## Court of Appeals, State of Michigan

## ORDER

Samuel C Voydanoff v Select Portfolio Servicing Inc

Docket No. 298098

LC No. 2009-102194 CK

Kurtis T. Wilder
Presiding Judge

Mark J. Cavanagh

Pat M. Donofrio
Judges

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The Court orders that the motion to file a late reconsideration motion is GRANTED.

The Court further orders that the motion for reconsideration is GRANTED, and this Court's opinion issued October 27, 2011 is hereby VACATED. A new opinion is attached to this order.

A true copy entered and certified by Larry S. Royster, Chief Clerk, on

DEC 22 2011
Date

Chief Clerk

# STATE OF MICHIGAN

# COURT OF APPEALS

SAMUEL C. VOYDANOFF,

Plaintiff-Appellant,

v

SELECT PORTFOLIO SERVICING, INC.,

Defendant-Appellee.

and

NATIONAL FORECLOSURE COUNSELING SERVICES and MORTGAGE ELECTRONIC REGISTRATION SYSTEMS,

Defendants.

UNPUBLISHED
December 22, 2011

No. 298098
Oakland Circuit Court
LC No. 2009-102194-CK

ON RECONSIDERATION

Before: WILDER, P.J., and CAVANAGH and DONOFRIO, JJ.

PER CURIAM.

In this action arising from a purportedly unlawful real property mortgage foreclosure by advertisement, plaintiff Samuel C. Voydanoff appealed as of right from a circuit court order granting summary disposition to defendant Select Portfolio Servicing, Inc. We reversed the circuit court's order essentially on the ground that, pursuant to *Residential Funding Co, LLC v Saurman*, ___ Mich App ___; ___ NW2d ___ (Docket Nos. 290248, 291443; April 21, 2011), MERS failed to satisfy MCL 600.3204(1)(d) which rendered the foreclosure proceedings void *ab inito*. Thus, the foreclosure proceedings were vacated and the matter remanded for further proceedings. Subsequently, however, our Supreme Court entered an order reversing *Saurman*. *Residential Funding Co, LLC v Saurman*, 490 Mich 909; 805 NW2d 183 (2011). Defendant's motion for reconsideration followed. And by order entered with this opinion, we granted defendant's motion and vacated our opinion issued October 27, 2011. On reconsideration, we affirm.

## I. BACKGROUND FACTS

In November 2006, Voydanoff borrowed $182,750 from EquiFirst Corporation, and in return granted EquiFirst a mortgage interest in Voydanoff's residential property. In January 2007, EquiFirst mailed Voydanoff a letter apprising him that the servicing of his mortgage loan was being "assigned, sold or transferred" to Select Portfolio, effective February 1, 2007. In October 2008, Select Portfolio mailed Voydanoff a "Demand letter—Notice of default," on the ground that Voydanoff had not made payments as required by the note and mortgage. The notice advised Voydanoff that he owed $4,394.68 if he desired to cure the default, "for the 09/01/2008 payment and subsequent payments." The notice concluded that if Voydanoff failed to cure the default within 30 days, "the entire unpaid balance, together with accrued interest, fees and expenses, may be ACCELERATED and your loan may be referred to outside counsel to commence foreclosure actions."

Select Portfolio's records of Voydanoff's account reflect that Voydanoff made no payments toward his note after September 26, 2008. In December 2008, Select Portfolio's attorneys sent Voydanoff a letter informing him that "the creditor has elected to accelerate the total indebtedness" and intended to "commence foreclosure proceedings against the property," although the letter noted that Voydanoff could still attempt to negotiate a reinstatement of the mortgage with Select Portfolio "before the date of the sheriff's sale." On December 15, 2008, Select Portfolio's counsel published notice of a foreclosure by public sale scheduled for January 13, 2009. At the public sale, defendant Mortgage Electronic Registration Systems (MERS) bid approximately $120,000 and received a "[s]heriff's deed on mortgage sale." A month later, MERS executed a quitclaim deed conveying its interest in the property to "U.S. Bank National Association, as trustee, on behalf of the holders of the Credit Suisse First Boston Mortgage Securities Corp., Home Equity Pass Through Certificates, Series 2007-1" in Salt Lake City, Utah, "for the sum of . . . One Dollar and no cents."

## II. UNDERLYING PROCEEDINGS

### A. VOYDANOFF'S COMPLAINT

In July 2009, Voydanoff filed a 13-count complaint against defendants Select Portfolio, MERS, and National Foreclosure Counseling Services (NFCS).[1] Count I alleged "wrongful foreclosure" by Select Portfolio and MERS in the following respects:

> (a) failing to file with the Oakland County Register of Deeds any assignment of mortgage;
>
> (b) failing to list the true mortgagee in the notice of foreclosure;

[1] In September 2009, the circuit court entered an order "for administrative closure due to bankruptcy stay" with respect to NFCS, which is not a party to this appeal.

(c) failing to provide [Voydanoff] with proof of the actual note holder when requested;

(d) failing to comply with contractual and/or statutory notice provisions regarding foreclosure;

(e) retaliating against [Voydanoff] with efforts to foreclose and evict [Voydanoff].

(f) Defendant interfered with [Voydanoff's] ability to obtain credit by reporting to Credit Bureaus information that would not be true except for their interference, acts, non-acts and deeds.

(g) damaged [Voydanoff] by preventing him from being able to refinance or restructure his loan. Note: Defendant's [sic] are charging about $40,000.00 more on his already troubled debt for services that handicapped [Voydanoff]; and

([h]) demanding more than is actually due to the Defendants.

Another count in the complaint that procedurally challenged the foreclosure appeared in Count XIII, "Wrongful foreclosure by advertisement," which asserted as follows:

> Defendants [sic] failure to comply with[] the standards . . . [governing foreclosures by advertisement, MCL 600.3201 *et seq*.,] could [sic] not validly foreclose a mortgage by advertisement unless the mortgage and all assignments of that mortgage (except those assignments effected by operation of law) are entitled to be, and have been, recorded. Defendant[] . . . , an assigned [sic] that holds the mortgage at the time the foreclosure proceedings commence must be named in the published notice of sale. If a foreclosing mortgagee or assigned [sic] does not have a recorded interest on the date the foreclosure by advertisement commences, the notice given by advertisement does not satisfy the statutory requirements for publication and may be the basis for asserting that the mortgage has not been validly foreclosed.

In Count III,[2] entitled breach of contract, Voydanoff averred that (1) in violation of the terms of his mortgage, "Defendants" neglected to send him a default notice or "respond to [Voydanoff's] attempts to resolve the dispute and reinstate or restructure the mortgage loan"; (2) MERS failed to identify in the published notice of foreclosure "any and all assignments of [Voydanoff's] mortgage note," and did not otherwise give Voydanoff notice of Select Portfolio's "assignment of his mortgage note"; and (3) because neither Select Portfolio nor MERS filed with the register of deeds an "assignment to MERS . . . or Select [Portfolio]," they had "absolutely no title interest in [Voydanoff's] property."

[2] The complaint does not set forth a Count II.

Count IV asked for injunctive relief to prevent the taking of any action relating to the foreclosure on Voydanoff's property. Count V requested that the circuit court remove the wrongful cloud MERS and Select Portfolio had placed over Voydanoff's property and quiet title in him. According to Count VI, MERS and Select Portfolio engaged in negligent or grossly negligent conduct when they "fail[ed] to adequately train and/or supervise [their] staff of loan collectors and servicing agents in the servicing of [Voydanoff's] mortgage," and instead gave "financial incentives to those collectors and agents for moving properties, including [Voydanoff's] into foreclosure." In Count VII, captioned "[i]ntentional infliction of emotional distress," Voydanoff claimed that all defendants had committed "extreme and outrageous" "actions" in "complete disregard for [Voydanoff's] rights," and "with the knowledge and sinister desire to wrongfully take [Voydanoff's] home covertly through a wrongful and illegal foreclosure and . . . eviction." Count VIII accused all "Defendants" of violating Michigan law governing debt collection by "failing to properly account for [Voydanoff's] payments, failing to verify the debt on the request of [Voydanoff], posting for foreclosure when [Voydanoff] was disputing the debt, preventing [Voydanoff] from curing the claimed default, giving inconsistent accounting information on the amount of the debt," and "adding outrageous charges to [Voydanoff's] loan balance." Count IX, erroneously entitled "[v]iolation of the Michigan debt collection practices act," complained that MERS had contravened 15 USC 1692 when it "collect[ed] or attempt[ed] to collect interest or a charged fee or expense . . . not authorized by the terms of the parties' contract," "threatening [and pursuing] a wrongful foreclosure," and "misrepresent[ing] the character, amount or extent of [Voydanoff's] debt." Count X maintained in summary fashion that "Defendants [sic] conduct violates the [Michigan Deceptive Trade Practices Consumer Protection Act]" and "the MCPA [Michigan Consumer Protection Act]." And Count XI theorized that defendants, Voydanoff's mortgage servicing agents, "st[ood] in a fiduciary capacity with respect to . . . monthly payments and credits on his mortgage, escrow account, loan, insurance premiums and other related obligations," and that "for the numerous reasons stated above" defendants breached their fiduciary duty.[3]

## B. SELECT PORTFOLIO'S MOTION FOR SUMMARY DISPOSITION

Select Portfolio filed a motion for summary disposition pursuant to MCR 2.116(C)(8) and (10). Regarding the allegations comprising Count I, Select Portfolio emphasized that "the mortgage contract states that MERS is the mortgagee and has the right to foreclose," "[t]here were no assignments of the mortgage," and "MERS is/was the foreclosing mortgagee and is listed as the grantee in the Sheriff's Deed." With respect to Count XIII, Select Portfolio insisted that because "MERS is the mortgagee of record, . . . [it] therefore has a legal right" to foreclose by advertisement, as required by MCL 600.3204(1)(d). Concerning Voydanoff's claim that the published notice did not comply with MCL 600.3212, Select Portfolio argued that "[t]he notice of foreclosure by advertisement . . . did include the names of the mortgagor, Voydanoff, and the original mortgagee, MERS. There was no assignee."

[3] Count XII sought "punitive damages" for defendants' "fraudulent, malicious, intentional, or at a minimum, grossly negligent" conduct, and Count XIV requested an award of attorney fees.

Among other arguments, Select Portfolio also disputed that it had breached "the mortgage contract or any other agreement with Voydanoff" relating to a mortgage modification. Select Portfolio concluded with the contentions that it "ha[d] no tort liability to Voydanoff on theory's [sic] of negligence/gross negligence or intention[al] infliction of emotional distress," that Select Portfolio violated no "debt collection practices act, deceptive trade practices statute or the MCPA," and that "[a] fiduciary relationship does not generally arise in the bank/lender relationship" and Voydanoff "allege[d] no other special facts . . . which would give rise to a fiduciary duty."

Voydanoff responded by proclaiming that "Defendant [improperly] initiated . . . [a] foreclosure sale when there was no default in the mortgage contract, Select Portfolio's assignment was not filed with the Oakland County Register of Deeds and the chain of title was incomplete at the time of the notice of the foreclosure." Voydanoff urged that, for these reasons and the publication notice's inaccurate information about the "assignee who holds the mortgage," "MERS was without [an] ownership interest or legal authority to have foreclosed."

Regarding breach of contract, Voydanoff elaborated that Select Portfolio had not afforded Voydanoff the 30-day "notice of default as required by Section 22, of the mortgage agreement." Voydanoff insisted as follows that he had cured any breach of the terms of his mortgage:

> [Voydanoff's] default was in August of 2008, which was cured by [Voydanoff] on or before September 15, 2008. [Voydanoff] after curing the default made his October and November . . . 2008, payments in a timely manner. Pursuant to the provisions of the mortgage agreement [Voydanoff] was in full and complete compliance.

Voydanoff further emphasized that in December 2008, he and Select Portfolio had entered a loan modification agreement, which Select Portfolio breached by allowing the foreclosure by advertisement to continue.

Voydanoff suggested that equitable estoppel precluded Select Portfolio from arguing that he had defaulted on his loan obligation, "because [Select Portfolio] did by representation, admissions, or silence intentionally or negligently induce[d] [Voydanoff] to believe that there would not be a sheriff's sale based upon his cure of the delinquencies in September . . . 2008." Voydanoff fleshed out his tort claims as follows:

> Defendant or its agents['] . . . behavior in accepting [Voydanoff's] mortgage payments . . . to cure the default and continuing to accept those payments for two . . . months following the default cure, advising [Voydanoff] that the collection activity would cease and sheriff's sale would be canceled, entering into a loan modification agreement, and then selling [Voydanoff's] home without prior notice to him, was . . . outrageous . . . . [and] . . . reckless in nature for the reason that [Voydanoff] made good on his delinquent obligation . . . .

Voydanoff also responded that MERS and Select Portfolio violated "Michigan debt collection statute[s] . . . [and] . . . 15 USC 1692(g)(a)." He concluded that a section of the Uniform

Commercial Code (UCC), MCL 440.3307 imposed on Select Portfolio a fiduciary duty to Voydanoff regarding the mortgage.

Select Portfolio replied, in part, by contesting Voydanoff's suggestion that he had cured his mortgage default. Select Portfolio observed that a copy of Voydanoff's account history and a Select Portfolio employee's affidavit confirmed that it never received Voydanoff's purported payments in October 2008 and November 2008, or any payments thereafter. Select Portfolio also highlighted that Voydanoff had "presented no admissible evidence" to rebut the evidence of his default.

The circuit court granted Select Portfolio's motion, explaining as follows:

> The court is going to grant the motion as to count six, negligent [sic] and gross negligence; count seven, intentional infliction of emotional distress as those claims are barred by the Economic Recovery Doctrine; the motion is granted as to count eight, unreasonable debt collection practices; count nine, violation of the Michigan Debt Collection Act; and count ten, Deceptive Trade Practices as the acts cited by [Voydanoff] are inapplicable to the defendant herein.
>
> Count eleven, breach of fiduciary duty is also dismissed as [Voydanoff] has not shown a fiduciary relationship between himself and the defendant.
>
> The motion is granted as to the remaining claims. In reviewing the evidence in the light most favorable to the non-moving plaintiff it is not possible for a reasonable juror to return a verdict in favor of [Voydanoff], and therefore, the motion is granted in its entirety.

## III. SUMMARY DISPOSITION CHALLENGES

Voydanoff initially challenges the circuit court's summary disposition ruling on the ground that material questions of fact existed with respect to whether he defaulted on the terms of his loan, whether Select Portfolio breached the mortgage's right to cure provision and a loan modification agreement, and whether equitable estoppel should have precluded Select Portfolio from continuing the foreclosure proceedings.

Select Portfolio moved for summary disposition pursuant to MCR 2.116(C)(8) and (10). The circuit court did not specify pursuant to which subrule it granted the motion. Because the parties referenced evidence beyond the pleadings, we review the summary disposition ruling pursuant to MCR 2.116(C)(10). *Walsh v Taylor*, 263 Mich App 618, 621; 689 NW2d 506 (2004). A motion brought under MCR 2.116(C)(10) "tests the factual support of a plaintiff's claim." *Id.*. "Summary disposition is appropriate under MCR 2.116(C)(10) if there is no genuine issue regarding any material fact and the moving party is entitled to judgment as a matter of law." *West v Gen Motors Corp*, 469 Mich 177, 183; 665 NW2d 468 (2003). "In reviewing a motion under MCR 2.116(C)(10), this Court considers the pleadings, admissions, affidavits, and other relevant documentary evidence of record in the light most favorable to the nonmoving party to determine whether any genuine issue of material fact exists to warrant a trial." *Walsh*, 263 Mich App at 621. "A genuine issue of 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*, 469 Mich at 183. Once the moving party satisfies his burden of presenting "[a]ffidavits, depositions, admissions, or other documentary evidence in support of the grounds asserted in the motion," MCR 2.116(G)(3), the burden returns to the nonmoving party to introduce "documentary evidence establishing the existence of a material fact, and the motion is properly granted if this burden is not satisfied." *AFSCME v Detroit*, 267 Mich App 255, 261; 704 NW2d 712 (2005); see, also, MCR 2.116(C)(4).

## A. VOYDANOFF'S DEFAULT

In support of the motion for summary disposition, Select Portfolio submitted an account summary showing Voydanoff's payment history after Select Portfolio began servicing his loan in February 2007, and an affidavit of Select Portfolio litigation specialist, Gina Tolman. In relevant part, Tolman's affidavit attested as follows about Voydanoff's payment status:

> 6. That my review of the records and payment history shows that the last monies received from Voydanoff were on August 8, 2008, September 22, 2008 and September 26, 2008 in the amounts of $3,046.34, $76.42 and $1530.67, respectively.
>
> 7. That my review of the records and payment history shows that, as of the last payment received from Voydanoff dated September 26, 2008 in the amount of $1,530.67, the loan was due for the August 1, 2008 payment.
>
> 8. That my review of the records and payment history shows that no further payments were received from Voydanoff.

The Select Portfolio account history reflects that the untimeliness of Voydanoff's payments increased over time; his payment due April 1, 2008, occurred on May 19, 2008; he made his payment due May 1, 2008, on June 27, 2008; Voydanoff did not satisfy his June 1, 2008, payment until August 8, 2008, when he also made a partial payment for July 1, 2008 (for a total of $3,046.34); however, Voydanoff did not discharge the full amount due for his July 1, 2008, payment until September 22, 2008 (when he paid $76.42); the payment due on August 1, 2008, occurred on September 26, 2008, when Voydanoff made his final payment of $1,530.67.

The information contained in the account statement and affidavit is consistent with an October 2008 notice of default that Select Portfolio sent to Voydanoff. The October 17, 2008, letter recites that it

> constitutes formal notice of default under the terms of the Note and . . . Mortgage. Your loan is currently due and owing for the 09/01/2008 payment and subsequent payments. . . . This letter is a formal demand to pay the amount due. . . . You have the right to cure the default on this loan if, on or before 30 days of the date of this letter, you" "[p]ay the amounts due[.]"

Select Portfolio attached to the default letter a copy of the mailing label to Voydanoff's home, and Tolman declared in her affidavit "[t]hat my review of the records and payment history shows that . . . a breach/acceleration, dated October 17, 2008, was sent to Voydanoff at the property address."

Voydanoff insists that he made payments of $1,523.17 to Select Portfolio in October 2008 and November 2008, and thus did not default on his loan, but he did not introduce any evidence in response to Select Portfolio's motion tending to support that he made any such payments. And although Voydanoff also disputes that he received the October 2008 notice of default from Select Portfolio, Voydanoff similarly neglected to submit any documentation substantiating his denial. Because Voydanoff failed to satisfy his burden to introduce "documentary evidence establishing the existence of a material fact," the circuit court correctly rejected Voydanoff's contentions that he did not default or receive a notice of default. *AFSCME*, 267 Mich App at 261.

B. BREACH OF MORTGAGE RIGHT TO CURE

Voydanoff alleges that Select Portfolio ignored a right to cure contained in ¶ 19 of his mortgage. Paragraph 19 of the November 2006 mortgage envisions, in relevant part:

> *Borrower's Right to Reinstate After Acceleration.* If Borrower meets certain conditions, Borrower shall have the right to have enforcement of this Security Interest discontinued at any time prior to the earliest of: (a) five days before sale of the Property pursuant to any power of sale contained in this Security Instrument; (b) such other period as Applicable Law might specify for the termination of Borrower's right to reinstate; or (c) entry of a judgment enforcing this Security Instrument. *Those conditions are that Borrower: (a) pays Lender all sums which then would be due under this Security Instrument and the Note as if no acceleration had occurred*; (b) cures any default of any other covenants or agreements; (c) pays all expenses incurred in enforcing this Security Instrument . . . ; and (d) takes such action as Lender may reasonably require . . . . [Emphasis added.]

Paragraph 22 of the mortgage provides the following pertinent details:

> Lender shall give notice to Borrower prior to acceleration following Borrower's breach of any covenant or agreement in this Security Instrument . . . . The notice shall specify: (a) the default; (b) the action required to cure the default; (c) a date, not less than 30 days from the date the notice is given to Borrower, by which the default must be cured; and (d) that failure to cure the default on or before the date specified in the notice may result in acceleration of the sums secured by this Security instrument and sale of the Property. . . . If the default is not cured on or before the date specified in the notice, Lender at its option may require immediate payment in full of all sums secured by this Security Instrument without further demand and may invoke the power of sale and any other remedies permitted by Applicable Law. . . .

Keeping in mind the unrebutted evidence of Voydanoff's default with respect to his loan payment obligation, we conclude that the October 2008 default notice mailed by Select Portfolio complied in every respect with the notice envisioned in ¶ 22 of the mortgage. It identified Voydanoff's default in neglecting to pay back his loan, it identified that Voydanoff had to remit $4,394.68 to cure the default, it gave Voydanoff a cure period of "30 days from the date of this

letter," and it mentioned that a failure to cure would potentially result in acceleration and referral "to outside counsel to commence foreclosure actions." We thus detect no manner in which Select Portfolio breached the mortgage agreement.

## C. LOAN MODIFICATION AGREEMENT

Voydanoff also has failed to establish a genuine issue of material fact that Select Portfolio breached a loan modification agreement. Voydanoff attached to his summary disposition response a December 12, 2008, Select Portfolio "offer to lower your monthly mortgage payment." Select Portfolio proposed three potential modifications: (1) the first option offered to reduce Voydanoff's monthly payment "from $1523.17 to $1,310.95," and stated that if Voydanoff began "paying $1,310.95 and continue[d] paying $1,310.95 each month without missing any payments" he would "not lose . . . [his] home to foreclosure"; (2) the second option, a "short payoff," offered "to accept $108,000 in certified funds for full and complete satisfaction of your mortgage loan," on which Select Portfolio estimated Voydanoff then owed in excess of $190,000; (3) for option three, Select Portfolio advised, "If you are unable to accept either of the first two offers, there may be other offers available to you based on your current financial situation including the possibility of an affordable payment that does not exceed 38% of your monthly income." The next page of the loan modification offer had the heading "Trial/Permanent Modification Agreement" and enumerated the agreement terms proposed in option one. The second page of the trial/permanent agreement bears Voydanoff's signature dated December 14, 2008, but has no signature of any Select Portfolio representative on the line below "Lender."

We conclude that the December 2008 loan modification proposal from Select Portfolio did not ripen into a binding agreement, primarily because the accompanying modification agreement bears only Voydanoff's signature, and therefore, does not objectively reflect a meeting of the minds regarding the essential modification terms. *Kloian v Domino's Pizza, LLC*, 273 Mich App 449, 453-454; 733 NW2d 766 (2006) ("a contract requires mutual assent or a meeting of the minds on all the essential terms," "[a] meeting of the minds is judged by an objective standard, looking to the express words of the parties and their visible acts"). Even assuming that Select Portfolio and Voydanoff reached a meeting of the minds to reduce his monthly payments to $1,310.95, as reflected in the "Trial/Permanent Modification Agreement" signed by Voydanoff, the Select Portfolio summary of Voydanoff's account and the affidavit of Tolman agree that Voydanoff made no payments in conformity with the modification agreement. Voydanoff's neglect to make any payments plainly breached Section 1 of the "Trial/Permanent Modification Agreement."

## D. ESTOPPEL

With respect to Voydanoff's appellate assertion characterizing the deed by foreclosure as voidable given that his "mortgage was not in default at the time of the sale," this argument ignores the uncontradicted evidence that Voydanoff defaulted on his mortgage. Regarding Voydanoff's further assertions invoking equitable estoppel premised on Select Portfolio correspondence or other representations that Voydanoff had cured any default, these assertions fail as a matter of law because Voydanoff presented to the circuit court no evidence tending to support them. *AFSCME*, 267 Mich App at 261.

## IV. FORECLOSURE BY ADVERTISEMENT STATUTES

Voydanoff complains that MERS violated several statutory foreclosure by advertisement provisions. MCL 600.3201 *et seq*. This Court reviews de novo the legal questions inherent in statutory interpretation. *Bloomfield Twp v Oakland Co Clerk*, 253 Mich App 1, 9; 654 NW2d 610 (2002).

> When faced with questions of statutory interpretation, our obligation is to discern and give effect to the Legislature's intent as expressed in the words of the statute. We give the words of a statute their plain and ordinary meaning, looking outside the statute to ascertain the Legislature's intent only if the statutory language is ambiguous. Where the language is unambiguous, we presume that the Legislature intended the meaning clearly expressed—no further judicial construction is required or permitted, and the statute must be enforced as written. [*Id*. (internal quotation and citation omitted).]

### A. MCL 600.3201

Voydanoff first seems to suggest that MERS did not comply with MCL 600.3201, which states:

> Every mortgage of real estate, which contains a power of sale, upon default being made in any condition of such mortgage, may be foreclosed by advertisement, in the cases and in the manner specified in this chapter. However, the procedures set forth in this chapter shall not apply to mortgages of real estate held by the Michigan state housing development authority.

We detect from the record no manner in which MERS violated this introductory section of Michigan's foreclosure by advertisement statute.

### B. MCL 600.3204(3)

Voydanoff next contends that MERS neglected to comply with MCL 600.3204(3), which requires that "*[i]f 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 under section 3216 evidencing the assignment of the mortgage to the party foreclosing the mortgage." (Emphasis added). Here, the original, recorded mortgage identifies MERS as the mortgagee. Because MERS is the original mortgagee "(solely as nominee for Lender and Lender's successors and assigns) . . . with power of sale," the terms of MCL 600.3204(3) did not preclude MERS from pursuing a foreclosure.

### C. MCL 600.3212(a)

Voydanoff also disputes the adequacy of the published notice of foreclosure given by MERS under MCL 600.3212(a), which directs that "[e]very notice of foreclosure by

advertisement shall include . . . . "[t]he names of the mortgagor, the *original mortgagee, and the foreclosing assignee, if any*." (Emphasis added).[4] The published notice in this case plainly identifies Voydanoff as the mortgagor and MERS as the mortgagee. As noted above, MERS constitutes "the original mortgagee," and no "foreclosing assignee" exists in this case.

D. MCL 600.3216

The last MERS violation claimed by Voydanoff involves MCL 600.3216, which instructs as follows:

> The sale shall be at public sale, between the hour of 9 o'clock in the forenoon and 4 o'clock in the afternoon, at the place of holding the circuit court within the county in which the premises to be sold, or some part of them, are situated, and shall be made by the person appointed for that purpose in the mortgage, or by the sheriff, undersheriff, or a deputy sheriff of the county, to the highest bidder.

Our review of the record reveals no violation of MCL 600.3216 by MERS.

V. VOYDANOFF'S TORT CLAIMS

We affirm the circuit court's grant of summary disposition of Voydanoff's negligence, gross negligence, and intentional infliction of emotional distress theories for a simple reason, unrelated to the economic loss doctrine invoked by the circuit court. Voydanoff introduced no documentary evidence in response to Select Portfolio's motion for summary disposition that tended to establish a genuine issue of material fact concerning whether Select Portfolio acted in a negligent or grossly negligent fashion, or intentionally inflicted emotional distress. See *Loweke v Ann Arbor Ceiling & Partition Co, LLC*, 489 Mich 157, 162; ___ NW2d ___ (2011) (reciting that to "establish a prima facie case of negligence, a plaintiff must prove the following elements: (1) the defendant owed the plaintiff a legal duty, (2) the defendant breached the legal duty, (3) the plaintiff suffered damages, and (4) the defendant's breach was a proximate cause of the plaintiff's damages"); *Dalley v Dykema Gossett, PLLC*, 287 Mich App 296, 321; 788 NW2d 679 (2010) (observing that an intentional infliction of emotional distress claim requires proof of "(1) the defendant's extreme and outrageous conduct, (2) the defendant's intent or recklessness, (3) causation, and (4) the severe emotional distress of the plaintiff"). Because the circuit court reached the correct result in dismissing Voydanoff's tort claims, we affirm the summary disposal of these claims. *Michigan's Adventure, Inc v Dalton Twp*, 290 Mich App 328, 334; 802 NW2d 353 (2010).

[4] MCL 600.3208 directs that a notice of foreclosure appear "for 4 successive weeks at least once in each week, in a newspaper published in the county where the premises included in the mortgage and intended to be sold . . . are situated."

## VI. DEBT COLLECTION STATUTES

Voydanoff avers that Select Portfolio violated provisions contained in federal laws regulating debt collection practices, 15 USC 1692 *et seq*., and Michigan debt collection statutes, legal questions that we consider de novo. *Bloomfield Twp*, 253 Mich App at 9. He also contends that the Michigan foreclosure by advertisement statutes violated his due process rights, another question that we consider de novo. *Cummins v Robinson Twp*, 283 Mich App 677; 770 NW2d 421 (2009).

### A. 15 USC 1692

15 USC 1692a(6) defines a "debt collector" as "any person who uses any instrumentality of interstate commerce or the mails in any business the principal purpose of which is the collection of any debts, or who regularly collects or attempts to collect, directly or indirectly, debts owed or due or asserted to be owed or due another." The statute goes on to explain that the "term does not include" "any person collecting or attempting to collect any debt owed or due or asserted to be owed or due another to the extent such activity . . . *concerns a debt which was not in default at the time it was obtained* by such person . . . ." 15 USC 1692a(6)(F)(iii) (emphasis added). Because the facts of record undisputedly established that Voydanoff had not defaulted on his loan in February 2007 when Select Portfolio commenced servicing the loan, Select Portfolio does not qualify as a debt collector for purposes of federal debt collection practice laws. See *Pollice v Nat'l Tax Funding, LP*, 225 F3d 379, 403 (CA 3, 2000) (observing that the Fair Debt Collection Practices Act's "provisions generally apply only to 'debt collectors'"); *Wadlington v Credit Acceptance Corp*, 76 F3d 103, 107 (CA 6, 1996) (explaining that a creditor does not meet the definition of a FDCPA "debt collector" when the creditor's "activity 'concerned' a debt that was 'not in default' at the time" the creditor "obtained the debt for servicing").

### B. MICHIGAN STATUTES

#### 1. THE MICHIGAN CONSUMER PROTECTION ACT

With respect to Voydanoff's allegation of a violation of the Michigan Consumer Protection Act (MCPA), MCL 445.901 *et seq*., he cites no specific section of the act in support of his argument. Select Portfolio maintains that it has no culpability under the MCPA in light of the exemption contained in MCL 445.904(1)(a), which provides that the act does not apply to "[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." With respect to the first portion of the exemption, a "transaction or conduct specifically authorized," our Supreme Court has clarified that "the relevant inquiry 'is whether the general transaction is specifically authorized by law, regardless of whether the specific misconduct alleged is prohibited.'" *Liss v Lewiston-Richards, Inc*, 478 Mich 203, 210; 732 NW2d 514 (2007) (internal quotation and citation omitted). Select Portfolio attached to its motion for summary disposition an internet printout confirmation of its status as a Michigan-licensed mortgage broker, lender, and servicer, and Voydanoff does not specifically dispute this licensing status. Neither party cites any statutes illustrating pursuant to what Michigan law Select Portfolio held its mortgage license, but presumably the licensure act applicable to mortgage servicer Select Portfolio is the Mortgage

Brokers, Lenders and Servicers Licensing Act (MBLSLA), MCL 445.1651 *et seq*. As contemplated in MCL 445.1653(1), the possession of a license pursuant to the MBLSLA authorizes the licensee "to act as a mortgage broker, mortgage lender, or mortgage servicer." Later sections of the MBLSLA reference a licensee's ability to impose on a borrower "reasonable and necessary charges" and mortgage interest, MCL 445.1673(1); multiple sections proscribe the conduct of licensees, MCL 445.1672 (detailing general MBLSLA violations), and MCL 445.1679 (listing more prohibited conduct and penalties); and another section subjects a mortgage loan for property located in Michigan "to th[e] . . . [MBLSLA] and all other applicable laws of this state," MCL 445.1676. And as set forth in MCL 445.1661(1), "[t]he commissioner shall exercise general supervision and control over mortgage brokers, mortgage lenders, and mortgage servicers doing business in this state."

In summary, Select Portfolio qualifies as exempt from the MCPA. Because Select Portfolio's status as a mortgage servicer, licensed under the MBLSLA and supervised by the commissioner of the office of financial and insurance regulation, see MCL 445.1651a(c), amounts to "conduct specifically authorized under laws administered by a regulatory board or officer acting under statutory authority of this state," MCL 445.904(1)(a), Voydanoff can pursue no MCPA claim against Select Portfolio.

2. MICHIGAN DEBT COLLECTION PRACTICE STATUTES

Nowhere in Voydanoff's brief on appeal or his brief in opposition to the motion for summary disposition did he identify any Michigan statutes or case law in support of his contentions that Select Portfolio engaged in "unreasonable debt collection practices under Michigan law" and "violated the Michigan Debt Collection Practices Act." Two acts in Michigan govern collection practices. MCL 339.901 *et seq*. and MCL 445.251 *et seq*. Regarding MCL 339.901 *et seq*., this Court has generally observed that "the[se] provisions . . . clearly attempt to protect the debtor and the creditor from the potentially improper acts of a third-party collection agency." *Asset Acceptance Corp v Robinson*, 244 Mich App 728, 732; 625 NW2d 804 (2001). Both acts contain nearly identical sections listing prohibited acts, MCL 339.915 and MCL 445.252, which include "[c]ommunicating with a debtor in a misleading or deceptive manner," MCL 339.915(a) and MCL 445.252(a), and "[m]aking an inaccurate, misleading, untrue, or deceptive statement or claim in a communication to collect a debt." MCL 339.915(e) and MCL 445.252(e). Even assuming that MCL 339.901 *et seq*. and MCL 445.252 *et seq*. apply to Select Portfolio in this case, Voydanoff presented no admissible evidence tending to substantiate that Select Portfolio ignored any of the prohibitions set forth in MCL 339.915 and MCL 445.252, or any other provisions of either act. *AFSCME*, 267 Mich App at 261.

3. DUE PROCESS

Regarding Voydanoff's argument that the foreclosure by advertisement statutes "did not afford [him] . . . . due process of law," in *Cramer v Metro Savings & Loan Ass'n*, 401 Mich 252, 257-260; 258 NW2d 20 (1977), our Supreme Court rejected the plaintiff's complaint that the defendant's initiation of foreclosure by advertisement proceedings violated her due process rights. The Supreme Court explained:

> The essence of plaintiff's constitutional argument is that the foreclosure statute grants a mortgagee the power to terminate a mortgage relationship by use of procedures that are not in harmony with the requirements of the Fourteenth Amendment to the United States Constitution and article 1, § 17 of the Michigan Constitution. Specifically, she claims that the Michigan foreclosure by advertisement statute, as applied, violated the due process clauses of the two constitutions in that it requires neither a notice of hearing, nor a hearing to establish the debt.
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> Plaintiff's argument rests upon the United States District Court's decision in *Northrip v Federal National Mortgage Ass'n*, 372 F Supp 594 (ED Mich, 1974).
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> * * *
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> Plaintiff in her brief fails to note, however, that the lower court decision in *Northrip* was subsequently reversed. The Sixth Circuit Court of Appeals disavowed the state action analysis employed and the result reached by the district court. 527 F2d 23 (CA 6, 1975).
>
> The Federal appellate court held that the existence of a statute which permitted a mortgagee to foreclose by advertisement rather than by judicial process did not constitute state action.
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> Since "the power of sale is an incident of the private right to contract[,] *Equitable Trust Co v Barlum Realty Co*, 294 Mich 167; 292 NW 691 (1940)," a mortgagee who exercises a foreclosure option is relying on a contract remedy, and not on a right created by the statute. 597 F2d 26-27. Therefore, the state cannot be said to be significantly involved, through "encouragement," in the challenged conduct, and a due process question is consequently not presented.
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> Our own Court of Appeals in *National Airport Corp v Wayne Bank*, 73 Mich App 572; 252 NW2d 519 (1977), has recently adopted the Sixth Circuit's full and definitive analysis of the Michigan foreclosure by advertisement statute. We do likewise.
>
> Accordingly, we hold that the plaintiff's instant claim of unconstitutionality under both the Michigan and Federal Constitutions fails for lack of the existence of state action. [*Cramer*, 401 Mich at 258-260.]

Our Supreme Court's discussion in *Cramer* renders meritless Voydanoff's due process claim.

## VII. FIDUCIARY DUTY

Lastly, Voydanoff urges that Select Portfolio has liability for a breach of fiduciary duty under MCL 440.3307. "A fiduciary relationship, which generally does not arise within the lender-borrower context, exists when there is a reposing of faith, confidence, and trust and the placing of reliance by one on the judgment and advice of another." *Farm Credit Serv's of*

*Michigan's Heartland, PCA v Weldon*, 232 Mich App 662, 680; 591 NW2d 438 (1998). Voydanoff here summarily posits that "Select [Portfolio] was an agent for purposes of possessing the notes," and that "examining the transactions between Select [Portfolio], Trott & Trott [Select Portfolio's counsel] and MERS as a whole, it is clear that the transactions established the agency relationship with its accompanying fiduciary duties."

Voydanoff's conclusory allegations do not suffice to establish that, in the context of this lender-borrower relationship, he "repos[ed] . . . faith, confidence, and trust" in Select Portfolio or "rel[ied] . . . on the judgment and advice of" Select Portfolio. *Farm Credit Serv's of Michigan's Heartland, PCA*, 232 Mich App at 680. And Voydanoff's documentation in opposition to the motion for summary disposition did not give rise to a genuine issue of material fact that Select Portfolio occupied a fiduciary position with respect to Voydanoff. *AFSCME*, 267 Mich App at 261. Concerning Voydanoff's citation to MCL 443.3307, a section of the Uniform Commercial Code—Negotiable Instruments, MCL 440.3101 *et seq*., this section simply has no applicability to the facts of this case.

In summary, the circuit court properly granted summary disposition in favor of Select Portfolio.

Affirmed.

/s/ Kurtis T. Wilder
/s/ Mark J. Cavanagh
/s/ Pat M. Donofrio