STATE OF MICHIGAN

COURT OF APPEALS

CHERYL SOBH and SAM SOBH, Plaintiffs-Appellants, v BANK OF AMERICA, NA, JP MORGAN CHASE BANK, TROTT & TROTT, and AMERICAN PREMIERE TITLE, Defendants-Appellees.	UNPUBLISHED June 6, 2013 No. 308441 Wayne Circuit Court LC No. 11-008363-CH

Before: WILDER, P.J., and STEPHENS and RONAYNE KRAUSE, JJ.

PER CURIAM.

Plaintiffs appeal by right the trial court's order granting summary disposition to defendants and dismissing their claims in this mortgage foreclosure action. For the reasons set forth below, we hold that defendant Bank of America lacked standing to foreclose under MCL 600.3204(3); accordingly, the foreclosure was voidable. We therefore reverse and remand for further proceedings consistent with this opinion.

I. BASIC FACTS

The property at issue in this case is located at 19035 Parke Lane, in Gross Isle, Michigan. In April, 2006, plaintiffs borrowed approximately $510,000 from Washington Mutual Bank (Washington Mutual), and in exchange, granted Washington Mutual a mortgage interest in the property. In 2008, Washington Mutual went into receivership, with the FDIC appointed as receiver. Chase acquired all of Washington Mutual's assets, including plaintiffs' mortgage, on September 25, 2008, via a voluntary Purchase and Assumption Agreement. There is no indication in the lower court record that Chase recorded its interest in plaintiffs' mortgage after it was conveyed by Washington Mutual. In March, 2010, Chase assigned its interest in the mortgage to Bank of America.

Plaintiffs stopped making payments on their mortgage in late 2009, and in early 2011, Bank of America initiated foreclosure by advertisement proceedings. Plaintiffs filed a complaint to stop the foreclosure, alleging a variety of statutory and common law causes of action. Defendants moved for summary disposition under MCR 2.116(C)(8) and MCR 2.116(C)(10), and the trial court granted the motion and dismissed plaintiffs' claims. Plaintiffs appealed.

II. ISSUE PRESERVATION AND STANDARD OF REVIEW

For an issue to be preserved for appeal it must be raised, addressed, and decided by the trial court. *Hines v Volkswagen of America, Inc*., 265 Mich App 432, 444; 695 NW2d 84 (2005) (citations omitted). Plaintiffs' argument on appeal is difficult to decipher, but it appears that it is based on whether plaintiffs had standing to foreclose under MCL 600.3204. Plaintiffs did not make this argument below, and therefore the trial court did not address or decide it. However, this issue is one of law for which all relevant facts are available; accordingly, we will review plaintiffs' argument. *Vushaj v Farm Bureau Gen Ins Co of Michigan*, 284 Mich App 513, 521; 773 NW2d 758 (2009).

Appellate courts review the grant or denial of summary disposition de novo. *Maiden v Rozwood*, 461 Mich 109, 119; 597 NW2d 817 (1999).

> A motion under MCR 2.116(C)(8) tests the legal sufficiency of the complaint. All well-pleaded factual allegations are accepted as true and construed in a light most favorable to the nonmovant. A motion under MCR 2.116(C)(8) may be granted only where the claims alleged are so clearly unenforceable as a matter of law that no factual development could possibly justify recovery. When deciding a motion brought under this section, a court considers only the pleadings.
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> A motion under MCR 2.116(C)(10) tests the factual sufficiency of the complaint. In evaluating a motion for summary disposition brought under this subsection, a trial court considers affidavits, pleadings, depositions, admissions, and other evidence submitted by the parties, in the light most favorable to the party opposing the motion. Where the proffered evidence fails to establish a genuine issue regarding any material fact, the moving party is entitled to judgment as a matter of law. [*Id*. at 119-120 (citations and quotations omitted).]

III. ANALYSIS

In Michigan, the prerequisites that a foreclosing party must satisfy in order for a foreclosure by advertisement to be valid are set forth in MCL 600.3204. Central to this case is whether defendants satisfied the requirements of MCL 600.3204(3). That statute provides:

> If 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 . . . evidencing the assignment of the mortgage to the party foreclosing the mortgage.

A chain of title is "[t]he ownership history of a piece of land . . . ." Black's Law Dictionary (9th ed).

The Michigan Supreme Court's recent decision in *Kim v JPMorgan Chase Bank, N.A.*, 493 Mich 98; 825 NW2d 329 (2012), addressed the proper application of MCL 600.3204(3). *Kim*, which was decided after the trial court granted summary disposition, is controlling in this case. In *Kim*, as here, the plaintiffs had a Washington Mutual mortgage. *Id*. at 103. The *Kim* plaintiffs' mortgage was acquired by Chase on September 25, 2008, by a Purchase and Assumption Agreement—the exact same agreement by which Chase acquired plaintiffs'

mortgage in this case. *Id*. Chase never recorded its interest in the *Kim* plaintiffs' mortgage, but foreclosed by advertisement nonetheless. *Id*. at 104. Similarly, in this case, there is no indication that once Chase acquired plaintiffs' mortgage it recorded an assignment of its interest. None of defendants' filings below assert that Chase recorded its interest in defendants' mortgage once it acquired it from Washington Mutual, and defendants' appellate brief suggests that Chase did not record its interest. Indeed, in both *Kim* and the instant case it appears that Chase did not record the mortgage interests it received from Washington Mutual. In fact, *Kim* and this case are factually identical up until the point at which, in the instant case, Chase assigned its interest in the mortgage to Bank of America, which eventually became the foreclosing entity.

In *Kim*, the Supreme Court held that because the Washington Mutual mortgage was acquired by Chase as part of a voluntary Purchase and Assumption Agreement, Chase did not acquire those mortgages by operation of law. *Id*. at 111. Further, the Court held, because Chase acquired Washington Mutual's mortgages voluntarily, and not by operation of law, those mortgages were subject to the requirements of MCL 600.3204(3), and because Chase never recorded its interest the plaintiffs' mortgage prior to foreclosing, the foreclosure was voidable. *Id*. at 113-115.

The same result is warranted here. There is no indication in the lower court record that Chase, after acquiring plaintiffs' mortgage via the same Purchase and Assumption Agreement at issue in *Kim*, ever recorded its assignment before assigning the mortgage to Bank of America. Chase's failure to comply with MCL 600.3204(3) prior to assigning its interest to Bank of America accordingly resulted in a break in the chain of title because Chase never recorded its assignment from Washington Mutual before assigning it to Bank of America. Therefore, the plain requirement of MCL 600.3204(3) was not met here because "a record chain of title" did not "exist prior to the date of sale."

Defendants argue that MCL 3204(3)

> does not require that all interim assignments be recorded . . . rather . . . all that is required is that the party foreclosing the mortgage record the assignment to it prior to the date of sale. Nowhere does the current statute require the recording of any interim assignments that may have been made between the date the initial mortgage was given and the date the last assignment was recorded prior to sale.

Defendants' argument is meritless. First, defendants fail to cite a single source in their appellate brief to support their contention that under MCL 600.3204(3), interim assignments such as the one from Washington Mutual to Chase need not be recorded so long as the foreclosing entity recorded the assignment by which it acquired the mortgage. Second, the *Kim* Court squarely addressed this issue when it held that, under MCL 600.3204(3), "a mortgagee cannot validly foreclose a mortgage by advertisement *before the mortgage and all assignments of that mortgage* are duly recorded." *Kim* 493 Mich at 106 (emphasis added). Accordingly, defendants are incorrect that MCL 600.3204(3) does not require that interim assignments be recorded—it does. The trial court erred when it concluded that Bank of America received a valid assignment from Chase: Chase's failure to comply with the statute resulted in a break in the chain of title, and consequently Bank of America did not have standing to foreclose on plaintiffs' property under MCL 600.3204(3).

As in *Kim*, because defendants lacked standing to foreclose, defendants' foreclosure is voidable, but not void *ab initio*. *Kim*, 493 Mich at 115. We therefore reverse the judgment of the trial court and remand. As in *Kim*, on remand:

> [T]o set aside the foreclosure sale, plaintiffs must show that they were prejudiced by . . . [the] 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 [the] noncompliance with the statute. [*Kim*, 493 Mich at 115-116.]

Reversed and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction. Plaintiffs, as the prevailing party, may tax costs pursuant to MCR 7.219(A).

/s/ Kurtis T. Wilder
/s/ Cynthia Diane Stephens
/s/ Amy Ronayne Krause