

STATE OF MICHIGAN
COURT OF APPEALS

SPARTAN DISTRIBUTORS, INC,
Plaintiff-Appellant,

UNPUBLISHED
May 17, 2011

v

GOLF COAST INTERNATIONAL, L.L.C.,
Defendant-Appellee.

No. 295408
Montmorency Circuit Court
LC No. 09-002278-CH

Before: HOEKSTRA, P.J., and MURRAY and M.J. KELLY, JJ.

PER CURIAM.

Plaintiff appeals as of right the circuit court's order denying its motion for summary disposition and granting defendant's motion for the same. We affirm.

I. BACKGROUND

The undisputed facts of this litigation involve a parcel of real property in Avery Township and certain mortgages related to that property. The relevant chain of events stretches back to 2004 when Birch Falls Development, L.L.C., began implementing plans to construct a golf course and housing development on that property. To finance this venture, Birch Falls took out two mortgages on the property – the first with RAF Consulting, L.L.C., and the second with Community Financial Members Credit Union. Plaintiff and several other entities also provided construction materials for the project secured by a construction lien.

By 2005, Birch Falls was unable to meet its financial obligations, and the aforementioned creditors filed foreclosure actions. These actions ultimately concluded in a settlement agreement in which several creditors received payments and the remaining lien-holders, including plaintiff, accepted deferred payments secured by yet another mortgage against the property. As further consideration for the settlement, RAF Consulting agreed to subordinate its first mortgage to that held by plaintiff thereby elevating plaintiff's mortgage to second in priority behind the Credit Union mortgage.

Shortly after its formation in early January 2008, defendant obtained assignment of the Credit Union mortgage, which as previously noted, was now first in priority. Defendant proceeded to foreclose on the property, which it purchased at the foreclosure sale of August 21, 2008, for \$142,701.48. On August 29, 2008, defendant recorded its Affidavit of Purchaser indicating that the last date to redeem the property was on February 21, 2009 – six months from

the date of purchase. The Affidavit of Purchaser listed Jamie K. Shafer of defendant's law firm (Even & Franks, P.L.L.C.) as the designee responsible to assist an appropriate person in calculating the amount required for redemption.

The following summer, June 2009, plaintiff's counsel contacted Mr. Kevin Even, an attorney at defendant's law firm, requesting a payoff letter indicating the foreclosure amount and additional expenses to redeem the mortgage. Even initially responded that an Affidavit of Abandonment filed on August 14, 2008, had reduced the redemption period to 30 days. However, after plaintiff's counsel insisted that the 30-day redemption period applied only to abandoned residential property,¹ Even shifted to arguing that the six-month redemption period pertaining to commercial property was applicable and had expired on February 21, 2009.² Plaintiff maintained that the redemption period was one year, expiring on August 21, 2009.³

On August 18, 2009, plaintiff filed its initial complaint alleging slander of title, and seeking both a declaration that it had the right to redeem the property and an emergency restraining order to enjoin the expiration of the redemption period. After the court denied injunctive relief, plaintiff amended its complaint, adding a count of unjust enrichment and requesting the court to enjoin the redemption period pending adjudication. Defendant filed its answer in due course, and both parties file cross motions for summary disposition.

Defendant argued that, regardless the redemption period, the suit should be dismissed and sanctions awarded because plaintiff failed to timely exercise its exclusive remedy at law to redeem its interest in the property, and because the facts failed to satisfy the elements of slander of title and unjust enrichment. Plaintiff countered that it had a right to redeem the property where the redemption period was one year and defendant had intentionally withheld the redemption price. Additionally, plaintiff argued that the Affidavit of Abandonment constituted slander of title and that defendant was unjustly enriched given that plaintiff had provided construction materials increasing the value of the property. Dispensing with oral argument, the court issued a 12-page opinion and order on November 16, 2009, denying plaintiff's motion for summary disposition and granting defendant's (with the exception of sanctions).

In its opinion, the court initially rejected plaintiff's primary argument for declaratory relief, citing plaintiff's "lack of diligence in vindicating its own rights" as foreclosing this equitable remedy. Specifically, the court explained that regardless of the "intransigence" of defendant's counsel, the Affidavit of Purchaser provided sufficient information from which plaintiff could calculate and tender the payoff amount. The court also dismissed plaintiff's claims of slander of title and unjust enrichment, and additionally declined to enjoin the redemption period. Regarding slander of title, the court found that in failing to allege damages or prejudice flowing from the filing of the Affidavit of Abandonment, plaintiff had failed to state

¹ See MCL 600.3240(11); MCL 600.3241a.

² See MCL 600.3240(7).

³ See MCL 600.3240(12).

a claim upon which relief could be granted. As for unjust enrichment, the court noted defendant had received no contractual benefit from plaintiff. With respect to the injunction request, the court explained that because such relief was personal in nature, a trial court

sitting as a court of equity, has no more authority to enjoin the redemption period from expiring than it has to enjoin a person's birthday from arriving, or a loaf of bread from going stale. Who would the [c]ourt have held in contempt for violating the decree? The date of August 21, 2009?

Despite these rulings, the court declined to award sanctions because plaintiff's request for declaratory relief was not baseless and the behavior of counsel for both parties—especially defendant's—was “curious.”

The instant appeal ensued.

II. ANALYSIS

A. REDEMPTION

On appeal, plaintiff maintains that the court erred in failing to declare that it was entitled to a redemption period of one year and in failing to enjoin the redemption period from expiring. We review de novo an order granting a motion for summary disposition pursuant to MCR 2.116(C)(10). *Dressel v Ameribank*, 468 Mich 557, 561; 664 NW2d 151 (2003). A motion for summary disposition pursuant to MCR 2.116(C)(10) should be granted when the moving party is entitled to judgment as a matter of law because there is no genuine issue of material fact. *Maiden v Rozwood*, 461 Mich 109, 120; 597 NW2d 817 (1999). A genuine issue of material fact exists when reasonable minds could differ after drawing reasonable inferences from the record. *West v Gen Motors Corp*, 469 Mich 177, 183; 665 NW2d 468 (2003). In reviewing this issue, the Court must consider the pleadings, affidavits, depositions, admissions, and other documentary evidence and construe them in a light most favorable to the nonmoving party. *Corley v Detroit Bd of Ed*, 470 Mich 274, 278; 681 NW2d 342 (2004). Additionally, we review issues of statutory interpretation as well as a court's decision to deny equitable relief de novo. *Gilliam v Hi-Temp Products, Inc*, 260 Mich App 98, 108; 677 NW2d 856 (2003); *Olsen v Porter*, 213 Mich App 25, 28; 539 NW2d 523 (1995).

The procedure governing the redemption of property following a foreclosure sale is set forth in MCL 600.3240. In order to redeem property from a mortgage foreclosure sale under § 3240, “plaintiff must pay the bid price plus interest, and any amount for taxes and insurance that the purchaser has properly filed with the register of deeds.” *Senters v Ottawa Saving Bank, FSB*, 443 Mich 45, 50; 503 NW2d (1993); MCL 600.3240(1), (2), (4). This sum must be paid to the purchaser, his representative or assigns, or the register of deeds. MCL 600.3240(1). The deadline for when a mortgagor must tender payment depends upon the type of property to be redeemed. MCL 600.3240(1), (7), (11), (12).

According to plaintiff, because the property is recreational, it does not fall under any enumerated category of property under § 3240, and the one-year catch-all redemption period of § 3240(12) is applicable.⁴ However, like the trial court, we find the actual deadline for redemption irrelevant, for plaintiff failed to tender *any* redemption payment even within the one-year deadline. Indeed, to preserve a statutory right to redemption, payment of the redemption amount must be tendered before the statutory redemption period ends; otherwise, the right to redeem becomes extinct, and absent a showing of fraud or irregularity, absolute title vests in the purchaser at the foreclosure sale. *Strempek v First National Bank-Detroit*, 293 Mich 435, 437; 292 NW2d 358 (1940); *Gerasimos v Continental Bank*, 237 Mich 513, 519-520; 212 NW 71 (1927); *Schulthies v Barron*, 16 Mich App 246, 247-248; 167 NW2d 784 (1969). Consequently, by failing to tender the required redemption payment, plaintiff has forfeited its right to redemption.

Plaintiff counters that it could not determine the redemption price (and accordingly tender payment) because the Affidavit of Purchaser did not contain additional statutory redemption costs under § 3240(4), which were known only to defendant, such as insurance premiums or special assessments. Section 3240(4) provides, however, that these additional statutory costs may be assessed *only* if the purchaser files, *inter alia*, an affidavit and receipts detailing these costs. Notably, the record does not reveal that such additional documentation was filed. Consequently, even though defendant listed a designee as permitted under § 3240(2) to assist in calculating the redemption amount, plaintiff can point to no documentary evidence revealing costs that could not be calculated from the face of the Affidavit of Purchaser filed with the register of deeds. More importantly, even if additional costs existed as the Affidavit of Purchaser implied, they would not be included in the redemption price since defendant filed no documentation detailing these costs as required under § 3240(4). Indeed, plaintiff is responsible only for payment of costs “that the purchaser has properly filed with the register of deeds.” *Senters*, 443 Mich at 50. Therefore, plaintiff’s claim that it could not determine the actual redemption amount without defendant’s assistance – let alone that tendering payment would have been futile – is without merit.⁵

⁴ Defendant initially claimed below that the redemption period was six months because the property was commercial. See MCL 600.3240(7). However, plaintiff presented evidence that the property was zoned as recreational, and defendant does not dispute plaintiff’s claim of a one-year redemption period on appeal.

⁵ We note that plaintiff’s claim of futility rests on the alleged “intransigence” of defendant’s law firm in response to plaintiff’s inquiries regarding the redemption amount. Whether defendant’s law firm obstructed plaintiff’s attempt to calculate the redemption amount, however, goes to whether there was fraud or an irregularity rather than futility. See *Flynn v Korneffel*, 451 Mich 186, 200; 547 NW2d 249 (1996). In any event, unlike the cases plaintiff cites, defendant in this case did not prevent plaintiff from calculating the redemption amount or refuse to accept a tendered payment. See *Williamson v Pruitt* 2 So3d 862, 867 (Ala Civ App, 2008); *Ross v Edwards*, 541 So2d 507, 510 (Ala, 1989); *Wilson v Crimmins*, 172 Or 616, 622; 143 P2d 665

Despite its failing to calculate redemption costs, plaintiff maintains that defendant's intentional withholding of the redemption price and failure to cooperate with plaintiff's attempt to ascertain this figure rose to a level of fraud or irregularity necessitating equitable relief. *Schulthies*, 16 Mich App at 247-248. On this score, plaintiff first alleges that defendant "attempted to avoid Spartan's payment in every way." However, the record is devoid of any evidence that plaintiff even attempted to tender payment, let alone that defendant avoided such a tender. That defense counsel allegedly twice misstated the period of redemption may reveal gross ignorance, but it certainly does not reveal fraud. See *Flynn v Korneffel*, 451 Mich 186, 200; 547 NW2d 249 (1996) (finding a purchaser's refusal to accept the redemption payment the "archetypal case of fraud," which must be proven by clear and convincing evidence).

Additionally, we find plaintiff's argument that defendant "let the matter 'drag along until the time for redemption expired,'" see *Brown v Burney*, 128 Mich 205, 208; 87 NW 221 (1901), disingenuous at best since plaintiff's letters to defense counsel reveal plaintiff's own awareness of a dispute as to the deadline for redemption. In other words, plaintiff's letters reveal plaintiff did not rely upon the information defense counsel was providing concerning the length of the redemption period. And since plaintiff could have independently calculated the redemption payment, plaintiff could have tendered a payment and preserved its right to redemption. Equitable relief is not an appropriate remedy where a party's failure to preserve its statutory right of redemption is wholly attributable to its own lack of reasonable diligence. *Spoon-Shacket Co, Inc v Oakland Co*, 356 Mich 151, 165; 97 NW2d 25 (1959); see also *Mettler Walloon, LLC v Melrose Twp*, 281 Mich App 184, 221; 761 NW2d 293 (2008) (declaratory relief is an equitable remedy). For these reasons, the court did not err in declining to grant declaratory relief or in declining to extend the redemption period.

B. SLANDER OF TITLE

Plaintiff next argues that when defendant filed and then subsequently failed to correct its Affidavit of Abandonment after conceding that the 30-day redemption period of abandoned residential property was inapplicable, it committed slander of title. The trial court dismissed this claim under MCR 2.116(C)(8) for failure to allege damages. We review de novo an order granting a motion for summary disposition under MCR 2.116(C)(8). *Henry v Dow Chemical Co*, 473 Mich 63, 71; 701 NW2d 684 (2005). A motion under subrule (C)(8) tests the legal sufficiency of the complaint based on the pleadings alone "to determine whether the claim is so clearly unenforceable as a matter of law that no factual development could establish the claim and justify recovery." *Smith v Stolberg*, 231 Mich App 256, 258; 586 NW2d 103 (1998).

Slander of title claims in Michigan have both a common law and statutory basis. *B & B Investment Group v Gitler*, 229 Mich App 1, 8; 581 NW2d 17 (1998); MCL 565.108. Under either theory, a plaintiff must show falsity, malice, and special (or pecuniary) damages, i.e., "that the defendant maliciously published false statements that disparaged a plaintiff's right in property, causing special damages". *Id.* "Special damages' are those which actually, but not

(1943); *Brown v Lawton*, 87 Me 83; 32 A 733, 735 (1894). Simply put, the ability to preserve redemption rights was wholly within plaintiff's power irrespective of the behavior of defendant. Declaratory relief was not appropriate.

necessarily, result from an alleged injury[.]" *Patten Corp v Canadian Lakes Development Corp*, 788 F Supp 975, 979 (WD Mich, 1991), and include litigation costs as well as reasonable attorney fees, *B & B Investment Group*, 229 Mich App at 9, 13-14. Here, although plaintiff fails to specify whether this allegation is based in common law or statute, the first amended complaint clearly requests "attorney fees incurred in bringing this matter before the Court." Thus, the complaint on its face sufficiently alleged damages.

However, applying the (C)(10) standard, we conclude that affirmance is warranted on alternate grounds because plaintiff has not shown malice.⁶ *Gleason v Dep't of Transp*, 256 Mich App 1, 3; 662 NW2d 822 (2003) ("A trial court's ruling may be upheld on appeal where the right result issued, albeit for the wrong reason"). For starters, plaintiff cites no evidence supporting its assertion that defendant intentionally filed the Affidavit of Abandonment to delay the redemption process, which in any event plaintiff did not commence until almost ten months *after* the Affidavit was filed. Notably, the provision under which defendant filed the Affidavit would permit *only* a 30-day window to redeem the property. See MCL 600.3240(11); MCL 600.3241a. When this is considered in conjunction with the fact that defendant filed the Affidavit ten months before plaintiff inquired about redemption, we are hard pressed to find that the affidavit was maliciously filed as a dilatory tactic. *Glieberman v Fine*, 248 Mich 8, 12; 226 NW 669 (1929) (express malice is a "desire or intention to injure"; implied malice is "a wrongful act, done intentionally, without just cause or excuse.")

Moreover, the fact that defendant failed to correct the Affidavit of Abandonment after changing its position with respect to the period of redemption is of no consequence. Indeed, once defendant conceded that the redemption period was not 30 days, the existence of the Affidavit of Abandonment became irrelevant for purposes of calculating the redemption period. Thus, the failure to correct the Affidavit of Abandonment also does not show malice. The court was correct to dismiss this claim.

C. UNJUST ENRICHMENT

This brings us to plaintiff's final argument that the court erred in dismissing its unjust enrichment claim on the ground that there was no bilateral activity between the parties. Instead, plaintiff contends, defendant was unjustly enriched when it purchased the property improved by materials that plaintiff had provided. As it appears the trial court looked outside the pleadings in rendering its decision, review is appropriate under the standard set forth for subrule (C)(10). "[W]hether a claim for unjust enrichment can be maintained is a question of law, which we

⁶ Contrary to defendant's argument, it appears the element of falsity was satisfied. Specifically, the Affidavit of Abandonment alleged the property was abandoned as provided in MCL 600.3241a. That provision, however, applies exclusively to residential property, and defendant later conceded that § 3241a was inapplicable. Thus, the Affidavit on its face contained a false assertion. Nonetheless, for the reasons stated *infra*, plaintiff's claim fails for failure to demonstrate malice.

review de novo.” *Morris Pumps v Centerline Piping, Inc*, 273 Mich App 187, 193; 729 NW2d 898 (2006).

The elements of unjust enrichment or quantum meruit are: “(1) the receipt of a benefit by defendant from plaintiff, and (2) an inequity resulting to plaintiff because of the retention of the benefit by defendant.” *Belle Isle Grill Corp v Detroit*, 256 Mich App 463, 478; 666 NW2d 271 (2003). When such elements exist, “the law operates to imply a contract in order to prevent unjust enrichment.” *Barber v SMH (US), Inc*, 202 Mich App 366, 375; 509 NW2d 791 (1993).

Because a claim for unjust enrichment sounds in equity, relief for unjust enrichment is appropriate in a statutory foreclosure action only if a plaintiff can show fraud or some other irregularity. *Tkachik v Mandeville*, 487 Mich 38, 47-48; 790 NW2d 260 (2010); *Senters*, 443 Mich at 55. As previously noted, plaintiff has failed to establish fraud or other irregularity. Therefore, plaintiff cannot maintain a claim of unjust enrichment.

Additionally, even if an equitable remedy were available, plaintiff failed to show that it conferred a benefit on defendant where defendant acquired its initial interest in the property by assignment from Community Financial Members Credit Union, and not plaintiff. But even considering, as plaintiff argues, that a plaintiff may recover in quantum meruit from a third party, there is no evidence that defendant in any way requested the benefit or misled plaintiff. See *Morris Pumps*, 273 Mich App at 196. Thus, recovery against a third party is not warranted under the circumstances of this case. The court did not error in dismissing plaintiff’s claim of unjust enrichment.⁷

Affirmed.

Defendant may tax costs having prevailed in full. MCR 7.219(A).

/s/ Joel P. Hoekstra
/s/ Christopher M. Murray
/s/ Michael J. Kelly

⁷ We decline to address defendant’s argument that plaintiff contractually extinguished its unjust enrichment claim which it had previously asserted against Birch Falls. Defendant failed to make this argument below and can point to no documentary evidence in the record memorializing this agreement.