STATE OF MICHIGAN

COURT OF APPEALS

RUFUS CHAPPELL, III, and ARNITA CHAPPELL,

Plaintiffs-Appellants,

v

DEUTSCHE BANK NATIONAL TRUST,

Defendant,

and

MORTGAGE ELECTRONIC REGISTRATION SYSTEMS, INC.,

Defendant-Appellee,

UNPUBLISHED
April 2, 2013

No. 308043
Oakland Circuit Court
LC No. 2011-117664-CH

Before: MURPHY, C.J., and O'CONNELL and BECKERING, JJ.

PER CURIAM.

Plaintiffs Rufus and Arnita Chappell appeal as of right the trial court's order granting summary disposition in favor of defendants Deutsche Bank National Trust and Mortgage Electronic Registration Systems, Inc. (MERS), pursuant to MCR 2.116(C)(8). MERS initiated a foreclosure by advertisement with respect to plaintiffs' residence following their default on a promissory note and mortgage. MERS subsequently purchased the home at a sheriff's sale, and on the day of the sale, MERS quitclaimed the property to defendant Deutsche Bank. In this action, plaintiffs challenge the validity of the foreclosure proceedings. We affirm.

I. BACKGROUND

As reflected in a recorded special warranty deed, on January 8, 2004, MERS conveyed a condominium unit located in Southfield (hereafter "the property") to plaintiffs for $286,000. On October 15, 2004, plaintiffs executed a promissory note in the amount of $315,200, payable over 30 years. WMC Mortgage Corporation was the lender. Plaintiffs provided security for the note by granting a mortgage on the property. The mortgage was recorded on October 27, 2004, by the Oakland County Register of Deeds. The mortgage identified MERS as the lender's nominee and as the mortgagee. The mortgage further provided that "MERS . . . has an address . . . of P.O.

Box 2026, Flint, MI 48501-2026." In a MERS Policy Bulletin dated August 27, 2002, which was addressed to all members of MERS, there was a general discussion regarding MERS' status as assignee of mortgage liens. The policy bulletin then provided:

> Additionally, for any assignments in the following New York Counties (Suffolk, Nassau, Dutchess and Westchester), please use the MERS Corporate address in lieu of the Post Office Box in Flint, Michigan. We have been informed that a post office box cannot be used as the assignee's address in those counties. Therefore use 1595 Spring Hill Road, Suite 310, Vienna, VA 22182. Do not use this address for any other States or Counties.

MCL 565.201 currently provides in relevant part, and did so at the time the mortgage was executed, as follows:

> (1) An instrument executed after October 29, 1937[,] by which the title to or any interest in real estate is conveyed, assigned, *encumbered*, or otherwise disposed of shall not be received for record by the register of deeds of any county of this state unless that instrument complies with each of the following requirements:
>
> . . .
>
> (d) The address of each of the grantees in each *deed of conveyance* or assignment of real estate, including the street number address if located within territory where street number addresses are in common use, or, if not, the post office address, is legibly printed, typewritten, or stamped on the instrument. [Emphasis added.]

Plaintiffs' position in this lawsuit is that MERS, as of the date of the mortgage, had a street number address – 1595 Spring Hill Road, Suite 310, Vienna, VA 22182 – in a territory where street number addresses were in common use.[1] MERS has not made a factual claim to the contrary. We shall return to a detailed discussion of MCL 565.201 below.

[1] Plaintiffs filed various documents in the lower court in connection with the street address issue under MCL 565.201(1)(d). Plaintiffs submitted Internet advertisements of a Comfort Inn and an office building, The Concourse, which included street address numbers located on Springhill Rd., Vienna, Va., near the MERS address referenced in the policy bulletin, ostensibly to show that street number addresses are in common use in the area. In a March 2008 policy bulletin, MERS informed members that its corporate office was moving to Reston, Va., and that the address for certain service of process was 1901 E. Voorhees Street, Suite C, Danville, IL 61834, which address should also "be used for recorded documents that require a street address." In a May 2008 policy bulletin, MERS informed members to use the Danville street address, along with a post office box address, for MERS documents in Pennsylvania that require a certificate of residence statement, thereby joining New York and Indiana in the mandate. The bulletin then

Sometime after the mortgage was executed and recorded, plaintiffs fell behind in their mortgage payments. The mortgage contained a power-of-sale clause, allowing for acceleration of the debt and foreclosure by advertisement upon default. According to affidavits of publication and posting prepared in May of 2009, plaintiffs were in default of the mortgage, the accelerated amount owing was $375,108, and a sheriff's sale had been scheduled. MERS purchased the property for $85,000 at the sheriff's sale, which was held on July 28, 2009. Pursuant to a quitclaim deed executed on July 28, 2009, MERS conveyed the property to defendant Deutsche Bank. The sheriff's deed was recorded on August 6, 2009, and the quitclaim deed was recorded on August 18, 2009. As set forth in the evidence of sale (affidavit of auctioneer), the last day for plaintiffs to redeem the property was January 28, 2010, subject to change if required by applicable law. The property was not redeemed by plaintiffs during the redemption period.

According to plaintiffs' pleadings, defendant Deutsche Bank commenced a summary proceedings action in the district court pursuant to MCL 600.5701 *et seq.*, seeking to evict plaintiffs from the property. Pursuant to a district court order dated March 3, 2010, plaintiffs were required to start making escrow rental payments to the court in the amount of $750 per month. On March 16, 2011, plaintiffs filed their complaint in the circuit (trial) court, along with a motion for a preliminary injunction. A stipulated order for a preliminary injunction entered by the trial court provided that until further order of the court or until plaintiffs failed to make a timely payment for the benefit of Deutsche Bank in accordance with the district court's escrow order, Deutsche Bank and MERS could not proceed with any eviction action.

Plaintiffs alleged in count 1 of their two-count complaint that Deutsche Bank became the assignee of the mortgage in fact and law under the quitclaim deed at the time of the foreclosure sale, and because Deutsche Bank continued the sale in the name of MERS "instead of advertising anew as the assignee and in its own name, the mortgage foreclosure sale . . . was . . . irregular and void." Subsequently, however, plaintiffs stipulated to the dismissal of this count, as they were unable to discover evidence supporting the theory outlined in count 1.

In count II of plaintiffs' complaint, they alleged that MERS listed a post office box number for its address in the mortgage, that a mortgage constitutes a "deed of conveyance" and an instrument encumbering real estate, thereby implicating MCL 565.201(1)(d), that MCL 565.201(1)(d) required MERS to list a street address in the mortgage, which was not accomplished, that MCL 600.3204(1)(c) requires that a mortgage be "properly recorded" as a prerequisite to foreclosing on a property by advertisement, and that the mortgage was not properly recorded given the failure by MERS to supply a street number address in the mortgage. We note that MCL 600.3204(1)(c) provides that "a party may foreclose a mortgage by advertisement if all of the following circumstances exist: . . . The mortgage containing the power of sale has been properly recorded." Plaintiffs asserted that because the mortgage was not properly recorded due to the fact that MERS only identified a post office address in the

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provided, with respect to all other states, "continue to use the post office box solely as the MERS address on MERS documents." In a September 2010 policy bulletin, MERS informed members that the Danville street address should be used for all recorded documents requiring a street address.

mortgage, the trial court should declare the sheriff's sale and foreclosure proceedings void *ab initio*.

As part of the allegations forming count II of plaintiffs' complaint, they acknowledged the language in MCL 565.201(4), which provides that "[a]ny instrument received and recorded by a register of deeds shall be *conclusively presumed* to comply with this act." (Emphasis added.) Plaintiffs alleged that the conclusive presumption in MCL 565.201(4) violates the separation of powers doctrine set forth in Const 1963, art 3, § 2, which provides that "[t]he powers of government are divided into three branches; legislative, executive and judicial[,]"and that "[n]o person exercising powers of one branch shall exercise powers properly belonging to another branch except as expressly provided in this constitution." Plaintiffs maintained in the complaint that the statutory presumption provision effectively delegates a judicial power to an executive office, the register of deeds.

In regard to the separation of powers argument, plaintiffs also posited that presumptions concern a question of evidence, that MRE 301 would govern over the statute, and that MRE 301 conflicts with the statutory conclusive presumption, where the presumption shifts the burden of proof to the party against whom it is directed.[2]

In the complaint, plaintiffs further alleged that the statutory conclusive presumption violates the Title-Object Clause of the Michigan Constitution, which provides that "[n]o law shall embrace more than one object, which shall be expressed in its title." Const 1963, art 4, § 24. Plaintiffs asserted that the conclusive presumption, an evidentiary mechanism, belongs in the Revised Judicature Act (RJA), MCL 600.101 *et seq.*, instead of Chapter 565 and the act governing recording requirements, 1937 PA 103; MCL 565.201 *et seq*.

Defendants filed a motion for summary disposition pursuant to MCR 2.116(C)(8) and (10). Defendants argued that the mortgage's reference to a post office address did not invalidate the security interest, nor impact the manner in which the mortgage could be foreclosed. In support of this proposition, defendants cited the conclusive presumption provision found in MCL 565.201(4), asserting that once the mortgage was accepted and recorded by the register of deeds, the mortgage was deemed to be in compliance with the law. In cursory fashion, defendants maintained that plaintiffs' constitutional challenges to MCL 565.201(4) were confusing and unavailing. In a response to the motion, plaintiffs set forth all of the arguments contained in their

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[2] MRE 301 provides:

> In all civil actions and proceedings not otherwise provided for by statute or by these rules, a presumption imposes on the party against whom it is directed the burden of going forward with evidence to rebut or meet the presumption, but does not shift to such party the burden of proof in the sense of the risk of nonpersuasion, which remains throughout the trial upon the party on whom it was originally cast.

complaint, including the claims in regard to the constitutionality of MCL 565.201(4). Plaintiffs additionally argued that MCL 565.201(4) violated constitutional due process principles. They cited United States Supreme Court cases which indicated that irrebuttable or conclusive presumptions offend the Due Process Clause, where there are practicable and reasonable means to prove the pertinent facts associated with the presumption, and where the presumption is not universally or necessarily true. See e.g., *Vlandis v Kline*, 412 US 441; 93 S Ct 2230; 37 L Ed 2d 63 (1973).

After a hearing on defendants' motion for summary disposition, in which the trial court took the matter under advisement, the court issued a one-page opinion and order granting the motion under MCR 2.116(C)(8). The full extent of the trial court's reasoning and analysis was as follows:

> Plaintiffs argue that pursuant to the Michigan Recording Statute, MCL 565.201(1)(d), the recorded mortgage should be invalidated because MERS used a PO Box rather than a street address. Having considered the merits and being fully advised in the premises, the Court finds that summary disposition is appropriate because Plaintiff[s] ha[ve] failed to state a valid claim. Once the mortgage was accepted for recording, it was presumptively presumed to be in compliance with MCL 565.201-203.

The trial court's ruling makes no mention of plaintiffs' constitutional arguments challenging the statutory conclusive presumption. Given the ruling, we can only imply that the court rejected the constitutional arguments, although some type of analysis or simply an acknowledgment of the arguments would have been appropriate.

II. ANALYSIS

A. STANDARD OF REVIEW AND MCR 2.116(C)(8) PRINCIPLES

A ruling on a motion for summary disposition is reviewed de novo on appeal. *Rowland v Washtenaw Co Rd Comm*, 477 Mich 197, 202; 731 NW2d 41 (2007). We also review de novo issues of statutory construction. *Id.*

MCR 2.116(C)(8) provides for summary disposition when a complaining party fails "to state a claim on which relief can be granted." A motion for summary disposition under MCR 2.116(C)(8) tests the legal sufficiency of a complaint. *Beaudrie v Henderson*, 465 Mich 124, 129; 631 NW2d 308 (2001). The trial court may only consider the pleadings in rendering its decision. *Id.* All factual allegations in the complaint must be accepted as true. *Dolan v Continental Airlines / Continental Express*, 454 Mich 373, 380-381; 563 NW2d 23 (1997). "The motion should be granted if no factual development could possibly justify recovery." *Beaudrie*, 465 Mich at 130.

B. PRINCIPLES OF STATUTORY CONSTRUCTION

This appeal concerns the construction and applicability of various statutory provisions. In *McCormick v Carrier*, 487 Mich 180, 191-192; 795 NW2d 517 (2010), our Supreme Court recited the controlling principles regarding statutory interpretation:

> The primary goal of statutory construction is to give effect to the Legislature's intent. This Court begins by reviewing the language of the statute, and, if the language is clear and unambiguous, it is presumed that the Legislature intended the meaning expressed in the statute. Judicial construction of an unambiguous statute is neither required nor permitted. When reviewing a statute, all non-technical words and phrases shall be construed and understood according to the common and approved usage of the language, MCL 8.3a, and, if a term is not defined in the statute, a court may consult a dictionary to aid it in this goal. A court should consider the plain meaning of a statute's words and their placement and purpose in the statutory scheme. Where the language used has been subject to judicial interpretation, the legislature is presumed to have used particular words in the sense in which they have been interpreted. [Citations and internal quotation marks omitted.]

C. DISCUSSION

Foreclosure by advertisement is governed by statute, MCL 600.3201 *et seq*. See *Kim v JPMorgan Chase Bank, NA*, __ Mich __; __ NW2d __, issued December 21, 2012 (Docket No. 144690), slip op at 5. In the event of a mortgage default, the mortgage may be foreclosed upon by advertisement and the mortgaged property sold at a sheriff's sale if the mortgage contained a power-of-sale clause. *Ruby & Assocs, PC v Shore Fin Servs*, 276 Mich App 110, 117; 741 NW2d 72 (2007), vacated in part on other grounds 480 Mich 1107 (2008). Upon a foreclosure sale, "the purchaser, including potentially the mortgagee, acquires a sheriff's deed." *Id.* As stated above, MCL 600.3204(1)(c) provides that "a party may foreclose a mortgage by advertisement if all of the following circumstances exist: . . . The mortgage containing the power of sale has been *properly recorded*." (Emphasis added.) A mortgagee cannot validly foreclose on a mortgage by advertisement unless the mortgage was entitled to be recorded and was indeed recorded. *Kim*, slip op at 6, quoting OAG, 2003-2004, No 7147, p 93 (January 9, 2004). Our Attorney General has stated that "[f]or a deed or instrument affecting title to be properly recorded, it is essential that it meet current statutory requirements." OAG, 2007-2008, No 7209, p 91 (October 4, 2007). In *Dohm v Haskin*, 88 Mich 144, 147; 50 NW 108 (1891), the Michigan Supreme Court ruled that a mortgage assignment executed in another state was "not entitled to record, and the register of deeds should have refused to record it[,]" where the assignment was purportedly acknowledged by a notary public, but there was no clerk certificate or other certification establishing that the person was indeed a notary public, as required by statute. Accordingly, to be "properly recorded," an instrument needs to be in compliance with statutory requirements.

Under MCL 565.201(1), an instrument by which an interest in real estate is encumbered, which clearly encompasses a mortgage, "shall not be recorded by the register of deeds" unless certain requirements are satisfied. Subsection (1)(d) of MCL 565.201 requires the inclusion of a

street number address of any grantee identified in a "deed of conveyance or assignment of real estate," but only if the grantee's address is "located within territory where street number addresses are in common use[.]" Again, MERS does not argue that the Spring Hill Rd. address in Vienna, Va., was not its corporate address at the time the mortgage was executed, nor does it argue that said address was not located within territory where street number addresses were in common use. Plaintiffs did submit documentary evidence somewhat supporting its factual position on the matter. It appears that MERS essentially concedes, for purposes of this litigation, that MCL 565.201(1)(d) is applicable and that the mortgage should have included the street number address in Virginia. With respect to MCL 565.201(1)(d), plaintiffs contend that the mortgage constituted a "deed of conveyance." The term "conveyance," as used in Chapter 565 governing conveyances, deeds, and mortgages, which includes MCL 565.201, "shall be construed to embrace every instrument in writing, by which any estate or interest in real estate is created, aliened, *mortgaged*, or assigned[.]" MCL 565.35 (emphasis added). Taking this definition into consideration in construing "deed of conveyance," plaintiffs maintain that MCL 565.201(1)(d) encompasses a deed of mortgage or a mortgage deed, which, as argued by plaintiffs, is defined in Black's Law Dictionary (7th ed) as an "instrument creating a mortgage." Citing MCL 565.35, this Court has stated that "[a] mortgage is clearly a conveyance within the meaning of the recording acts." *Ameriquest Mtg Co v Alton*, 273 Mich App 84, 93; 731 NW2d 99 (2006). In a different context, our Supreme Court once noted that it had regularly dealt with the issue of whether an instrument in the form of a "deed of conveyance" was intended to be an absolute deed or a mortgage. *Sheets v Huben*, 354 Mich 536, 540; 93 NW2d 168 (1958). Perhaps it can be said that a standard mortgage can always be coined a deed of conveyance, but a standard deed of conveyance, e.g., a warranty deed, is generally not treated as a mortgage, unless a contrary intent is established. However, for reasons that shall become clear later in this opinion, we ultimately find it unnecessary to definitively determine whether the mortgage here constituted a "deed of conveyance" for purposes of MCL 565.201(1)(d).[3] We shall proceed in our analysis as if the mortgage was a deed of conveyance, thereby requiring MERS to include a street number address in the mortgage, which it failed to do.

Despite the *assumed* failure by MERS to have the mortgage "properly recorded" due to a lack of compliance with MCL 565.201(1)(d) relative to a street number address, MCL 565.201(4) nevertheless provides that "[a]ny instrument received and recorded by a register of deeds shall be conclusively presumed to comply with this act." In other words, even if there was an actual failure to comply with MCL 565.201(1)(d), a conclusive presumption of compliance arose under MCL 565.201(4) because the mortgage was received and recorded by the register of deeds. MCL 565.201(4) formed the basis of the trial court's ruling, and it is the central theme of MERS' defense to plaintiffs' action and appeal. In reply, plaintiffs pose constitutional challenges to MCL 565.201(4), arguing that the provision violates the separation of powers doctrine, the Title-Object Clause of the Michigan Constitution, and due process principles. On the strength of language in our Supreme Court's recent opinion in *Kim*, slip op at 13-16, we conclude, for reasons explained in more detail below, that plaintiffs' lawsuit fails because any

[3] Plaintiffs have not argued that the mortgage qualified as an "assignment of real estate" under MCL 565.201(1)(d); therefore, we shall not explore that issue.

presumed address defect in the mortgage rendered the foreclosure proceedings voidable and not void *ab initio*, and no prejudice has been established that supports voiding the proceedings on the basis of the defect under the circumstances presented. Accordingly, even if plaintiffs' constitutional claims are valid, plaintiffs' action still fails. In general, "we will not reach constitutional issues that are not necessary to resolve a case." *Booth Newspapers, Inc v Univ of Mich Bd of Regents*, 444 Mich 211, 234; 507 NW2d 422 (1993). That said, we shall at least provide a cursory examination of the constitutional arguments given the trial court's failure to even expressly acknowledge them, especially considering that the separation of powers and title-object challenges are wholly lacking in merit.

Plaintiffs argue that MCL 565.201(4) violates the separation of powers doctrine, as it delegates a judicial power to the register of deeds. Plaintiffs contend that the statutory conclusive presumption concerns an evidentiary matter and that our Supreme Court alone has rule-making power, having complete authority on matters of practice and procedure under Const 1963, art 6, § 5, which provides that "[t]he supreme court shall by general rules establish, modify, amend and simplify the practice and procedure in all courts of this state." Plaintiffs assert that the conclusive presumption conflicts with MRE 301.

"The rules of practice and procedure include the rules of evidence." *Mumaw v Mumaw*, 124 Mich App 114, 120; 333 NW2d 599 (1983). A statutory rule of evidence violates Const 1963, art 6, § 5, only when no clear legislative policy reflecting considerations other than judicial dispatch of litigation are identifiable. *McDougall v Schanz*, 461 Mich 15, 30; 597 NW2d 148 (1999). Also, "the Legislature may enact statutory rules of evidence that do not conflict with the Michigan Rules of Evidence[.]" *People v McDonald*, 201 Mich App 270, 273; 505 NW2d 903 (1993); see also MRE 101 ("A statutory rule of evidence not in conflict with these rules or other rules adopted by the Supreme Court is effective until superseded by rule or decision of the Supreme Court."). Here, plaintiffs' argument fails upon simple examination of the introductory language in MRE 301, the presumption rule, which indicates that it is applicable in "all civil actions and proceedings *not otherwise provided for by statute* or by these rules." (Emphasis added.) MRE 301 embraces and expressly allows for statutory presumptions, and thus there can be no conflict between MRE 301 and MCL 565.201(4). Furthermore, there would appear to be reasons other than judicial dispatch of litigation behind the Legislature's enactment of MCL 565.201(4), e.g., finality in recording, placing the onus on a register of deeds to determine compliance before accepting an instrument.[4] We would also note that the Supreme Court has stated that a "conclusive presumption is actually a *substantive* rule of law," which further militates against a finding that MCL 565.201(4) creates a separation of powers problem. *Kidd v Gen Motors Corp*, 414 Mich 578, 588; 327 NW2d 265 (1982) (emphasis added). The statutory

[4] Plaintiffs' undeveloped argument that the statute allows a register of deeds to usurp the court's authority is meritless. A register of deeds simply has the power to receive, examine, and record real property instruments, which gives rise to the presumption crafted by the Legislature. While the decision by a register of deeds to accept an instrument for recording conclusively establishes the soundness of the instrument under the statute, as opposed to a decision made in a courtroom, there is no inherent judicial authority for a court to have a say on the matter.

language does not offend the separation of powers doctrine, and plaintiffs cite no relevant authority to the contrary.

Furthermore, MCL 565.201(4) does not violate the Title-Object Clause. In *Pohutski v City of Allen Park*, 465 Mich 675, 691; 641 NW2d 219 (2002), our Supreme Court made the following observations regarding a title-object challenge:

> This constitutional limitation ensures that legislators and the public receive proper notice of legislative content and prevents deceit and subterfuge. The goal of the clause is notice, not restriction of legislation. The "object" of a law is defined as its general purpose or aim. The "one object" provision must be construed reasonably, not in so narrow or technical a manner that the legislative intent is frustrated. We should not invalidate legislation simply because it contains more than one means of attaining its primary object; "[h]owever, if the act contains 'subjects diverse in their nature, and having no necessary connection,'" it violates the Title Object Clause. The act may include all matters germane to its object, as well as all provisions that directly relate to, carry out, and implement the principal object. [Citations omitted.]

The general purpose or aim of Chapter 565 is to set forth the law as it relates to real property conveyances, and more specifically, the recording requirements act, 1937 PA 103; MCL 565.201 *et seq*, provides in its title that it is "AN ACT to prescribe certain conditions relative to the execution of instruments entitled to be recorded in the office of the register of deeds." A provision that creates a presumption of statutory compliance with respect to real property instruments received and recorded by a register of deeds, i.e., MCL 565.201(4), has a necessary connection to real property conveyances and most certainly to conditions relative to the execution of instruments entitled to recordation by a register of deeds. The subject matters of MCL 565.201(4) and the recording requirements act are not diverse in nature. MCL 565.201(4) is germane to the recordation of real property instruments, it relates to such matters, and it is a tool that assists in carrying out and implementing the act.

In regard to the due process challenge, the United States Supreme Court in *Vlandis*, 412 US at 446, stated that "[s]tatutes creating permanent irrebuttable presumptions have long been disfavored under the Due Process Clauses of the Fifth and Fourteenth Amendments." A statute that creates a presumption that operates to deny a fair opportunity to rebut it can violate due process protections. *Id.* The Court indicated that a permanent and irrebuttable presumption can offend due process principles when the presumption is not necessarily and universally true, when there are alternative means of making a determination on the matter that is presumed, and when evidence countering or defeating the presumption is obtainable. *Id.* at 452.[5] Here, one can

[5] In *Van Slooten v Larsen*, 410 Mich 21, 51; 299 NW2d 704 (1980), the Court observed that "[a] statutory presumption violates due process if there is no rational connection between the facts established and the facts to be presumed." It would seem irrational, for example, to presume that a warranty deed lacking the name and signature of the grantor satisfied the statutory requirements simply because a register of deeds received and recorded the deed.

plausibly argue that the statutory conclusive presumption is not necessarily and universally true, that the determination of whether an instrument complies with the act can be made by alternate means, e.g., simple examination of an instrument, without the necessity of the presumption, and that evidence countering or defeating the presumption is obtainable. However, as indicated earlier, we decline to resolve whether MCL 565.201(4) violated plaintiffs' due process rights, as it is unnecessary to do so. We leave that question for another day.

Turning to *Kim*, the opening paragraph in the opinion provides a good overview of the case:

> At issue in this case is the manner in which defendant JPMorgan Chase Bank, N.A. (Chase), the successor in interest to Washington Mutual Bank (WaMu), acquired plaintiffs' mortgage. Plaintiffs' mortgage was among the assets held by WaMu when it collapsed in 2008 in the largest bank failure in American history. Specifically, we must determine whether defendant acquired plaintiffs' mortgage by "operation of law" and, if so, whether MCL 600.3204(3), which sets forth requirements for foreclosing by advertisement, applies to the acquisition of a mortgage by operation of law. We asked the parties to address whether, if the foreclosure proceedings that defendant initiated were flawed, the subsequent foreclosure is void *ab initio* or merely voidable.
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> We hold that defendant did not acquire plaintiffs' mortgage by operation of law. Rather, defendant acquired that mortgage through a voluntary purchase agreement. Accordingly, defendant was required to comply with the provisions of MCL 600.3204. We further hold, differently than did the Court of Appeals, that the foreclosure sale in this case was voidable rather than void *ab initio.* [*Kim*, slip op at 1-2 (footnotes omitted).]

The Supreme Court found that the defendant bank was required and failed to comply with MCL 600.3204(3), which provides that "[i]f 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." (Emphasis added.) This Court had rendered the same holding, but then ruled that the defendant bank's failure to record its mortgage interest prior to commencing foreclosure proceedings rendered the sheriff's sale void *ab initio*. *Kim*, slip op at 13. The Supreme Court, citing long-established precedent, rejected that aspect of this Court's ruling, stating:

> [W]e hold that defects or irregularities in a foreclosure proceeding result in a foreclosure that is voidable, not void *ab initio.* Because the Court of Appeals erred by holding to the contrary, we reverse that portion of its decision. We leave to the trial court the determination of whether, under the facts presented, the foreclosure sale of plaintiffs' property is voidable. *In this regard, to set aside the foreclosure sale, plaintiffs must show that they were prejudiced by defendant's failure to comply with MCL 600.3204.* To demonstrate such prejudice, they must

> show that they would have been in a better position to preserve their interest in the property absent defendant's noncompliance with the statute. [*Id.* at 15-16 (emphasis added).[6]]

Even the dissent in *Kim* noted its "agreement with the majority's reasoning . . . and conclusion that 'defects or irregularities in a foreclosure proceeding result in a foreclosure that is voidable, not void *ab initio*.'" *Id.*, dissent, slip op at 14 n 34.[7]

Here, at no stage of the litigation have plaintiffs suggested or even hinted that they were somehow prejudiced by MERS' assumed failure to comply with the "properly recorded" language in MCL 600.3204(1)(c), as it related to the use of a post office address instead of a street number address in the mortgage, MCL 565.201(1)(d). Plaintiffs have not claimed that they would have been in a better position to preserve their interest in the property had MERS used a street number address, nor is there any indication in the record that such was the case. There is no claim, nor indication in the record, that the lack of a street number address hampered plaintiffs' ability to contest the foreclosure or redeem the property; they had full notice of the proceedings by posting and publication. Indeed, as reflected in policy bulletins and for purposes of prospective communications, the Virginia street address for MERS at the time of the mortgage was no longer even its street address at the time the mortgage foreclosure proceedings were initiated, yet the post office address in Flint remained constant. Under these circumstances, there is no need to remand for further proceedings.[8]

III. CONCLUSION

Albeit for reasons different than those espoused by the trial court, we affirm the order granting summary disposition in favor of defendants. In sum, assuming a defect in the

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[6] "Void *ab initio*" means null from the beginning, whereas "voidable" is defined as valid until annulled, such as where a contract can be affirmed or rejected. *Kim*, slip op at 2 n 2.

[7] Plaintiffs place a great deal of reliance on our Supreme Court's decision in *Dohm*, 88 Mich 144, which we touched on earlier, and which was decided in 1891. In *Dohm*, the Court found that a mortgage assignment should not have been recorded as it was not in compliance with the then-applicable recording statute. *Id.* at 147. The Court held that a foreclosure sale was "void" and that "[t]he right to foreclose by advertisement is conferred solely by statute, and its provisions must be strictly complied with." *Id.* The Court set aside the sale. *Id.* at 148. The *Dohm* Court did not really address the concept of prejudice, nor engage in any discussion concerning differences between a foreclosure sale being voidable and void *ab initio*. To the extent that *Dohm* can be read to conflict with *Kim*, the ruling in *Kim* controls, as it is the most recent pronouncement by the Supreme Court on the legal issue of prejudice in relationship to a defect in foreclosure proceedings. *Champion v Secretary of State*, 281 Mich App 307, 315 n 5; 761 NW2d 747 (2008).

[8] This opinion is not to be construed as supporting a general proposition that any address defects are always harmless and non-prejudicial. The issue must be addressed on a case-by-case basis.

foreclosure proceedings as argued by plaintiffs, there is no basis to void the proceedings and set aside the sheriff's sale as the requisite prejudice simply does not exist.

Affirmed. Having fully prevailed on appeal, defendants are awarded taxable costs pursuant to MCR 7.219.

/s/ William B. Murphy
/s/ Peter D. O'Connell
/s/ Jane M. Beckering