State Bar of Michigan

NEWSLETTER

Consumer Law

V. 18, No. 1 State Bar of Michigan Consumer Law Section April 2014

Contents

From the Chair

SB 551

September 25, 2013, Introduced by Senator BOOHER and referred to the Committee on Banking and Financial Institutions.

A bill to amend 1962 PA 174, entitled "Uniform commercial code," by amending sections 9625 and 9626 (MCL 440.9625 and 440.9626), as added by 2000 PA 348.

THE PEOPLE OF THE STATE OF MICHIGAN ENACT: 1 Sec. 9625. (1) If it is established that a secured party is 2 not proceeding in accordance with this article, a court may order 3 or restrain collection, enforcement, or disposition of collateral 4 on appropriate terms and conditions. 5 (2) Subject to subsections (3), (4), and (6), a person is 6 liable for damages in the amount of any loss caused by a failure to 7 comply with this article. Loss caused by a failure to comply may 8 include loss resulting from the debtor's inability to obtain, or increased costs of, alternative financing.

(3) Except as otherwise provided in section 9628, both of the following apply:

(a) A person that, at the time of the failure, was a debtor, was an obligor, or held a security interest in or other lien on the collateral may recover damages under subsection (2) for its loss.

(b) If the collateral is consumer goods, a person that was a debtor or a secondary obligor at the time a secured party failed to comply with this part may recover for that failure in any event an amount not less than the credit service charge PAID plus 10% of the principal amount of the obligation or the time-price differential PAID plus 10% of the cash price.

(4) A debtor whose deficiency is eliminated under section 9626 may recover damages for the loss of any surplus. However, a debtor or secondary obligor whose deficiency is eliminated or reduced under section 9626 may not otherwise recover under subsection (2) for noncompliance with the provisions of this part relating to collection, enforcement, disposition, or acceptance. REGARDLESS OF WHETHER THE DEBTOR'S OR SECONDARY OBLIGOR'S DEFICIENCY IS ELIMINATED OR REDUCED UNDER SECTION 9626 OR OTHER APPLICABLE LAW, ANY DAMAGES RECOVERED BY THE DEBTOR OR SECONDARY OBLIGOR UNDER SUBSECTION (3) SHALL BE REDUCED BY THE AMOUNT THAT THE SUM OF THE SECURED OBLIGATION, EXPENSES, AND ATTORNEY'S FEES EXCEEDS THE PROCEEDS OF COLLECTION, ENFORCEMENT, DISPOSITION, OR ACCEPTANCE.

(5) In addition to any damages recoverable under subsection (2), the debtor, consumer obligor, or person named as a debtor in a filed record, as applicable, may recover $500.00 in each case from a person that does 1 or more of the following:

(a) Fails to comply with section 9208.

(b) Fails to comply with section 9209.

(c) Files a record that the person is not entitled to file under section 9509(1).

(d) Fails to cause the secured party of record to file or send a termination statement as required by section 9513(1) or (3).

(e) Fails to comply with section 9616(2)(a) and whose failure is part of a pattern, or consistent with a practice, of noncompliance.

(f) Fails to comply with section 9616(2)(b).

(6) A debtor or consumer obligor may recover damages under subsection (2) and, in addition, $500.00 in each case from a person that, without reasonable cause, fails to comply with a request under section 9210. A recipient of a request under section 9210 that never claimed an interest in the collateral or obligations that are the subject of a request under that section has a reasonable excuse for failure to comply with the request within the meaning of this subsection.

(7) If a secured party fails to comply with a request regarding a list of collateral or a statement of account under section 9210, the secured party may claim a security interest only as shown in the list or statement included in the request as against a person that is reasonably misled by the failure.

Sec. 9626. (1) In an action arising from a transaction , other than a consumer transaction, in which the amount of a deficiency or surplus is in issue, the following rules apply:

(a) A secured party need not prove compliance with the provisions of this part relating to collection, enforcement, disposition, or acceptance unless the debtor or a secondary obligor places the secured party's compliance in issue.

(b) If the secured party's compliance is placed in issue, the secured party has the burden of establishing that the collection, enforcement, disposition, or acceptance was conducted in accordance with this part.

(c) Except as otherwise provided in section 9628, if a secured party fails to prove that the collection, enforcement, disposition, or acceptance was conducted in accordance with the provisions of this part relating to collection, enforcement, disposition, or acceptance, the liability of a debtor or a secondary obligor for a deficiency is limited to an amount by which the sum of the secured obligation, expenses, and attorney fees exceeds the greater of 1 of the following:

(i) The proceeds of the collection, enforcement, disposition, or acceptance.

(ii) The amount of proceeds that would have been realized had the noncomplying secured party proceeded in accordance with the provisions of this part relating to collection, enforcement, disposition, or acceptance.

(d) For purposes of subdivision (c)(ii), the amount of proceeds that would have been realized is equal to the sum of the secured obligation, expenses, and attorney fees unless the secured party proves that the amount is less than that sum.

(e) If a deficiency or surplus is calculated under section 9615(6), the debtor or obligor has the burden of establishing that the amount of proceeds of the disposition is significantly below the range of prices that a complying disposi-

tion to a person other than the secured party, a person related to the secured party, or a secondary obligor would have brought.

(2) The limitation of the rules in subsection (1) to transactions other than consumer transactions is intended to leave to the court the determination of the proper rules in consumer transactions. The court may not infer from that limitation the nature of the proper rule in consumer transactions and may continue to apply established approaches.

Testimony of Lorray S.C. Brown On Behalf of the Michigan Poverty Law Program (MPLP) House Financial Services Committee Senate Bill 551

Chairman Callton and members of the House Financial Services Committee, please accept my written testimony pertaining to SB 551. I am Lorray Brown, the statewide consumer law specialist at Michigan Poverty Law Program. Michigan Poverty Law Program is the statewide support office for legal services programs.

The Michigan Poverty Law Program (MPLP) opposes SB 551 as it will effectively eliminate any penalty for the creditor's failure to comply with the Uniform Commercial Code (UCC) Article 9 in consumer transactions, thereby protecting consumers. Article 9 sets out certain requirements that the creditor must take when repossessing the secured property. For example, Article 9 requires timely notice to the consumer, and that repossession is sold in a commercially reasonable manner.

Michigan law, MCL 440.9625, currently provides a penalty or disincentive to creditors who fail to comply with Article 9. The statute and current case law interpreting the statute prohibit the creditor from seeking the deficiency from the consumer if the creditor failed to comply with Article 9, such as giving notice of the sale to the consumer.

In Honor State Bank v Timber Wolf Construction, 391 NW2d 442 (Mich App 1986), the Michigan Court of Appeals, in interpreting this section of the UCC, stated:

The purpose of the reasonable notification requirement is threefold: 1) to give the debtor the opportunity to exercise his redemption rights ... ; 2) to afford the debtor an opportunity to bid at the sale or to encourage others to bid on the property so as to help assure a fair sale price; and 3) to allow the debtor to oversee every aspect of the disposition so as to maximize the price obtained.

With proper notice, we can ensure that the creditor will sell the property in a commercially reasonable manner and for the fair market price. Without the notice, the creditor can sell the property for an amount well below the fair market value and then seek a deficiency against the consumer. So the current law prevents this from happening, thereby protecting consumers.

SB 551 eliminates this protection. SB 551 also in effect "overrules" Michigan case law that bars deficiencies in consumer cases when proper notice of sale is not given. In the process, it gets rid of the incentives for repossessing creditors of consumers to follow the Article 9 notice and sale rules. Under SB 551, creditors who ignore the law will simply testify that the amount they got at the sale would not have changed with notice to the consumer or whatever else they should have done, and they will get their deficiency. There is no reason to drop one of the few consumer-friendly rules in Michigan UCC case law. Accordingly, the Michigan Poverty Law Program opposes SB 551. Thank you.

Written Testimony Prepared for: House Financial Services Committee Public Hearing – March 5, 2014.

Consumer Law Section's Opposition

Currently the vote to submit a public policy statement opposing SB-551, the bill amending Section 9-625 of the UCC is 11 favoring a public policy statement opposing the bill, 1 abstaining, and 3 yet to vote.

I would propose attaching the statement below to our public policy statement.

The Consumer Law Section of the State Bar of Michigan, opposes SB 551 as it will effectively eliminate any penalty for the creditor's failure to comply with the Uniform Commercial Code (UCC) Article 9 in consumer transactions, thereby removing any protections consumers. As proposed, SB 551 is likely to encourage secured creditors to ignore any of the protections built into Article 9 because the secured creditor will perceive that without the potential of a penalty being assessed against it if the procedures are ignored, following the procedures would be too time consuming or cumbersome.

Article 9 sets out certain requirements and procedures that the creditor must meet and take when repossessing the secured property. In writing the Uniform Commercial Code, the legislature recognized that there were differences between business parties who enter into secured transactions amongst themselves and consumers who enter into secured transactions with businesses. For example, Article 9 requires timely notice to the consumer, and that the repossessed property be sold in a commercially reasonable manner.

Michigan law, MCL 440.9625, currently insures that this will happen by providing for a penalty or disincentive to creditors who fail to comply with Article 9. The statute and current case law interpreting the statute prohibit the creditor from seeking the deficiency from the consumer if the creditor failed to comply with Article 9, such as giving notice of the sale to the consumer. In Honor State Bank v Timber Wolf Construction, 391 NW2d 442 (Mich App 1986), the Michigan Court

of Appeals, in interpreting this section of the UCC, stated:

> "The purpose of the reasonable notification requirement is threefold:
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> 1. to give the debtor the opportunity to exercise his redemption rights ... ;
> 2. to afford the debtor an opportunity to bid at the sale or to encourage others to bid on the property so as to help assure a fair sale price; and
> 3. to allow the debtor to oversee every aspect of the disposition so as to maximize the price obtained."

There is no evidence that the procedure currently required by Article 9 prohibits or deminishes the secured party's rights. Moreover, with proper notice, we can ensure that the creditor will sell the property in a commercially reasonable manner and for the fair market price. Without the protections of notice to the consumer that currently exist, the creditor can sell the property in a manner not consistent with commercial reasonableness requirements and then seek a deficiency against the consumer who will have no effective remedy.

Recognizing that secured transactions between consumers and businesses often involve parties with unequal bargaining power in the marketplace, drafters of the uniform law included a provision, in the current law which allowed the court to adopt additional measures if necessary to protect the consumer in situations where a secured party is exercising its rights. The proposed amendment removes that authority from the court.

So the current law prevents this from happening, thereby protecting consumers. SB 551 eliminates this protection. SB 551 also in effect "overrules" Michigan case law that bars deficiencies in consumer cases when proper notice of sale is not given. In the process, it gets rid of the incentives for repossessing creditors of consumers to follow the Article 9 notice and sale rules. Under SB 551, creditors who ignore the law will simply testify that the amount they got at the sale would not have changed with notice to the consumer or whatever else they should have done, and they will get their deficiency. There is no reason to drop one of the few consumer-friendly rules in Michigan UCC case law. Accordingly, the Consumer Law Section of the State Bar of Michigan opposes SB 551.

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Musings on the Voluntary Payment Doctrine

By Josh Ard

A recent unpublished Court of Appeals case involved a successful use of the voluntary payment doctrine. That case and various implications are well worth considering.

The case is *Slavik v The Baskin Law Firm*, docket number 311905, decided December 26, 2013. The holding is very short and one cannot easily tell all of the facts. It appears that the plaintiff signed a retainer agreement with a divorce lawyer that contained a value added clause. The record includes this portion:

The final bill, in addition to the time expended, will be based upon the extent to which preparation is required for accomplishment of discovery proceedings, mediation, and/or trial, the degree to which outside expertise, such as accounting, appraisal or other assistance is needed, the skill and experience brought to this case by me, the time involved, the results obtained and other factors which are used to determine reasonableness, as contained in Section 1.5(a) of the Code of Professional Responsibility, which is attached.

In essence, this language allowed the lawyer to give himself a bonus on any basis he wanted to, including his own views of how good a job he did.

It appears that neither the plaintiff nor her lawyers acted reasonably, but this could be disguised by the record. The basis of the complaint was that the language was ambiguous. The defendants moved for summary disposition saying that the claim was "barred under what they refer to as 'the voluntary payment doctrine.'" Plaintiff responded but didn't include an affidavit or any other documentary evidence. The trial court ruled in favor of the motion and this was affirmed by the Court of Appeals. The record fails to indicate what arguments were raised against the voluntary payment doctrine, although there are some compelling ones. This might be one reason why the opinion is unpublished.

The essence of the voluntary payment doctrine is that a person who pays a detailed bill without objection cannot later change her mind and challenge the bill. Obviously, this doctrine would be highly detrimental in many consumer cases, so it is important to investigate in greater depth.

The court traces the doctrine back to *Pingree v Mutual Gas Co*, 107 Mich 156, 65 NW 6 (1895). That court explains the doctrine:

> It is well settled that a voluntary payment cannot be recovered back, but a voluntary payment is one made with a full knowledge of all the circumstances upon which it is demanded, and without artifice, fraud, or deception on the part of the payer, or duress of the person, or goods of the person making the payment. It is equally true that money paid under a mistake of a material fact may be recovered. p. 157.

In *Pingree*, the plaintiff paid higher prices for gas than was allowed under local ordinances. The court held that the plaintiff did not know that the charges were in violation of the ordinance and also held that the plaintiff had no duty to know ordinances governing gas pricing. On the other hand, the regulated business did have a duty to know the ordinances it operated under. For that reason, the court rejected the defense based on the voluntary payment doctrine. The rule of the case as announced by the court is that in "general that money paid under a mistake of material facts may be recovered back [even if] there was negligence on the part of the person making the payment."

The *Slavik* court only quoted the first sentence of the citation above, ignoring the mistake of a material fact. In fact, the only relevant defense to the voluntary payment doctrine the *Slavik* court expressly mentioned was duress and said that nothing in the record indicated any duress.

There was an important material fact not mentioned by the court. Perhaps it was never raised at trial level or on appeal (if allowed if not in the record below). Michigan Rule of Professional Conduct 1.5 clearly states:

> (d) A lawyer shall not enter into an arrangement for, charge, or collect a contingent fee in a domestic relations matter or in a criminal matter.

It seems self-evident that the retainer agreement, which governs representation in divorce, contemplates a contingent fee in a domestic relations matter. Moreover, there is an ethic opinion directly on point. The syllabus to RI-346, issued on October 23, 2009, says

The use of a "results obtained" or "value added" clause in the charge or calculation of fees in a divorce case makes the fee contingent and thus is prohibited by MRPC 1.5(d).

The record does not indicate whether the trial court or the Court of Appeals was aware of either the text of the ethical rule or the ethics opinion.

Following the analysis of *Pingree*, had the proper facts been raised, the voluntary payment doctrine should have been refuted. The defendant certainly should have known the relevant Michigan Rule of Professional Conduct. In fact, that very rule was cited in the passage in the holding. That in itself is not enough to determine whether the plaintiff should have prevailed on her underlying claim.

In retrospect, it seems odd that the basic complaint was that the retainer agreement was ambiguous. It seems perfectly plain to me—the lawyer reserved the right to adjust his fee upwards without having to justify why. That strategy could be questioned, but it is not relevant for the topic of how the voluntary payment doctrine operates.

Let us now turn from this particular matter to consumer complaints in general. *Pingree* gives various grounds for contesting the application of the affirmative defense of the voluntary payment doctrine:

- The plaintiff did not have full knowledge of the circumstances
- There was artifice
- There was fraud
- There was deception
- There was duress
- There was a mistake of a material fact (even negligence on the part of the payor may be excused)

One interesting question is whether contesting the voluntary payment doctrine could revive the Consumer Protection Act as a shield after it has largely been vitiated as a shield. The sad demise of the Consumer Protection Act is eulogized in two articles in the Michigan Bar Journal. One by Gary Victor ("The Michigan Consumer Act: What's Left After Smith v Globe?) in September 2003 and one by Daniel Andrews ("The MCPA: So Long, It's Been Good to Know Ya!") in September 2010. What happened essentially is that an exception for "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" MCL § 445.904(1)(a) has eaten up the entire statute. Arguably, the exception was designed to prevent claims for specifically authorized conduct, such as being off by up to 10% in a car repair estimate. Without the exception, a plaintiff could have argued that an estimate off by 5% was an unfair and deceptive act, even though such tolerances are specifically allowed in laws regulating car repair. The Michigan Supreme Court in *Smith v Globe*, 460 Mich 446; 597 NW2d 28 (1999), do exempt anything done by a regulated entity as long as the activity in general was authorized. Needless to say, defendant after defendant claimed to be regulated.

Earlier sections of the Consumer Protection Act list various "unfair, unconscionable, or deceptive methods, acts, or practices in the conduct of trade or commerce." Depending on how one counts subdivisions, section 3 lists 34 examples. Even more are given in sections 3a through 3i. Presumably, these lists reflect the public policy decisions of the legislature about behaviors that are unfair, unconscionable, or deceptive.

The exemption section cited above says:

(1) This act does not apply to either of the following

(a) 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.

There are multiple ways of interpreting this provision, including

- This act does not authorize any actions against violators if they are exempt under the act.
- The act is totally irrelevant with regard to and inapplicable in any manner to a regulated entity

There are various arguments why the former interpretation is more correct. For example, parts of the act require the Attorney General to keep records. There is no indication that regulated entities must be expunged from the records.

A better argument is that MCL 445.904 does not say that otherwise unfair, unconscionable, or deceptive methods, acts, or practices somehow are transmogrified into acceptable ones if the entity is regulated. Rather, it says that it's the job of the regulators to address the problem, not persons authorized to enforce the Consumer Protection Act.

Therefore, the lists of bad acts in the Consumer Protection Act provide good evidence of types of behavior that would qualify as artifice, fraud, or deception. Even if the act does not allow a positive claim for a violation, the list could be useful in fighting the affirmative defense based on the voluntary payment doctrine.

It is important to understand the limitations. This is just like overcoming any other affirmative defense. If a defendant pleads the affirmative defense of laches or a statute of limitations, the plaintiff must show that the claim was timely in order to maintain the action. Simply overcoming the affirmative defense does not suggest that the actual cause of action is feasible.

The basic insight is that the voluntary payment doctrine is limited and should be strictly construed. If the bill was in violation of some law or regulation, the doctrine should not apply. If there was anything deceptive in the bill, it should not apply. If the entire situation was not explained completely, it should not apply. It is the duty of the plaintiff to act quickly and comply with all requirements about responses to an affirmative defense and a motion for summary disposition. The voluntary payment doctrine does not create a higher barrier, but the plaintiff must take the effort to step over it before the doors close.

Select Cases of Interest

Michigan Court of Appeals - Published

Issues: Foreclosure by advertisement; MCL 600.3201 *et seq.*; Deficiency actions; MCL 600.3280; *Citizens Bank v. Boggs*; *Pulleyblank v. Cape*; *Guardian Depositors Corp. v. Darmstaetter*; *Guardian Depositors Corp. v. Hebb*; Conflict of laws; Restatement Conflict of Laws, 2d, § 188(2)(a)-(e); *Grange Ins. Co. of MI v. Lawrence*; *Chrysler Corp. v. Skyline Indus. Servs., Inc.*; *Farm Bureau Ins. Co. v. Abalos*; *Sutherland v. Kennington Truck Serv., Ltd.*; *Hudson v. Mathers*; *Federal Deposit Ins. Corp. v. Henry* (D MA);*Cardon v. Cotton Lane Holdings, Inc.* (AZ); *Consolidated Capital Income Trust v. Khaloghli* (CA App.); Attorney fees; *Fleet Bus. Credit, LLC v. Krapohl Ford Lincoln Mercury Co.*; *Central Transp., Inc. v. Fruehauf Corp.*; *Department of Transp. v. Randolph*; *Wood v. Detroit Auto. Inter-Ins. Exch.*

Case Name: *Talmer Bank & Trust v. Parikh*
e-Journal Number: 56525
Judge(s): Murphy, M.J. Kelly, and Ronayne Krause

The court held that the trial court properly applied Michigan law and granted summary disposition for plaintiff in its actions seeking deficiency judgments against defendants after the foreclosure sales of two condos they had purchased, and properly awarded attorney fees for plaintiff in one of the actions, but erred in failing to award plaintiff attorney fees in the other action. Plaintiff filed two separate breach of note actions seeking deficiency judgments against defendants after foreclosure sales of two condos they had purchased in Las Vegas. On appeal, the court first reviewed and compared Michigan and Nevada law, and concluded that the Restatement factors favored applying Michigan law, "where the place of negotiating the promissory notes was Michigan, the place of contracting was Michigan, the place of performance as to making the payments on the notes was Michigan, the place of defendants' residence was Michigan, and the place of [the original bank's] business, as well as the place of [plaintiff's] business, was Michigan." Even though "the funds received by defendants were used to purchase condos in Nevada, and the notes were secured by the Nevada condos" the factors "in § 188(2)(a)-(e) still weigh heavily in favor of Michigan law." Defendants could not overcome the choice of law because Michigan "had a substantial relationship to the parties and transaction and there was thus a reasonable basis for the parties to have chosen application of Michigan law, considering that the parties were from Michigan, the note was negotiated and executed in Michigan, and performance of the note occurred in Michigan." Further, "Michigan and Nevada law with respect to deficiency actions, under the facts presented here, are sufficiently similar such that Nevada policies and interests are not circumvented or defeated by the application of Michigan law." The court also rejected defendants' argument that Nevada law required the trustee sales to be joined with the deficiency suits in a single action, finding that plaintiff's "exercise of the power of sale provisions in the two deeds of trust did not constitute an action that necessitated the joinder of deficiency suits, even if Nevada law applied." Finally, the court held that the trial court erred in denying plaintiff attorney fees in the first case, noting that the promissory note required defendants to pay the lender's reasonable attorney fees incurred in collecting on the note upon default. "Given our holding affirming entry of the summary disposition judgment, [plaintiff] is contractually entitled to reasonable attorney fees incurred in litigating the case, including reasonable attorney fees associated with this appeal." Affirmed in part, reversed in part, and remanded.

Michigan Court of Appeals - Unpublished

Issues: Foreclosure; Whether there was a question of fact that the defendant defaulted; Notice of default; MCL 600.3205a(1); Notice of adjournment; MCL 600.3220; Defect rendering a foreclosure sale voidable (not void); *Sweet Air Inv., Inc. v. Kenney*; Prejudice; Whether any liability defendant owed on the first mortgage was extinguished when the second mortgage was foreclosed; *Board of Trs. of Gen. Ret. Sys. of Detroit v. Ren-Cen Indoor Tennis & Racquet Club*; Alleged "full credit bid"; Procedural due process; Notice and an opportunity to be heard; *Al-Maliki v. LaGrant*; *Sua sponte* grant of partial summary disposition under MCR 2.116(I)(2); Whether the trial court properly allowed witness testimony; Witness lists; MCR 2.401(I)(1) & (2); *Grubor Enters., Inc. v. Kortidis*; *DC Barnes Assocs., Inc. v. Star Heaven, LLC*; *Duray Dev., LLC v. Perrin*; Actual notice; Whether the witnesses' testimony was inadmissible because they lacked personal knowledge; MRE 602; Business records; *FDIC v. Staudinger* (10th Cir.);*People v. Kirtdoll*; *People v. Safiedine*; Award of post-foreclosure interest; Extinguishing of the mortgage; *Bank of Three Oaks v. Lakefront Props.*; *Citizens Bank v. Boggs*; MCL 600.3240(1) & (2); Attorney fees and costs; The "American rule"; *Reed v. Reed*; Abandoned issue as to the reasonableness of the fees; MCR 7.212(C)(5); *Smith v. Khouri*; *Wilson v. Taylor*; MCR 2.626

Case Name: *Federal Deposit Ins. Co. v. Torres*

e-Journal Number: 56324

Judge(s): Per Curiam – Wilder, Fort Hood, and Servitto

Holding that there was no genuine issue of material fact that the defendant defaulted, the court concluded that the trial court did not err in granting the plaintiff summary disposition on the issue of liability. The court also rejected his claims that his right to procedural due process was violated, and that the trial court erred in allowing two witnesses to testify. Further, the court upheld the trial court's award of attorney fees and costs to plaintiff pursuant to the contractual language of the loan documents. However, it agreed with defendant that the award of post-foreclosure interest to plaintiff was contrary to law. Thus, the court affirmed in part, reversed in part, and remanded the case for further proceedings. It instructed the trial court on remand to revise the judgment by limiting the amount of post-default interest and fees to only those accruing before the foreclosure sale. Defendant borrowed $1,100,000 from a bank to purchase over 60 acres of property. The loan was secured by a mortgage on the property. The property was appraised at $1,730,000. Defendant later opened a $200,000 line of credit with the bank, which also was secured by a mortgage to the property. Both mortgages contained "cross-collateralization" language. Defendant's plans to develop the property fell through due to economic conditions. Plaintiff accelerated the loans. As of 7/13/09, the balance owed was $913,775.91 for the original loan and $94,602.71 for the line of credit, for a total of $1,008,378.62. Plaintiff foreclosed by advertisement, won the property with a bid of $487,113.18, and sued defendant, claiming that it was owed $527,225.45, plus interest, costs, and expenses, as a result of the deficiency remaining after the sale. Relying on *Bd. of Trustees*, defendant argued, among other things, that plaintiff should not have been awarded summary disposition as to liability because any liability he owed on the first mortgage was extinguished when the second one was foreclosed. The court disagreed, concluding that "the rule enunciated in *Bd. of Trustees* simply does not apply." Unlike the second mortgage in that case, "the second mortgage here secured *all* of defendant's debts with plaintiff, including the amount owed on the first note." Thus, assuming that "the first mortgage was extinguished when the second mortgage was foreclosed, the entire debt was still secured on the second mortgage." Further, "the equitable concern of a plaintiff seeking a 'double recovery' by holding onto property that was worth well in excess of the amount owed" was not present

here. The court also rejected defendant's other arguments on appeal, except as to interest, holding that the trial court erred in awarding plaintiff interest of $74.04 per day "going forward, until paid in full." The last date that interest could accrue was the date of the foreclosure sale, 8/28/09.

Issues: Breach of warranty; MCL 257.1401 *et seq.*; Magnuson-Moss Warranty-Federal Trade Commission Improvement Act (15 USC § 2301 *et seq.*); Trial court's role in determining credibility of witnesses in a bench trial; *Triple E Produce Corp. v. Mastronardi Produce, Ltd.*; *Kalamazoo Cnty. Rd. Comm'rs v. Bera*; Contract construction and interpretation; *Bandit Indus., Inc. v. Hobbs Int'l, Inc.* (*After Remand*);*Mallory v. Detroit*; Offer and acceptance requirements; *Mathieu v. Wubbe*; "Meeting of the minds"; *Houghton Lake Tourism & Convention Bureau v. Wood*; Oral contracts;*Strom-Johnson Constr. Co. v. Riverview Furniture Store*; Whether an inquiry as to the terms of a proposal, or a request to modify or change the offer, has the effect of rejecting the offer; *Johnson v. Federal Union Sur. Co.*; *Marshal Mfg. Co. v. Berrien Cnty. Package Co.*; Acceptance; *Pakideh v. Franklin Commercial Mtg. Group, Inc.*; Modification or waiver; *Quality Prods. & Concepts Co. v. Nagel Precision, Inc.*; Fraud;*Webb v. First of MI Corp.*; Case evaluation sanctions; Court of Appeals' role as an error correcting court; *Burns v. Detroit* (*On Remand*); Failure to challenge the basis of the trial court's ruling; *Derderian v. Genesys Health Care Sys.*; When remand is warranted; *City of Jackson v. Thompson-McCully Co., LLC*; Advisory opinions; *Rozankovich v. Kalamazoo Spring Corp.* (*On Rehearing*)

Court: Michigan Court of Appeals (Unpublished)

Case Name: Yaldo v. Toyota Motor Sales USA, Inc.

e-Journal Number: 56159

Judge(s): Per Curiam – M.J. Kelly, Wilder, and Fort Hood

The court held in Docket No. 308600 that the trial court did not err in finding that the parties entered into an enforceable contract for the repurchase of plaintiff's vehicle. In Docket No. 310018, the court rejected plaintiff's claim that the trial court erred by denying his request for attorney fees and costs where it did not deny his motion on the merits. Plaintiff sued defendant for breach of a settlement agreement under which defendant had agreed to repurchase a vehicle it sold to plaintiff, as well as state and federal warranty claims. The trial court ruled in favor of plaintiff, finding that the parties had reached a valid and enforceable settlement. However, it denied plaintiff's motion for attorney fees and costs "pending completion of the appeal." On appeal, the court rejected defendant's argument that there was no valid and enforceable contract between the parties, and they did not agree to a material term. "In light of the actions by defendant's agent following receipt of plaintiff's response to the offer, defendant's contention . . . is without merit." The court also found that the condition of the vehicle was not a material term, nor was it a condition precedent. It further found defendant's contention that plaintiff fraudulently induced it to enter into the transaction without merit, noting that defendant had the means of discovering accident damage to the vehicle by examining Lexus records. Lastly, the court ruled that, in light of the parties' acknowledgment that return of the vehicle is proper upon satisfaction of the judgment, remand for amendment of the judgment was appropriate. The court rejected plaintiff's claim that he was entitled to recovery of case evaluation sanctions as a matter of law and to attorney fees and costs, noting that his contention that the trial court "erred" in denying his motion for costs and attorney fees "is not an accurate reflection of the lower court's ruling." It declined to issue an advisory opinion as to the validity of plaintiff's claims, noting he "is free to renew his motion in the trial court." Affirmed and remanded.

Issues: Declaratory judgment voiding *ab initio* the foreclosure of plaintiff's property; Whether defendant-Mortgage Electronic Registration System (MERS) had a right to foreclosure by advertisement; *Residential Funding Co. v. Saurman*; Motion for reconsideration; MCR 2.119(F)(3); *Kokx v. Bylenga*; MCL 600.3204(1)(d); Rule that an assignee stands in the shoes of an assignor; *Coventry Parkhomes Condo. Ass'n v. Federal Nat'l Mtg. Ass'n*; Full retroactive effect of the Michigan Supreme Court's decision in *Saurman*; *Pohutski v. Allen Park*; *Dunn v. Detroit Auto. Inter-Ins. Exch.*; *Rowland v. Washtenaw Cnty. Rd. Comm'n*

Court: Michigan Court of Appeals (Unpublished)

Case Name: Mangray v. GMAC Mtg., L.L.C.

e-Journal Number: 56040

Judge(s): Per Curiam – Murphy, Fitzgerald, and Borrello

Holding that the trial court abused its discretion in denying the defendants' motion for reconsideration because defendant-US Bank was entitled to foreclose on the plaintiff's property under *Saurman*, the court reversed the trial court's grant of summary disposition to plaintiff and remanded for entry of summary disposition for the defendants. Plaintiff's mortgage identified a non-party (FMF) as the lender and defendant-MERS as the mortgagee. MERS later executed an assignment of the mortgage to US Bank as "Trustee." The assignment was recorded. Plaintiff defaulted on the mortgage leading to a non-judicial foreclosure by advertisement and sheriff's

sale. The defendant-law firm initiated foreclosure proceedings on behalf of US Bank. Plaintiff's property was sold at sheriff's sale to defendant-Ore Creek. After the sale, plaintiff sued to quiet title. Her main argument was that MERS had no right to foreclosure by advertisement under the court's decision in *Saurman*. Twelve days after the trial court granted her summary disposition, the Michigan Supreme Court reversed*Saurman*. US Bank, MERS, and defendant-GMAC moved the trial court for reconsideration. They attached two new pieces of evidence to their brief in support of their motion. First, they attached a new copy of the Adjustable Rate Note at issue in the case. The new copy had a different allonge page, which was the same as the old page, except that it included two specific endorsements. The first endorsement transferred the note from FMF to another non-party (Residential Funding). The second endorsement transferred the note from Residential Funding to US Bank. The second new piece of evidence was a sworn declaration by L, a Senior Litigation Analyst for GMAC, attesting that the note was transferred from FMF to Residential Funding, and later from Residential Funding to US Bank. The court noted that it was undisputed that "MERS (as the original mortgagee) executed an assignment of plaintiff's mortgage to US Bank. 'It is well established that an assignee stands in the shoes of an assignor, acquiring the same rights and being subject to the same defenses as the assignor.'" Thus, "US Bank had the same rights as MERS, the original mortgagee, had. US Bank was the party that initiated foreclosure proceedings against plaintiff." Thus, under the Supreme Court's decision in *Saurman*, US Bank was entitled to foreclose on the property because it had the rights of a mortgagee. The trial court should have granted defendants' motion for reconsideration and corrected its opinion.

Tuesday, Wednesday, & Thursdays February–July 2014

Noon–1:00 p.m.

Bring your lunch (soup by Zoup provided)
Only $25 per session; Limited seating

Speakers

Diane Ebersole, JoAnn Hathaway, & Samantha Meinke

Location

State Bar of Michigan
306 Townsend St, Lansing

Register online at http://e.michbar.org

TECH Tuesdays

May 13, 2014
Explore Web File Storage Using Dropbox or Box

Learn to use two of the leading web-based file storage services, Dropbox and Box. This session will also demonstrate methods to improve the security of your documents stored on the web.

June 10, 2014
Tools to Help Build Your Virtual Practice

Explore the two leading SaaS based applications designed to facilitate virtual practice, DirectLaw and Total Attorney, and learn how these applications can help you expand your practice into the virtual realm.

July 8, 2014
Prezi for Presentations

Prezi is a newer presentation software application which approaches presentation design from a totally different concept than the linear approaches of PowerPoint and Keynote. Prezi is available as a free web-based version very useful for exploring and learning the application.

Social Media

May 21, 2014
Maximize Twitter: Utilize lists, learn how to utilize @ and #

You've tweeted, you're following more than 100 people, your news feed looks more like an information tsunami than anything meaningful, and you have to fight the urge to throw your smart phone out the window. This session will help you get the most out of Twitter by grouping the people and organizations you follow into lists and utilizing hashtags and @ messages to enter into meaningful, two-way conversations.

June 18, 2014
Facebook 101

You think you're a Facebook Jedi master—you can post photos of your cat from your smart phone like nobody's business. You shared "What does the Fox Say" from YouTube before your friends had even heard of it. You always have the best snarky comeback to your sarcastic teenage nephew's posts. You don't need an introduction to Facebook, right? Wrong. This session is an introduction to using Facebook professionally, teaching you to set up a page for your firm or professional organization to help you reach the site's one billion users.

July 16, 2014
Boost Your Posts on Facebook Newsfeed

You've got a professional Facebook page, but you're surprised to see your posts aren't going anywhere. How could anyone find photos of the new baby in their family more interesting than that blog you linked to about patent trolls? This session will help you create fun, dynamic content that can increase your firm's followers and interactions and elevate your firm's reputation.

Practice Management

April 24, 2014
Getting Your Cloud-On

Explore the world of cloud computing for lawyers. Learn about its pros and cons, available software as a service, and considerations for evaluating vendors. Get the knowledge you need to decide if cloud computing is the right choice for you.

May 29, 2014
Financial Benchmarks for Your Law Firm

Using financial benchmarks to create data leading to knowledgeable business management decisions is essential for success in today's market. In addition to the standard monthly reports generated by the firm's accountant or bookkeeper, revenue capacity, billing realization and turnover rates, receivable collection turnover rates, and partner leveraging need to be incorporated into management decisions. Learn to create these reports and use the data, and explore financial reports you should review every month in this session.

June 26, 2014
Unleash the Acrobat in Adobe

Explore the legal-specific benefits of Adobe Acrobat Pro. Learn to make any form fillable and embed annotations when trading documents. From redaction and document comparison to Bates numbering and document bundling in PDF portfolios, see how you can maximize the power of Adobe Acrobat in your practice.

July 31, 2014
Cool Technology for Hot Lawyers

From hardware to software to apps and utilities and more, new technology continues to explode. In this fast-paced session, rocket to new frontiers by keeping abreast of what's new in technology for legal professionals.

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