STATE OF MICHIGAN

COURT OF APPEALS

CATHERINE NICOLE DONKERS and BRAD BARNHILL, Plaintiffs-Appellants, v COUNTRYWIDE HOME LOANS, INC., and TROTT & TROTT, P.C., Defendants-Appellees.	UNPUBLISHED September 13, 2007 No. 270474 Oakland Circuit Court LC No. 2005-068586-CZ

Before: O'Connell, P.J., and Murphy and Fitzgerald, JJ.

PER CURIAM.

Plaintiffs appeal as of right from the trial court's order granting defendants' motion for summary disposition pursuant to MCR 2.116(C)(10) in this case arising from the foreclosure of a mortgage. We affirm.

Plaintiff Catherine Nicole Donkers purchased a condominium in Wayne County after obtaining a mortgage loan from defendant Countrywide Home Loans, Inc. (Countrywide) that was secured by a mortgage on the property. After Donkers defaulted on the loan, Countrywide referred the matter to defendant Trott & Trott, P.C. (Trott), to foreclose on the mortgage. Trott published notice of the foreclosure sale in the *Detroit Legal News* and also posted a notice on the premises. The notice indicated that a foreclosure sale was scheduled for July 2, 2003, at the Coleman A. Young Municipal Center in Detroit. On the date scheduled for the foreclosure sale, Donkers and her alleged common-law husband, plaintiff Brad Barnhill, filed an action against Countrywide in the Wayne County Circuit Court, challenging the validity of the mortgage loan on various grounds. Wayne County Sheriff's Deputy Adrienne Sanders eventually conducted the foreclosure sale on August 20, 2003. Plaintiffs' Wayne County action was dismissed in October 2003.

Almost two years later, in August 2005, plaintiffs filed this action in the Oakland Circuit Court, alleging various tort and contract theories arising from alleged irregularities in the foreclosure sale. The trial court granted defendants' motion for summary disposition, finding that there was no genuine issue of material fact with regard to whether defendants provided proper notice of the foreclosure and that plaintiffs' loss was caused by their failure to redeem the property.

On appeal, plaintiffs first argue that the trial court erred by failing to strike the affidavit of Deputy Sanders. The trial court did not specifically address this issue. This Court's review is generally limited to issues actually decided by the trial court. *Allen v Keating*, 205 Mich App 560, 564-565; 517 NW2d 830 (1994). However, this Court may overlook preservation requirements to prevent manifest injustice, to decide an issue that is necessary to a proper determination of the case, or to decide an issue that involves a question of law for which the necessary facts have been presented. *Steward v Panek*, 251 Mich App 546, 554; 652 NW2d 232 (2002). Here, it is clear from the trial court's decision that it was aware of plaintiffs' claim that Sanders's affidavit should be stricken. A party should not be punished for a trial court's failure to rule on an issue that was properly raised before the trial court. *Peterman v Dep't of Natural Resources*, 446 Mich 177, 183; 521 NW2d 499 (1994). Therefore, we shall consider plaintiffs' argument.

Plaintiffs have established nothing about Deputy Sanders's affidavit that affords them a basis for reversing the trial court's decision to grant defendants' motion for summary disposition. Plaintiffs' reliance on *Bobier v Norman*, 138 Mich App 819, 822; 360 NW2d 313 (1984), is misplaced because the current court rule, MCR 2.116(G), does not require a party to support a motion for summary disposition under MCR 2.116(C)(10) with an affidavit. *Michigan Nat'l Bank-Oakland v Wheeling*, 165 Mich App 738, 742-743; 419 NW2d 746 (1988).

Further, we find no basis for concluding that a sanction was justified under MCR 2.116(F). Unlike *Hazelton v Lustig*, 164 Mich App 164; 416 NW2d 373 (1987), the present case does not involve an affidavit offered by a party to contradict prior deposition testimony. Rather, plaintiffs had the opportunity to depose Deputy Sanders regarding the substance of her affidavit and to offer her deposition testimony in opposition to defendants' motion for summary disposition. Taken together, Deputy Sanders's deposition and her affidavit indicate that she relied heavily on her normal routine to explain what she would have done to conduct the foreclosure sale in this case. "Evidence of the habit of a person or of the routine practice of an organization, whether corroborated or not and regardless of the presence of eyewitnesses, is relevant to prove that the conduct of the person or organization on a particular occasion was in conformity with the habit or routine practice." MRE 406; see also *Laszko v Cooper Laboratories, Inc*, 114 Mich App 253, 256; 318 NW2d 639 (1982).

Further, in response to plaintiffs' motion to strike the affidavit, defendants adequately demonstrated that plaintiffs were provided with copies of the notice documents referred to in the affidavit. In light of Deputy Sanders's deposition testimony that the original notices were not retained and the absence of any evidence of bad faith, the contents of the notices could be established through other evidence. MRE 1004(1). Considering that Barnhill used a copy of one of the notice documents to question Deputy Sanders during her deposition and that Deputy Sanders was able to authenticate her signature stamp on the copy, plaintiffs were not prejudiced by any deficiency in the form of the affidavit. Absent a showing of prejudice, any error regarding the form of the affidavit is harmless. *Baker v DEC Int'l*, 218 Mich App 248, 262; 553 NW2d 667 (1996), rev'd in part on other grounds 458 Mich 247 (1998); see also MCR 2.613(A).

The material issue in this case is not whether Deputy Sanders's affidavit should have been stricken, but whether there was substantively admissible evidence to create a genuine issue of material fact to preclude summary disposition under MCR 2.116(C)(10). See MCR 2.116(G)(6); *Maiden v Rozwood*, 461 Mich 109, 120-121; 597 NW2d 817 (1999). Our review of

this issue is de novo. *Al-Shimmari v Detroit Medical Ctr*, 477 Mich 280, 287; 731 NW2d 29 (2007); *Maiden, supra* at 118.

In evaluating a motion under MCR 2.116(C)(10), "a court considers the entire record in the light most favorable to the party opposing the motion, including affidavits, pleadings, depositions, admissions, and other evidence submitted by the parties. 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." *Corley v Detroit Bd of Ed*, 470 Mich 274; 681 NW2d 342 (2004); see also *Maiden, supra* at 120. "A genuine issue of a material fact exists when the record, giving the benefit of reasonable doubt to the opposing party, leaves open an issue upon which reasonable minds might differ." *West v Gen Motors Corp*, 469 Mich 177, 183; 665 NW2d 468 (2003).

Viewing the evidence in a light most favorable to plaintiffs, we are not persuaded that a genuine issue of material fact was shown with respect to whether the foreclosure sale was adjourned from week to week, but an issue of fact was shown with respect to whether some of the weekly adjournment notices, after the initial adjournment to July 9, 2003, were actually published by posting on the bulletin board at the Coleman A. Young Municipal Center. But if we were to follow the decision in *Worthy v World Wide Financial Services, Inc*, 347 F Supp 2d 502, 505 (ED Mich, 2004), that MCL 600.3220 does not require republication of each weekly adjournment, this factual dispute would not be material because it would not have been necessary for Deputy Sanders to actually post the weekly adjournments after July 9, 2003. We decline to reach this issue, however, because a notice defect only renders a foreclosure sale voidable and, from the evidence, it is clear that plaintiffs cannot demonstrate prejudice arising from any alleged posting irregularity. *Sweet Air Investment, Inc v Kenney*, ___ Mich App ___; ___ NW2d ___ (Docket No. 265691, issued May 15, 2007), lv pending.

Although summary disposition is not proper when a material factual assertion depends on an affiant's credibility, conclusory averments do not establish disputed facts. *SSC Assoc Ltd Partnership v Gen Retirement Sys*, 192 Mich App 360, 364; 480 NW2d 275 (1991). Here, Donkers's affidavit[1] indicates that she lacked actual knowledge of the August 20, 2003, foreclosure sale until June 9, 2005. It contains a hindsight assessment of what her intent would have been if she had learned about the foreclosure sale before the redemption period expired, but does not indicate that Donkers had the actual financial means to redeem. At the motion hearing, plaintiff Barnhill asserted that Donkers left Michigan in July 2003. Plaintiffs offered no evidence suggesting that Donkers maintained contact with the property or attempted to pay the mortgage loan, taxes, or other expenses that a person claiming to have continuing ownership interest in the property might expect to pay, even after the Wayne Circuit Court case challenging the mortgage debt was dismissed in October 2003. There is no evidence that Donkers made any

[1] Donkers's affidavit indicates that it was executed before a notary public in the state of Nevada and contains a verification of facts, rather than an affidavit made under oath. Defendants do not challenge the form of the affidavit.

affirmative inquiry to determine the status of the property or the foreclosure before June 9, 2005, when, according to Donkers's affidavit, she went to the Wayne County Register of Deeds.

Examining Donkers's affidavit in the face of her lengthy delay, inaction, and failure to offer evidence that she had a financial ability to redeem, the affidavit is insufficient to create a genuine issue of material fact regarding the question of prejudice. Because plaintiffs cannot show that Donkers was prejudiced by any alleged defect in the notices of adjournment, we affirm the trial court's order granting summary disposition in favor of defendants, albeit for different reasons. *Sweet Air Investment, Inc, supra*; *Taylor v Laban*, 241 Mich App 449, 458; 616 NW2d 229 (2000) (this Court will not reverse a trial court's order of summary disposition if the right result was reached).

Affirmed.

/s/ Peter D. O'Connell
/s/ William B. Murphy
/s/ E. Thomas Fitzgerald