

MICHIGAN COURT OF APPEALS ANALYZES FORECLOSURE RIGHTS IN TWO RECENT OPINIONS

As every lender and mortgage servicer knows, since the financial and housing crisis, courts have been clogged with cases analyzing the rights of lenders and borrowers with respect to consumer mortgage loans. These loans are usually evidenced by a promissory note, whereby the borrower promises to repay the loan to the lender, and secured by a mortgage, which gives the lender the right to foreclose on the property if the borrower defaults on the loan obligation.

The Michigan Court of Appeals (the “Court”) recently published two opinions addressing the respective rights of borrowers and lenders in connection with mortgage foreclosures.

Select Commercial Assets, LLC v. Jay W. Carrothers

In this case the trial court granted summary judgment in favor of the plaintiff/mortgagee. Defendant appealed the decision, arguing that the trial court erred because the plaintiff lacked standing to foreclose because it had not shown that it owned the underlying mortgage debt, and also argued that the foreclosure was premature because plaintiff had not made a formal demand for payment before bringing its action.

As to the first issue, the Court noted that the public record showed that both the mortgage and the underlying debt had been assigned to the plaintiff. The Court explained, in upholding the trial court’s decision that holding the underlying debt was immaterial to the plaintiff’s right to foreclose as the mortgagee of record. Specifically, **THE COURT MADE CLEAR THAT THE LAW DOES NOT REQUIRE THAT “THE MORTGAGE AND THE DEBT IT SECURE[S] BE OWNED BY THE SAME PARTY BEFORE THE MORTGAGEE [CAN] FORECLOSE ON THE BASIS THAT THE DEBTOR [IS] IN DEFAULT.”**

The Court also rejected defendant’s argument that the foreclosure action was premature because it was undertaken before demand for payment was made. The Court analyzed the underlying contract and found that, not only did the defendant fail to specify what wording in the mortgage required demand for payment or notice of default, but also that the “plain language of the mortgage and notes demonstrates defendant’s argument must fail.”

PNC Bank v. Nelly Goodman and S & A Capital Partners, Inc.

This case also involved the attempted foreclosure of a mortgage on real property. Following a series of assignments and transactions, the mortgage servicing rights regarding the mortgage at issue were assigned to the plaintiff. It was undisputed that the defendant stopped making payments on the underlying loan. Plaintiff brought suit and defendant brought counter-claim. Both parties brought motions for summary disposition. The trial court ruled in favor of the plaintiff. The Court upheld the trial court's decision on appeal.

Defendant's primary argument was that plaintiff lacked standing to foreclose because it was not the mortgagee, a successor, or an assignee of the mortgagee. The trial court disagreed and granted plaintiff's motion, reasoning that "the authority to foreclose may be delegated and that such authority was properly delegated to plaintiff as the servicer of the mortgage." The Court ruled in favor of the plaintiff on appeal. It explained that the mortgage expressly authorizes the servicer to initiate foreclosure proceedings, and that nothing in the contract prevented the mortgage from delegating its duties under the contract to another party.

The defendant also argued that plaintiff's claims must fail because it did not comply with Michigan Court Rule 3.411(C)(2), which requires a plaintiff to "attach to the complaint . . . a statement of the title on which the pleader relies, showing from whom the title was obtained and the page and book where it appears of record."

The Court rejected this argument because it found that MCR 3.411(C)(2) was not applicable to plaintiff's claims. It explained that "plaintiff never sought a determination that its claim was inconsistent with any interest owned by any other person," and that "[p]laintiff did not dispute that defendant owned the property." Rather, "plaintiff merely alleged a claim for judicial foreclosure under MCL 600.3101 and did not file a claim to determine property interests under MCL 600.2932."

Finally, the defendant argued that plaintiff's claim for "Reformation of Mortgage" must fail because there was no mistake to correct in the mortgage. Plaintiff's reformation claim was based on the fact that, although the mortgage provided a space for the property's legal description, such description was inadvertently omitted.

The Court also rejected this argument, noting that "Michigan law allows for contracts to be reformed based on the existence of a mutual mistake." Because the

mortgage included a space for the legal description, and yet it was left blank, the Court agreed with the trial court's decision that the parties made a mutual mistake in omitting the description.