second, the bank's documentary evidence contradicts her claim. Third, assuming that the alleged promises or representations were oral in nature, any action based on the promises and representations would be barred by the statute of frauds. See MCL 566.132(2)(c) (action against a financial institution cannot be maintained to enforce a promise or commitment to waive a loan provision or to make a financial accommodation unless the promise or commitment was in writing and signed by an authorized agent of the institution); *Crown Technology Park v D & N Bank, FSB*, 242 Mich App 538, 548-553; 619 NW2d 66 (2000) (statutory provision bars all actions, even one based on promissory estoppel). In sum, there was no legal or evidentiary support for the count alleging breach of implied agreement and specific performance.

Finally, with respect to the count alleging failure to comply with MCL 600.3205c, we have already ruled above, in the context of our discussion of the quiet title count, that said claim lacked merit.

In summation, plaintiff's pleadings were not well grounded in fact and were not warranted by existing law or a good-faith argument for the extension, modification, or reversal of existing law. MCR 2.114(D)(2). Further, the pleadings were clearly imposed to cause unnecessary delay. MCR 2.114(D)(3). Plaintiff's failure to provide any supporting documentation for her claims is the best indication that this lawsuit was entirely lacking in merit. We reverse the trial court's denial of the bank's request for sanctions and remand for entry of an award of reasonable attorney fees pursuant to MCR 2.114(E). Given the bank's argument below that limited the sanction request to plaintiff's counsel, on remand the sanctions are to be imposed solely against plaintiff's counsel, as permitted by MCR 2.114(E).

[3] We note that the redemption period had not yet expired on the date the complaint was filed; it expired six days later.

Affirmed as to the summary disposition ruling in light of this Court's order dismissing plaintiff's appeal for failure to submit a brief, affirmed in regard to the denial of sanctions against plaintiff herself, reversed with respect to the denial of sanctions against plaintiff's counsel, and remanded for proceedings to enter an award of reasonable attorney fees against plaintiff's attorney. We do not retain jurisdiction. Having fully prevailed on appeal, the bank is awarded taxable costs pursuant to MCR 7.219.

/s/ William B. Murphy
/s/ Michael J. Kelly
/s/ Amy Ronayne Krause