STATE OF MICHIGAN

COURT OF APPEALS

MARY SAND,

Plaintiff-Appellant,

v

BORROWERS NETWORK, L.L.C., FIRST ALLIANCE MORTGAGE COMPANY, and MARTIN B. ROTHENBERG REVOCABLE LIVING TRUST,

Defendants-Appellees.

UNPUBLISHED
January 12, 2010

No. 285807
Wayne Circuit Court
LC No. 06-619158-CH

MARY SAND,

Plaintiff-Appellee,

v

BORROWERS NETWORK, L.L.C. and MARTIN B. ROTHENBERG REVOCABLE LIVING TRUST,

Defendants-Appellants,

and

FIRST ALLIANCE MORTGAGE COMPANY,

Defendant.

No. 290326
Wayne Circuit Court
LC No. 06-619158-CH

Before: Wilder, P.J., and O'Connell and Talbot, JJ.

PER CURIAM.

In Docket No. 285807, plaintiff Mary Sand appeals as of right from a judgment of no cause of action in favor of defendants Borrowers Network, L.L.C. ("Borrowers Network") and the Martin B. Rothenberg Revocable Living Trust ("the Living Trust") (collectively "defendants").[1] Plaintiff also raises issues pertaining to an earlier order granting partial summary disposition for defendants pursuant to MCR 2.116(C)(10). In Docket No. 290326, defendants appeal as of right from the trial court's denial of their motion for case evaluation sanctions pursuant to MCR 2.403. We affirm the judgment of no cause of action, affirm in part and reverse in part the order granting partial summary disposition for defendants, reverse the order denying case evaluation sanctions, and remand for further proceedings.

Plaintiff first argues that the trial court erred by failing to rule on her breach of contract claim with respect to her conditional right to refinance. Plaintiff's breach of contract claim, however, was not based on her conditional right to refinance, but rather on defendants' failure to accept her monthly payments submitted before July 18, 2009. Because plaintiff failed to assert this issue in the trial court, it is not preserved for our review. *Fast Air, Inc v Knight*, 235 Mich App 541, 549; 599 NW2d 489 (1999). This Court reviews unpreserved issues for plain error affecting substantial rights. *Veltman v Detroit Edison Co*, 261 Mich App 685, 690; 683 NW2d 707 (2004); *Kern v Blethen-Coluni*, 240 Mich App 333, 336; 612 NW2d 838 (2000). "'To avoid forfeiture under the plain error rule, three requirements must be met: 1) the error must have occurred, 2) the error was plain, i.e., clear or obvious, 3) and the plain error affected substantial rights.'" *Id*. (citation omitted).

The trial court did not plainly err by dismissing plaintiff's breach of contract claim without addressing her conditional right to refinance. Nowhere in plaintiff's complaint did she assert a breach of contract claim based on defendants' alleged denial of her conditional right to refinance. Although she asserted this argument in response to defendants' motion for summary disposition, it did not form the basis for her breach of contract claim. Accordingly, no plain error occurred.

Moreover, contrary to plaintiff's argument, the trial court did not determine in its findings of fact and conclusions of law after the bench trial that plaintiff had established a breach of contract claim. Rather, in addressing plaintiff's promissory estoppel claim, the trial court stated that plaintiff failed to establish the elements of promissory estoppel and demonstrated, at best, that she was entitled to rely on the contract. The trial court recognized, however, that it had previously dismissed plaintiff's breach of contract claim. Thus, contrary to plaintiff's argument, the trial court did not determine after the bench trial that plaintiff had established a breach of contract claim.

Further, had plaintiff alleged in her complaint a breach of contract claim based on the conditional right to refinance, it would have been barred by the applicable six-year limitations period, MCL 600.5807(8). A claim accrues at the time that suit may be brought. *Harris v City*

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[1] Defendant First Alliance Mortgage Company is not a party to these appeals and apparently was never served with plaintiff's complaint. References to "defendants" refer to defendants Borrowers Network and the Living Trust only.

of Allen Park, 193 Mich App 103, 106; 483 NW2d 434 (1992). In breach of contract actions, the limitations period generally begins to run on the date of the breach. *Id.* Here, the note holder, i.e., the Living Trust, was required to notify plaintiff of her conditional right to refinance at least 60 days before the maturity date of the loan. Because the maturity date was July 18, 2000, the Living Trust was required to notify plaintiff of her conditional right to refinance by May 18, 2000, at the latest. Accordingly, plaintiff's breach of contract claim accrued on that date and the statute of limitations for asserting such a claim expired on May 18, 2006. Because plaintiff did not file her complaint until July 6, 2006, any claim based on the Living Trust's failure to provide notice of the conditional right to refinance would have been time-barred.

Plaintiff next argues that the trial court erred by dismissing her usury claim before the end of discovery. This issue is not properly before this Court because plaintiff failed to assert it in her statement of questions presented. MCR 7.212(C)(5); *Mettler Walloon, LLC v Melrose Twp*, 281 Mich App 184, 221; 761 NW2d 293 (2008). Nevertheless, this argument lacks merit.

We review de novo a trial court's decision on a motion for summary disposition. *Manuel v Gill*, 481 Mich 637, 643; 753 NW2d 48 (2008). Defendants moved for summary disposition under both MCR 2.116(C)(8) and (C)(10), and the trial court granted the motion in part under subrule (C)(10). A motion for summary disposition under MCR 2.116(C)(8) "tests the legal sufficiency of the pleadings standing alone." *Johnson-McIntosh v Detroit*, 266 Mich App 318, 322; 701 NW2d 179 (2005). A motion under subrule (C)(8) is properly granted if no factual development could justify recovery under the plaintiff's claim. *Id.*

A motion for summary disposition under MCR 2.116(C)(10) is properly granted if no factual dispute exists, thus entitling the moving party to judgment as a matter of law. *Rice v Auto Club Ins Ass'n*, 252 Mich App 25, 31; 651 NW2d 188 (2002). In deciding a motion brought under subrule (C)(10), a court considers all the evidence, affidavits, pleadings, and admissions in the light most favorable to the nonmoving party. *Id.* at 30-31. The nonmoving party must present more than mere allegations to establish a genuine issue of material fact for resolution at trial. *Id.* at 31. Further, we review for an abuse of discretion a trial court's decision whether to permit a party to amend her pleadings. *In re Kostin Estate*, 278 Mich App 47, 51; 748 NW2d 583 (2008). An abuse of discretion occurs when the trial court's decision falls outside the range of reasonable and principled outcomes. *Id.*

Plaintiff argues that the trial court erred by dismissing her usury claim before discovery was complete. Defendants, on the other hand, contend that discovery concluded before the trial court dismissed plaintiff's usury claim. Regardless of whether discovery ended before or after the trial court dismissed the usury claim, dismissal was proper because usury is a defense to a cause of action and does not form the basis of an independent action. *Olsen v Porter*, 213 Mich App 25, 30; 539 NW2d 523 (1995); *Rutter v Troy Mortgage Servicing Co*, 145 Mich App 116, 124; 377 NW2d 846 (1985).

In her complaint, plaintiff alleged usury in violation of MCL 438.32, which provides:

> Any seller or lender or his assigns who enters into any contract or agreement which does not comply with the provisions of this act or charges interest in excess of that allowed by this act is barred from the recovery of any interest, any official fees, delinquency or collection charge, attorney fees or court

> costs and the borrower or buyer shall be entitled to recover his attorney fees and court costs from the seller, lender or assigns.

"This statute is a forfeiture provision that is intended to penalize a lender attempting to enforce a usurious contract." *Washburn v Michailoff*, 240 Mich App 669, 674; 613 NW2d 405 (2000). A borrower may rely on the statute only when a lender brings an action to enforce such a contract. *Olsen, supra* at 30. This Court has repeatedly held that a borrower cannot maintain an independent action in reliance on MCL 438.32. *Id.*; *Waldorf v Zinberg*, 106 Mich App 159, 164; 307 NW2d 749 (1981). Thus, although dismissal of plaintiff's usury claim would have been more appropriate under MCR 2.116(C)(8) rather than (C)(10), dismissal was nevertheless proper.

Plaintiff further argues that the trial court should have granted her motion to amend her affirmative defenses to defendants' counter-complaint to assert usury as an affirmative defense. The trial court did not abuse its discretion by denying plaintiff's motion. Plaintiff did not move to amend her affirmative defenses until January 11, 2008. However, this was nearly six months after the trial court dismissed her usury claim and approximately two months before trial. As the trial court recognized when it ruled on plaintiff's motion on the day of the bench trial, the motion was untimely. In any event, defendants agreed to dismiss their counter-complaint in exchange for plaintiff's withdrawal of her motion for a jury trial. Thus, plaintiff was not prejudiced by the trial court's denial of her motion to amend her affirmative defenses to include usury.

Plaintiff next argues that the trial court erred by dismissing her Michigan Consumer Protection Act ("MCPA") claim against defendants when they failed to present evidence that they were exempt from the act. We agree in part. This issue involves a question of statutory interpretation, which is a question of law that we review de novo. *Griffith v State Farm Mut Auto Ins Co*, 472 Mich 521, 525-526; 697 NW2d 895 (2005).

MCL 445.904(1)(a) explicitly exempts from the MCPA "[a] transaction or conduct specifically authorized under laws administered by a regulatory board or officer acting under statutory authority of this state or the United States." In *Newton v Bank West*, 262 Mich App 434, 438-439; 686 NW2d 491 (2004), this Court determined that "residential mortgage loan transactions fit squarely within [this] exemption." Plaintiff argues that defendants failed to present evidence that they were licensed under, and thus subject to, the Mortgage Brokers, Lenders, and Servicers Licensing Act (MBLSLA), MCL 445.1651 *et seq*. To the contrary, defendants presented evidence that Borrowers Network was licensed under the MBLSLA. Defendants presented an affidavit of Lorrie Glassford, Borrowers Network's vice-president, stating that Borrowers Network possessed a valid license to act as a mortgage broker, lender, and servicer under the MBLSLA. Defendants also submitted the affidavit of Randall L. Shaw, Borrowers Network's president, who made the same assertions regarding the entity's license. In addition, defendants presented the results of a Michigan Department of Labor and Economic Growth Internet search indicating that Borrowers Network was licensed as a broker, lender, and servicer.

Once defendants presented documentary evidence supporting their motion for summary disposition, the burden was on plaintiff to present evidence establishing that there existed a material factual dispute for trial. *Smith v Globe Life Ins Co*, 460 Mich 446, 455; 597 NW2d 28 (1999).[2] Plaintiff failed to present any evidence on this issue and contends that summary disposition was premature because discovery was incomplete at the time the trial court granted the motion. A party opposing a motion for summary disposition on the basis that discovery is incomplete, however, must assert that a dispute exists and support that assertion with independent evidence. *Village of Dimondale v Grable*, 240 Mich App 553, 567; 618 NW2d 23 (2000). Although plaintiff filed a response to defendants' motion for summary disposition asserting that discovery was incomplete, she failed to present independent evidence tending to show the existence of a material fact regarding Borrowers Network's licensing status. Accordingly, the trial court properly granted summary disposition for Borrowers Network on plaintiff's MCPA claim.

The trial court also granted summary disposition for the Living Trust on plaintiff's MCPA claim. Defendants, however, failed to present any evidence showing that the Living Trust was licensed similar to Borrowers Network or was otherwise exempt from the MCPA. Defendants argue that it was incumbent on plaintiff, rather than defendants, to present proofs regarding whether the Living Trust violated the MCPA. To the contrary, a moving party has the initial burden of supporting its position with documentary evidence. Only after the moving party presents such evidence does the burden shift to the opposing party to establish a genuine issue of material fact for trial. *Smith*, *supra* at 455. Thus, the Living Trust was required to present some evidence supporting its argument that it was exempt from the MCPA for summary disposition to be proper under MCR 2.116(C)(10).

Defendants argued in the trial court that plaintiff made no allegation in her complaint that the Living Trust violated the MCPA. However, plaintiff's MCPA claim as stated in her complaint appears to refer to all defendants, including the Living Trust. Defendants also argued in the trial court that the Living Trust was not required to be licensed because it was not a broker, lender, or servicer of the loan, but rather an investor that purchased the loan. Defendants' argument lacks merit. MCL 445.1651a(p) defines "mortgage lender" as "a person[3] who, directly or indirectly, makes or offers to make mortgage loans." Moreover, MCL 445.1651a(q) defines "mortgage loan" as

> a loan secured by a first mortgage on real property located in this state and used, or improved for use, as a dwelling and designed for occupancy by 4 or fewer families or a land contract covering real property located in this state used, or improved for use, as a dwelling and designed for occupancy by 4 or fewer families. A mortgage loan does not include a home improvement installment

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[2] Superceded on other grounds by statute as stated in *McLiechey v Bristol West Ins Co*, 408 F Supp 2d 516 (WD Mich, 2006).

[3] The Living Trust is considered a "person" under MCL 445.1651a(p) because it is a legal entity pursuant to MCL 445.1651a(t).

> contract under the home improvement finance act, 1965 PA 332, MCL 445.1101 to 445.1431.

It is undisputed that the loan at issue in this case was a first mortgage on the property. The Living Trust acquired the note via an assignment of rights from First Alliance Mortgage Company ("First Alliance") on the same day that plaintiff, her ex-husband, and First Alliance executed the mortgage. Thus, the Living Trust was the successor in interest and stood in the shoes of the original lender, First Alliance. Under these circumstances, it appears that the Living Trust was a "mortgage lender" within the meaning of MCL 445.1651a(p).

Because the Living Trust was a mortgage lender, it was required to be licensed under MCL 445.1652(1) unless certain exceptions applied. That provision formerly provided as follows:[4]

> A person shall not act as a mortgage broker, mortgage lender, or mortgage servicer without first obtaining a license under this act or registering under section 6, unless 1 or more of the following apply:
>
> (a) The person is providing loan officer services as an employee or agent of only 1 mortgage broker, mortgage lender, or mortgage servicer and is registered as a loan officer registrant if that registration is required under this act.
>
> (b) The person is exempted from the act under section 25.
>
> (c) The person is licensed as a class I licensee under the consumer financial services act, 1988 PA 161, MCL 487.2051 to 487.2072.
>
> (d) The individual is an employee of a professional employer organization, as that term is defined in section 113 of the Michigan business tax act, 2007 PA 36, MCL 208.1113, solely acting as a residential mortgage originator of only 1 mortgage broker or mortgage lender. The mortgage broker or mortgage lender shall do all of the following:
>
> (i) Direct and control the activities of the individual under this act.
>
> (ii) Be responsible for all activities of the individual and assume responsibility for the individual's actions that are covered by the proof of financial responsibility deposit required under section 4.

If the Living Trust was not licensed and no exception to MCL 445.1652(1) applied, its conduct was not "specifically authorized under laws administered by a regulatory board or officer acting under statutory authority of this state" and, as such, it was not exempt from the MCPA under

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[4] MCL 445.1652 has recently been amended, but the amendments are not relevant to this appeal.

MCL 445.904(1)(a). Accordingly, we reverse the trial court's dismissal of plaintiff's MCPA claim against the Living Trust and remand for further proceedings on this claim.

Plaintiff next argues that the trial court should have ruled in her favor on her promissory estoppel and quiet title claims. We disagree. We review a trial court's findings of fact for clear error and its conclusions of law de novo. *Dep't of Environmental Quality v Waterous Co*, 279 Mich App 346, 364; 760 NW2d 856 (2008). "A finding is clearly erroneous when the reviewing court is left with the definite and firm conviction that a mistake has been made." *American Federation of State, Co & Muni Employees v Bank One, NA*, 267 Mich App 281, 283; 705 NW2d 355 (2005).

"The elements of promissory estoppel are: (1) a promise, (2) that the promisor should reasonably have expected to induce action of a definite and substantial character on the part of the promisee, and (3) that in fact produced reliance or forbearance of that nature in circumstances such that the promise must be enforced if injustice is to be avoided." *Novak v Nationwide Mut Ins Co*, 235 Mich App 675, 686-687; 599 NW2d 546 (1999). In order to establish a claim of promissory estoppel, a "promise must be clear and definite." *Derderian v Genesys Health Care Sys*, 263 Mich App 364, 381; 689 NW2d 145 (2004) (citation omitted). Moreover, a promisee's reliance must be reasonable. *Northern Warehousing, Inc v Dep't of Ed*, 475 Mich 859; 714 NW2d 287 (2006); *State Bank of Standish v Curry*, 442 Mich 76, 83-84; 500 NW2d 104 (1993).

The trial court did not clearly err in determining that plaintiff failed to establish that there existed a clear and definite promise to extend the loan maturity date to July 18, 2009. Plaintiff testified that her first loan servicer, Pines Investment Company, contacted her in 2000 to inform her that the balance on the balloon note was due. Plaintiff maintained that she was informed at that time that she could continue to make monthly payments instead of paying the loan balance in full and she chose to do so. She did not attempt to refinance the loan before the July 18, 2000, maturity date because her credit report reflected a prior bankruptcy. Thereafter, the servicing of her loan was transferred to Royal Mortgage, Inc., and plaintiff paid her monthly payments to Royal Mortgage for two years before Borrowers Network became her loan servicer.

Although plaintiff continued making monthly payments after July 18, 2000, she did not present any evidence that she made her payments in reliance on a new loan maturity date. Rather, she testified that she received a letter from Borrowers Network dated November 15, 2004, which indicated a loan payoff date of July 18, 2009. She acknowledged receiving another letter from Borrowers Network dated September 14, 2005, indicating that her balloon note had expired and requesting the balance in full. Thereafter, she received yet another letter from Borrowers Network dated October 14, 2005, indicating a loan payoff date of July 18, 2009. One week later, Borrowers Network informed her that the reference to the July 18, 2009, payoff date in the October 14, 2005, letter was erroneous and payment was due in full. Plaintiff testified that she believed that she had until July 18, 2009, to pay off her loan based on the two letters that indicated a July 18, 2009, balloon note due date. However, the two letters did not constitute a clear and definite promise of a new maturity date, particularly since after sending the first letter and before sending the third letter, Borrowers Network sent plaintiff a letter stating that the balloon note had expired and requesting the loan balance in full. Borrowers Network also corrected its erroneous reference to a 2009 maturity date in its October 21, 2005, letter sent only one week after the October 14, 2005, letter. Thus, under these circumstances, there existed no definite and clear promise to extend the maturity date to July 18, 2009, and any reliance on such

an alleged promise was not reasonable. *State Bank of Standish, supra* at 83-84; *Derderian, supra* at 381.

The trial court also correctly determined that plaintiff did not establish reliance or forbearance based on the alleged promise. Plaintiff offered no testimony that she chose not to refinance the loan in reliance on Borrowers Network's indication of a July 18, 2009, balloon note due date. Rather, plaintiff testified that she merely continued making her monthly payments until a representative from Pathway Financial or Pathway Mortgage Company contacted her and told her that she needed to refinance the loan because her note holder had died. Therefore, she failed to present any evidence of reliance or forbearance on Borrowers Network's erroneous indication of a July 18, 2009, due date. Accordingly, plaintiff failed to establish the elements of promissory estoppel. *Novak, supra* at 686-687.

Further, because plaintiff failed to establish her promissory estoppel claim, the trial court did not err by dismissing her quiet title claim, because there existed no basis for title to the property to be quieted in plaintiff's name. Although we reverse the dismissal of plaintiff's MCPA claim with respect to the Living Trust, plaintiff requested only monetary damages on this claim in her complaint. Therefore, even if plaintiff prevails on this issue on remand, plaintiff will not be entitled to have title to the property quieted in her name.

In Docket No. 290326, defendants argue that the trial court erred by denying their motion for case evaluation sanctions. In light of our decision reversing the trial court's dismissal of plaintiff's MCPA claim against the Living Trust, it is unnecessary to address this issue as it pertains to the Living Trust. On remand, either plaintiff or the Living Trust may move for case evaluation sanctions as appropriate after a verdict is reached on remand. With respect to Borrowers Network, we conclude that the trial court erred by denying the motion for sanctions. We review de novo a trial court's decision to grant or deny case evaluation sanctions. *Harbour v Correctional Medical Services, Inc*, 266 Mich App 452, 465; 702 NW2d 671 (2005).

MCR 2.403(O)(1) provides:

> If a party has rejected an evaluation and the action proceeds to verdict, that party *must* pay the opposing party's actual costs unless the verdict is more favorable to the rejecting party than the case evaluation. However, if the opposing party has also rejected the evaluation, a party is entitled to costs only if the verdict is more favorable to that party than the case evaluation. [Emphasis added.]

The term "verdict" in this provision includes "a judgment entered as a result of a ruling on a motion after rejection of the case evaluation" as well as "a judgment by the court after a nonjury trial." MCR 2.403(O)(2)(b) and (c). Further, "[t]he use of the word 'must' indicates that the imposition of these sanctions is mandatory." *Allard v State Farm Ins Co*, 271 Mich App 394, 398; 722 NW2d 268 (2006).

The trial court denied the motion for case evaluation sanctions on the basis that it was untimely. Significantly, the trial court stated that "ordinarily case evaluation sanctions would apply" and that it was denying the motion solely on the basis that it was untimely. In their motion for reconsideration, defendants presented evidence indicating that the motion was timely

filed, including a UPS tracking summary indicating that the motion was delivered to the circuit court on June 12, 2008, an affidavit of deputy clerk Shirley McClain stating that the motion was delivered on June 12, 2008, but was not processed for filing until the following day, and a circuit court package drop-off log sheet indicating that the motion was delivered on June 12, 2008. Despite these proofs, the trial court denied the motion for reconsideration because defendants failed to attach a transcript of the original hearing on the motion for costs and, as such, the court was unaware of its reasons for having denied the motion. We conclude that the trial court erred by denying case evaluation sanctions on this basis, particularly considering that the court acknowledged that such sanctions would be appropriate and that the alleged untimeliness of the motion was the sole reason for the denial. We therefore reverse the trial court's order denying case evaluation sanctions with respect to Borrowers Network. Because plaintiff disputed the amount of attorney fees and costs that Borrowers Network requested, the trial court shall address this issue on remand.

In sum, we affirm the judgment of no cause of action, affirm in part and reverse in part the order granting partial summary disposition for defendants, reverse the order denying case evaluation sanctions with respect to Borrowers Network, and remand for further proceedings.

Affirmed in part, reversed in part, and remanded for further proceedings not inconsistent with this opinion. We do not retain jurisdiction.

/s/ Kurtis T. Wilder
/s/ Peter D. O'Connell
/s/ Michael J. Talbot