STATE OF MICHIGAN

COURT OF APPEALS

DAWN BARTOLOMEO,

Plaintiff-Appellant,

v

JP MORGAN CHASE NATIONAL CORPORATE SERVICES, INC. and CHASE HOME FINANCE, LLC,

Defendants-Appellees.

UNPUBLISHED
December 18, 2012

No. 306467
Macomb Circuit Court
LC No. 2011-001759-CZ

Before: SAAD, P.J., and K. F. KELLY and M. J. KELLY, JJ.

PER CURIAM.

In this suit arising from a foreclosure, plaintiff Dawn Bartolomeo appeals by right the trial court's order dismissing her claims against defendants JP Morgan Chase National Corporate Services, Inc. and Chase Home Finance, LLC (collectively Chase). Because the trial court did not err when it dismissed Bartolomeo's claims, we affirm.

I. BASIC FACTS

In 2006, Bartolomeo purchased real property in Clinton Township with financing from Washington Mutual Bank. In the loan documentation, Bartolomeo represented to Washington Mutual that she would not reside at the property, but was purchasing it as an investment or rental property. Chase subsequently acquired Bartolomeo's note and mortgage.[1]

Bartolomeo began to have problems making the payments required under the note in 2009. In May 2009, Chase sent Bartolomeo a letter outlining a "Trial Plan Agreement" that Bartolomeo might use to pursue a "stay-in-home" option in lieu of foreclosure. Under the Trial Plan, Bartolomeo could avoid foreclosure by signing the agreement and sending a payment of

[1] The record is not entirely clear as to the timing of Chase's acquisition of the note and mortgage. It appears that Bartolomeo first began to negotiate an accommodation with Washington Mutual, but then began to work with Chase. For ease of reference, we shall refer to Chase from this point on.

$1,005.25 to Chase. But Chase had to receive the signed letter and payment by July 1, 2009, in order for the Trial Plan to take effect. Thereafter, Bartolomeo had to make additional timely payments. Chase also stated in the letter that all "the original terms of your loan remain in full force and effect, unless specifically mentioned within this Agreement." It also warned that, if "any part of this Agreement is breached" or if Bartolomeo filed for bankruptcy, it could terminate or void the agreement. Chase also provided a check list with the letter outlining the terms of the Trial Plan; the checklist provided additional terms. One term required Bartolomeo to make all trial plan payments in certified funds. Finally, Chase agreed that, if "all payments are made as scheduled, we will reevaluate your application for assistance and determine if we are able to offer you a permanent workout solution to bring your loan current."

In August 2010, the property was sold at a sheriff's sale.

In April 2011, Bartolomeo sued Chase. She alleged that Chase breached the Trial Plan that she signed on July 1, 2009 by refusing to accept her payments and foreclosing on the property. She also alleged that Chase was unjustly enriched by its participation in a government program that compensated Chase for processing Bartolomeo's loan modification. She also alleged that Chase harmed her by making misrepresentations that she relied on and by violating the Michigan Consumer Protection Act (MCPA). Finally, she asked the trial court to enjoin Chase from evicting her and asked it to set aside the sheriff's sale and quiet title to the property in her name.

The trial court entered a temporary restraining order preventing Chase from evicting Bartolomeo on April 29, 2011. It converted the temporary restraining order into a preliminary injunction on May 9, 2011.

In August 2011, Chase moved for summary disposition under MCR 2.116(C)(8) and (10). Chase argued that summary disposition was appropriate because Bartolomeo filed for bankruptcy in March 2011 and included the note and mortgage at issue as liabilities, but failed to list her claims against Chase as an asset on her petition. Chase also presented evidence that Bartolomeo did not use the property as her primary residence, which was a requirement for eligibility under the federal program. Therefore, it argued, it could not be liable for failing to give her a modification that she was ineligible to receive. It also presented evidence that she breached the Trial Plan by failing to timely make the required payments. Chase maintained that Bartolomeo's claim premised on misrepresentation had to be dismissed because, under MCL 556.132, Bartolomeo could not sue for oral misrepresentations, but had to present evidence that Chase made a written promise or commitment, which she did not do. Chase also stated that, as a matter of law, the MCPA did not apply to its activities because those activities were specifically authorized under federal law. Finally, Chase argued that Bartolomeo lacked standing to assert her claims for injunctive relief.

In reply, Bartolomeo argued that it was undisputed that the parties had accepted the Trial Plan and that she complied with its terms, but Chase unilaterally refused to accept her payments and imposed a new condition—that she make the payments with certified funds. She also argued that her remaining claims were viable because she would be able to obtain evidence of the misrepresentations and unjust enrichment during discovery. For that reason, she asserted, Chase's motion was premature. Bartolomeo also argued that, although the period of redemptions

had passed, she could still seek equitable relief to void the sheriff's sale and avoid eviction. She did not, however, address Chase's motion to dismiss her claim under the MCPA.

In September 2011, the trial court issued its opinion and order on Chase's motion for summary disposition. The trial court first noted that it was undisputed that Bartolomeo filed for bankruptcy and that Chase could, for that reason, void the Trial Plan and proceed with foreclosure. It also noted that Bartolomeo's own evidence showed that she did not timely accept the agreement and that she did not use certified funds, as required under the Trial Plan. Moreover, the trial court stated that, under MCL 566.132(2), Bartolomeo could not rely on oral statements that Chase would postpone or hold its foreclosure in abeyance or make other financial accommodations. Because it was undisputed that Chase could properly proceed to foreclose against the property, the trial court determined that all Bartolomeo's claims challenging the foreclosure must necessarily fail. The trial court then vacated the preliminary injunction and dismissed Bartolomeo's claims with prejudice under MCR 2.116(C)(10).

Bartolomeo now appeals to this Court.

II. SUMMARY DISPOSITION

A. STANDARD OF REVIEW

Bartolomeo argues, on a variety of grounds, that the trial court erred when it dismissed her claims on Chase's motion for summary disposition. This Court reviews de novo a trial court's decision on a motion for summary disposition. *Barnard Mfg Co, Inc v Gates Performance Engineering, Inc*, 285 Mich App 362, 369; 775 NW2d 618 (2009). This Court also reviews de novo the proper interpretation of statutes and contracts. *Hunter v Hunter*, 484 Mich 247, 257; 771 NW2d 694 (2009); *Rory v Continental Ins Co*, 473 Mich 457, 464; 703 NW2d 23 (2005).

B. BREACH OF CONTRACT

A motion for summary disposition under MCR 2.116(C)(10) tests the factual basis for a claim. A party is entitled to summary disposition under MCR 2.116(C)(10) when there is "no genuine issue as to any material fact . . . ." *Maiden v Rozwood*, 461 Mich 109, 120; 597 NW2d 817 (1999). If the moving party properly raises and supports its motion for summary disposition, the burden shifts to the nonmoving part to establish that a genuine issue of fact exists that must be resolved by the finder of fact. *Barnard Mfg*, 285 Mich App at 370. The nonmoving party may "not rely on 'mere allegations or denials' in their pleading, but [must], 'by affidavits or as otherwise provided in this rule, set forth specific facts showing that there is a genuine issue for trial.'" *Id.* at 374, quoting MCR 2.116(G)(4).

Bartolomeo alleged in her complaint that Chase breached the Trial Plan by proceeding to foreclose against the property rather than restructuring the note and mortgage. In its motion for summary disposition, Chase argued that it did not breach the Trial Plan by foreclosing because, under the Trial Plan's terms, it could properly foreclose after Bartolomeo failed to timely make her payments. In support of its motion, Chase attached a copy of the Trial Plan, which it noted required Bartolomeo to make timely payments; specifically, the agreement provided that Bartolomeo would be in breach if any of her payments were untimely and that Chase's

"collection and/or foreclosure activity will resume." It also attached a business record that showed that it had accepted one payment from Bartolomeo under the Trial Plan, but that the remaining payments were overdue. Once Chase properly supported its motion with evidence that its foreclosure was proper under the Trial Plan, Bartolomeo had the burden to present evidence establishing a question of fact as to whether she made timely payments. *Id.*

In response, Bartolomeo attached her affidavit in which she averred that she "made the payments as outlined on the Trial Plan and complied with the requirements . . . provided to me by Chase." But there was clear documentary evidence that she failed to comply with the Trial Plan's terms and the accompanying checklist; indeed, she submitted a copy of the check she sent for the second payment and that check plainly showed that her payment was untimely. Bartolomeo's averment that she made the payments and otherwise complied with Chase's requirements could not establish a question of fact as to the *timeliness* of her payments under the Trial Plan.

The undisputed documentary evidence shows that Bartolomeo failed to make timely payments under the Trial Plan, and, because she failed to make timely payments, Chase could properly proceed with its foreclosure without violating the terms of the Trial Plan. Therefore, the trial court did not err when it dismissed Bartolomeo's claim that Chase breached the Trial Plan by proceeding to foreclose against the property rather than making an accommodation that would enable her to keep the property.[2]

C. UNJUST ENRICHMENT

In order to establish a claim for unjust enrichment, Bartolomeo had to establish that Chase took receipt of a benefit from her and that it would be inequitable for Chase to retain that benefit. *Barber v SMH (US), Inc*, 202 Mich App 366, 375; 509 NW2d 791 (1993). But she did not make any such allegations. Instead, Bartolomeo alleged that Chase was unjustly enriched by accepting compensation from a third party—the federal government—for processing her loan modification. Thus, she failed to state a claim for unjust enrichment. MCR 2.116(C)(8).

In any event, Chase moved for summary disposition on the grounds that it was undisputed that it did not receive any compensation from the federal government for attempting to work with Bartolomeo. Specifically, it noted that the federal government does not provide compensation to lenders for borrowers who do not qualify for or enter into a permanent modification under the federal plan. Bartolomeo did not dispute that Chase did not offer her a permanent modification; as such, Chase established that it did not receive any funds from the federal government as a result of its efforts to accommodate Bartolomeo with the Trial Plan and could not, therefore, have been unjustly enriched on that basis.

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[2] Although the trial court stated additional bases for dismissing Bartolomeo's contract claim under MCR 2.116(C)(10), even if it erred as to those additional reasons, we would affirm the trial court because it came to the correct result. *Fisher v Blankenship*, 286 Mich App 54, 70; 777 NW2d 469 (2009). Therefore, we decline to consider those alternate bases.

Bartolomeo did not respond to this motion with any evidence that Chase had in fact been compensated by the federal government for its efforts to arrange the Trial Plan with Bartolomeo or for processing any other paperwork related to her efforts to qualify for assistance. Instead, she merely asserted that she made this claim to provide the jury with Chase's "motivation" for committing fraud and promised to add any "necessary parties" to prove the unjust enrichment. This was insufficient to establish a question of fact on her unjust enrichment claim. Therefore, the trial court properly dismissed this claim. MCR 2.116(C)(10).

D. MISREPRESENTATIONS

Bartolomeo alleged in her complaint that Chase made several misrepresentations to her and that she relied on those misrepresentations to her detriment. She identified the misrepresentations as all relating to Chase's efforts to help her work towards a permanent modification of her loan, whether under the Trial Plan or any future permanent modification, and its decision to foreclose and sell the property.

Chase moved for summary disposition on the ground that Bartolomeo could not rely on any oral representations that it allegedly made with regard to any accommodations to her note and mortgage under MCL 566.132(2). Chase maintained that, because the only written agreement—the Trial Plan—permitted Chase to pursue foreclosure after Bartolomeo breached the agreement, Bartolomeo could not establish her claim for misrepresentation.

The Legislature has determined that an "action shall not be brought against a financial institution" to enforce promises or commitments to modify or make accommodations to a loan unless the promise or commitment is in writing. MCL 566.132(2). And this Court has held that MCL 566.132(2) is "unambiguous" and "plainly states that a party is precluded from bringing a claim—no matter its label—against a financial institution to enforce the terms of an oral promise to waive a loan provision." *Crown Technology Park v D&N Bank, FSB*, 242 Mich App 538, 550; 619 NW2d 66 (2000). Because Bartolomeo premised her misrepresentation claim on representations regarding Chase's efforts to provide her with an accommodation on her note and mortgage or to otherwise forego foreclosure, she had to demonstrate that those promises were in writing.

Bartolomeo did not respond to Chase's motion with evidence that Chase had in fact made a written promise or commitment to forego foreclosure or otherwise alter the terms of her note and mortgage. Rather, she merely asserted that she would be able to prove that Chase made oral misrepresentation after conducting depositions and that summary disposition was therefore premature. That is, she merely promised to provide evidence. This was insufficient to establish a question of fact on her claim of misrepresentation. *Maiden*, 461 Mich at 121 ("A litigant's mere pledge to establish an issue of fact at trial cannot survive summary disposition under MCR 2.116(C)(10). The court rule plainly requires the adverse party to set forth specific facts at the time of the motion showing a genuine issue for trial."). Even considering this response, it is nevertheless clear that Bartolomeo promised to provide *oral* evidence that Chase had represented that it would make an accommodation. But, as already explained, Bartolomeo could not sue Chase—under any theory—for failing to adhere to an oral promise to make a loan accommodation. *Crown Technology*, 242 Mich App at 550.

The trial court did not err when it dismissed Bartolomeo's misrepresentation claim under MCR 2.116(C)(10).

E. INJUNCTIVE RELIEF, QUIET TITLE, AND MCPA

Bartolomeo also argued that Chase improperly proceeded to foreclose against her property in violation of the Trial Plan and, as such, she asked the trial court to enjoin Chase from evicting her and to quiet title to the property in her name. Chase moved for summary disposition on the grounds that Bartolomeo had no standing to ask for equitable relief, but the trial court did not grant summary disposition on that basis. Rather, the trial court determined that these equitable claims failed as a matter of law because Chase demonstrated that it could properly proceed to foreclose under the terms of the Trial Plan after Bartolomeo breached that agreement.

The undisputed evidence showed that Bartolomeo failed to make timely payments under the Trial Plan; as such, Chase could properly proceed with foreclosure. Because Bartolomeo relied solely on Chase's alleged failure to comply with the Trial Plan as the basis for her claims for equitable relief, those claims necessarily fail.

Finally, in its motion for summary disposition, Chase argued that its lending activities were not subject to the MCPA, citing MCL 445.904(1). Bartolomeo did not address this argument in her brief in response to Chase's motion for summary disposition. Moreover, on appeal, Bartolomeo merely asserted that her MCPA claim is "viable"; although she did acknowledge that she may have a problem, given our Supreme Court's holding in *Smith v Globe Life Ins Co*, 460 Mich 446; 597 NW2d 28 (1999). By failing to properly argue and support this issue on appeal, Bartolomeo has abandoned any claim that the trial court erred with regard to its decision to dismiss her MCPA claim. See *Hamade v Sunoco, Inc (R & M)*, 271 Mich App 145, 173; 721 NW2d 233 (2006).

III. CONCLUSION

The trial court did not err when it determined that the undisputed evidence showed that Bartolomeo breached the terms of the Trial Plan and, for that reason, Chase could not be liable for breaching the Trial Plan when it proceeded to foreclose the property at issue. Because Bartolomeo's contract and equitable claims were founded on the premise that Chase wrongfully foreclosed under the terms of the Trial Plan, Chase was entitled to have those claims dismissed. The trial court also did not err when it determined that Bartolomeo failed to present evidence to establish a question of fact as to whether Chase was unjustly enriched or made written misrepresentations. Finally, Bartolomeo abandoned her claim that the trial court erred when it dismissed her MCPA count.

Affirmed. As the prevailing parties, JP Morgan Chase National Corporate Services, Inc. and Chase Home Finance, LLC may tax their costs. MCR 7.219(A).

/s/ Henry William Saad
/s/ Kirsten Frank Kelly
/s/ Michael J. Kelly