STATE OF MICHIGAN

COURT OF APPEALS

ADAM SCHAUB and WENDY SCHAUB,

Plaintiffs-Appellants,

v

BANK OF NEW YORK MELLON NA, Trustee, MORTGAGE ELECTRONIC REGISTRATION SYSTEMS, FLAGSTAR BANK, and KENNETH KUREL,

Defendants-Appellees,

and

DOES 1-10,

Defendants.

UNPUBLISHED
May 29, 2014

Nos. 315242, 315283
Grand Traverse Circuit Court
LC No. 12-029252-CH

Before: BECKERING, P.J., and RONAYNE KRAUSE and BOONSTRA, JJ.

PER CURIAM.

In these consolidated appeals, plaintiffs appeal by right the trial court's grant of summary disposition in favor of all defendants in Docket No. 315242 and the trial court's grant of sanctions against them in favor of defendant Flagstar Bank (Flagstar) in Docket No. 315283. We affirm.

In May 2006, plaintiffs obtained a loan from Great Lakes Mortgage Company, LLC (Great Lakes), in exchange for a promissory note and mortgage on their Traverse City residence. The mortgage was duly recorded on May 30, 2006, showing Great Lakes as the "Lender" and defendant Mortgage Electronic Registration Systems, Inc. (MERS) as the mortgagee "solely as a nominee for Lender and Lender's successors and assigns." MERS is an entity and system that serves as a common agent to hold mortgages for a number of financial institutions to allow those institutions to efficiently transfer loans amongst themselves without the need to record a mortgage transfer each time. See *Residential Funding Co LLC v Saurman*, 292 Mich App 321, 328-329; 807 NW2d 412 (2011), overruled on other grounds 490 Mich 909 (2011). On the same day, according to the MERS Milestones Report, Flagstar registered the loan on the MERS system, and plaintiffs were sent a letter notifying them that Great Lakes had transferred the servicing rights of the loan to Flagstar effective July 1, 2006.

The MERS Milestones Report also reflects that, on October 1, 2006, Flagstar sold the loan to non-party BAC Home Loans Servicing, LP (BAC).[1] On October 20, 2006, Flagstar transferred its servicing rights to BAC, and on October 26, 2008, BAC transferred the loan to defendant Bank of New York Mellon (BNY) as trustee for CWALT, Inc. Alternative Trust Loan 2006-J6 (the Trust). On December 15, 2010, MERS, acting pursuant to its designation as nominee, assigned its title and interest in the mortgage to BNY, and this assignment was duly recorded on December 20, 2010. The note executed by plaintiffs reflects endorsements from Great Lakes to Flagstar, from Flagstar to Countrywide, and from Countrywide "in blank."

At some point, plaintiffs defaulted on the loan and BNY initiated foreclosure proceedings. In 2011, plaintiffs' counsel, Daniel Marsh, filed a complaint on their behalf seeking to prevent BNY from foreclosing on the mortgage. Plaintiffs asserted in that case, No. 11-28572-CH, as they did in this one, that BNY did not have the authority to foreclose on the mortgage because the transfer of the note and mortgage was void ad initio because it occurred after the closing date of the Trust. Based on representations that the foreclosure had been cancelled, that case was dismissed without prejudice by order dated July 25, 2011.

Flagstar, which was a named defendant in that case, sought to be dismissed with prejudice, arguing that Flagstar no longer had any interest in the loan or mortgage and that plaintiffs had "decided to take out a shotgun and name every entity identified in the chain of title after the mortgage origination regardless of whether they were a real party in interest." Flagstar declined to seek costs at the time, but advised plaintiffs that it would sign a stipulated dismissal without prejudice only if the stipulation explicitly preserved the right for Flagstar "to seek the fees and costs it incurred in this action in the event your clients re-file and name Flagstar again." Plaintiffs' counsel replied, in relevant part that "You can make your arguments for costs IF this issue comes back and litigation is necessary. You have made your point very clear and it would support your argument for costs in the future if necessary."

BNY subsequently initiated new foreclosure proceedings. On March 6, 2012, BNY's counsel sent plaintiffs written notice of foreclosure pursuant to MCL 600.3205a, which included a list of housing counselors (the 3205a notice). The 3205a notice provided, in part:

> Within 30 days from the date of this notice, you may contact either a housing counselor from the list enclosed or our Loan Modification Department . . . to request a meeting to attempt to work out a modification of the mortgage and avoid foreclosure. If you request a meeting, foreclosure proceedings will not start until 90 days after the date this notice was sent, subject to the provisions of MCL 600.3205b.

[1] There are references in the record to BAC, Countrywide Homes Loans, Inc (Countrywide) and Bank of America NA (BOA). There are uncontradicted representations in the record that BAC was the successor by merger to Countrywide and that BOA is the successor by merger to BAC, but dates of those mergers were not provided. Nevertheless, it makes no difference for the purpose of our analysis when or even if these mergers occurred. Accordingly, this opinion uses the names contained on the documents themselves rather than referring to them all as BOA.

Plaintiffs contacted the loan modification department and requested a meeting to try to work out a modification of the loan. Plaintiffs were asked to provide certain financial documents to determine if they qualified for a loan modification, and plaintiffs concede that they did not fully comply with the request. Plaintiffs assert that some of their documents were "unreasonably rejected" and others did not exist. BNY contended that plaintiffs simply never responded to an April 30, 2012, letter detailing the missing documents and requesting their production by May 5, 2012. It is undisputed that no loan modification meeting occurred, and on May 18, 2012, plaintiffs were sent a letter accelerating the balance due on the loan and notifying them that foreclosure proceedings were commencing.

The sheriff's sale of the property was originally scheduled for June 20, 2012. Two days before that date, plaintiffs filed their initial complaint in the instant matter, again contesting the assignment from MERS to BNY as invalid, alleging the transfer of the loan to the trust was illegal, and asserting that defendants lacked standing to foreclose and acted improperly and illegally. The trial judge in this case is the same judge who heard the first action. Plaintiffs requested an ex-parte temporary restraining order, which the trial court denied, but it scheduled a hearing on the motion for July 2. The only person who showed up to that motion hearing was Flagstar's counsel, who

> had an extended discussion [with the trial court] about this case and the prior case and the statements that were made in connection with prior hearings, the Court went and retrieved [its] bench notes from the hearing and at that time [it and Flagstar's counsel] had discussions about what the appropriate remedy also would be and the Court determined looking at [its] bench notes that from the hearing that took place, and it had to be July 25, that there is no question that Flagstar did not own the paper, they hadn't owned the paper subject to their lawsuit since October of 2006, which was established by [plaintiffs'] own complaint. Their original complaint [in the previous case] at Paragraph 44 established that Flagstar didn't own the paper.

Flagstar submitted an order under the 7-day rule that would have dismissed Flagstar with prejudice and permitted it to file a motion for sanctions against plaintiffs. Plaintiffs objected on the ground that the proposed order did not accurately reflect the trial court's ruling, even though their counsel was not present at the hearing. The trial court held a hearing on the disputed orders related to Flagstar's dismissal. Ultimately, the trial court requested Flagstar file "a motion with a brief, attaching papers from the file from the prior action," which the trial court would then set for a hearing.

Flagstar then moved for summary disposition and for sanctions, arguing that whatever the merits of plaintiffs' claims against BNY might be, plaintiffs had failed "to state any cause of action under which Flagstar may be found liable" and, indeed, failed "to allege that Flagstar committed any wrongful act whatsoever." Flagstar also reasserted that it "has no interest in the Loan or Property, and is claiming no interest in the Loan or Property." MERS and BNY also moved for summary disposition, alleging that plaintiffs had failed to state a claim under MCR

2.116(C)(8). Defendant Kenneth Kurel moved for summary disposition under MCR 2.116(C)(8) and (10). Defendants also sought a protective order and stay of discovery pending resolution of their motions for summary disposition, which the trial court granted.[2]

At the summary disposition hearing, plaintiffs' arguments largely concerned whether the mortgage and the note were held by the same entity and whether that entity was the foreclosing party. Plaintiffs argued that Flagstar had represented that it owned the note and mortgage simultaneously with BNY and that the Trust was "prohibited from receiving it" because the Trust had received it past its closure deadline. Plaintiffs also argued that the assignment of the mortgage from MERS to BNY was invalid because defendant Kenneth Kurel, Vice President of MERS at the time and whose signature appeared on the assignment, had not actually signed it at all in lieu of "robo-signing."

Regarding the trust, the trial court concluded that plaintiffs were raising an issue not belonging to them, although it noted that "people in New York will get all excited about that" and that they would undoubtedly "appreciate your help on interfering on their behalf." The trial court rejected plaintiffs' contention that BNY did not own the note or mortgage on the basis of the trust deadline. It therefore also concluded that Flagstar had no interest in either and the note, as a bearer instrument because it was endorsed in blank, was owned by BNY. Plaintiffs' own expert indicated that Kurel's signature was likely his actual signature, as Kurel stated in an affidavit, and MERS ratified the assignment after it occurred in any event. Ultimately, the trial court granted summary disposition in favor of Flagstar, MERS, and Kurel.

Plaintiffs also argued that that they were not given the requisite 90 days to which they were entitled pursuant to MCL 600.3205a while loan modifications were ongoing. The trial court determined that the notice was sent March 6, 2012, making 90 days June 4, 2012. The trial court agreed with plaintiffs that the statute prohibited "commencement" of foreclosure proceedings, rather than completion thereof, prior to that date, and sending the notice commenced the proceedings. BNY conceded that "it was probably commenced prior to June 4th," but argued that whether plaintiffs had previously gone through the loan modification process may alter the requirements under the statute. The trial court concluded that BNY would be required to brief the issue of whether there was any legal significance to whether plaintiffs engaged in loan modification in 2011, but in any event the appropriate remedy would be judicial foreclosure. The trial court entered an order dismissing all counts with prejudice other than the alleged violation of MCL 600.3205a, and it required plaintiffs to amend the complaint to seek conversion of the proceedings to a judicial foreclosure. In addition, BNY was not precluded from filing for summary disposition against the revised complaint.

Plaintiff duly filed an amended complaint. BNY filed a renewed motion for summary disposition, asserting that there was no factual dispute that plaintiffs failed to provide foreclosure counsel with required documents, so BNY was permitted to schedule the sheriff's sale pursuant to MCL 600.3205b(2). The trial court observed that BNY was not contending that it complied

[2] Plaintiffs have provided us with a transcript of the hearing pursuant to MCR 7.210(B) at which the trial court decided to grant this motion.

with the 90-day requirement, but rather that circumstances permitted it to proceed after a different statutory requirement of only 60 days. Plaintiffs conceded that they had no proof that the documents requested on April 2 and again on April 30 were provided. The trial court determined that, under the statute, there was no violation because there was "a wholesale failure to provide the documents that were requested" and granted BNY's motion for summary disposition.

Flagstar moved for sanctions and noted that plaintiffs' objection thereto was simply a bare request for an evidentiary hearing without any particular objection to any time entry, task, billable rate, or anything else in the submitted bills. The trial court determined that plaintiffs' claim against Flagstar was frivolous and awarded sanctions. It agreed that plaintiffs had objected to the entire concept of sanctions, but had not objected to any of the rates, entries, or details. The trial court awarded "the full amount" of Flagstar's requested sanctions. Plaintiffs reiterated their objection, to which the trial court again noted that the bills were excellent and detailed and that plaintiffs had made no objection to anything specific in them. However, the trial court did reconsider Flagstar's requested hourly rate and reduced it.

After the trial court entered the order awarding sanctions and closing the case, plaintiffs moved for reconsideration of the order granting BNY's renewed request for summary disposition and the order awarding Flagstar sanctions. Plaintiffs asserted that they had provided the requested materials and that whether they had participated in the loan modification process was a question of fact.[3] They attached an affidavit from Adam Schaub as well as various emails purporting to show that plaintiffs were in the loan modification process. Plaintiffs also asserted that the sanctions were awarded in contravention of Michigan caselaw and that there was no basis for concluding that the filing against Flagstar had been frivolous. The trial court denied both motions for reconsideration. It noted in particular that the additional evidence plaintiffs had submitted had been in plaintiffs' possession "all along" and could not have misled anyone because it should have been presented previously. Plaintiffs then filed the instant two appeals, which were administratively consolidated. *Schaub v Bank of New York Mellon NA*, unpublished order of the Court of Appeals, entered May 17, 2013 (Docket Nos. 315242, 315283).

I. DOCKET NO. 315242

In Docket No. 315242, plaintiffs' claims all relate to the trial court's grant of summary disposition in favor of defendants. "This Court reviews de novo whether a trial court properly granted a motion for summary disposition." *Barnard Mfg Co, Inc v Gates Performance Engineering, Inc*, 285 Mich App 362, 369; 775 NW2d 618 (2009). When reviewing a motion under MCR 2.116(C)(10), which tests the factual sufficiency of the complaint, all evidence submitted by the parties must be considered, and it must be viewed in the light most favorable to the non-moving party; summary disposition should be granted if the evidence fails to establish a genuine issue regarding any material fact. *Maiden v Rozwood*, 461 Mich 109, 120; 597 NW2d

[3] Plaintiffs also renewed their arguments regarding the Mortgage and Note ownership by arguing there was an outstanding factual question of whether BNY "possesses the credentials to be the foreclosing party necessary to issue the 3205a notice."

817 (1999). A motion brought under MCR 2.116(C)(8) should be granted only where the complaint is so legally deficient that recovery would be impossible even if all well-pleaded facts were true and construed in the light most favorable to the non-moving party. *Id*., 119. In contrast to a motion under MCR 2.116(C)(10), only the pleadings may be considered when deciding a motion under MCR 2.116(C)(8). *Id*., 119-120.

Plaintiffs first argue that the trial court was not permitted to grant summary disposition in favor of BNY pursuant to MCR 2.116(C)(10) because it had already denied BNY's motion for summary disposition pursuant to MCR 2.116(C)(8). As noted, the two bases for granting summary disposition are completely different and not necessarily relevant to each other. The trial court found at the first hearing that plaintiff's pleadings sufficiently alleged a genuine cause of action: a violation of MCL 600.3205a. The fact that a complaint articulates a cause of action does not mean there necessarily exists evidence to support it. Indeed, in granting defendants' (C)(8) motion, the trial court explicitly did so without prejudice to defendants' right to bring a subsequent (C)(10) motion. Furthermore, the trial court did not "grant" plaintiffs' request for judicial foreclosure, but rather directed plaintiffs to amend their complaint to request judicial foreclosure. The trial court's subsequent grant of summary disposition pursuant to MCR 2.116(C)(10) was in no way a "reversal" of its denial under MCR 2.116(C)(8). To the extent that plaintiffs selectively rely on the trial court's statements at the hearing, that reliance is misplaced because "[i]t is well settled that a court only speaks through written judgments and orders." *Brausch v Brausch*, 283 Mich App 339, 353; 770 NW2d 77 (2009).

Plaintiffs contend summary disposition was inappropriate because they "provided an affidavit supporting that they in fact participated in the loan modification program as specifically alleged in the complaint." However, the affidavit was only provided with the motion for reconsideration, and their counsel conceded at the hearing that he had no evidence at that time to show that plaintiffs had provided the necessary documents. Plaintiffs' argument that the trial court erred by considering an affidavit provided by BNY on the theory that the affiant was not available for cross-examination reflects a fundamental failure to comprehend how a motion under MCR 2.116(C)(10) works. The moving party may support its position with affidavits, and the opposing party may not merely rely on allegations or denials in its pleadings. MCR 2.116(G)(3)-(4). The trial court was in fact required to consider the affidavit under MCR 2.116(C)(10). The fact that the proponent of the affidavit was not available for cross-examination was irrelevant. See *Barnard Mfg*, 285 Mich App at 373 ("although the evidence must be substantively admissible, it does not have to be in admissible form").

"If the moving party properly supports its motion, the burden 'then shifts to the opposing party to establish that a genuine issue of disputed fact exists.'" *Barnard Mfg*, 285 Mich App at 370, quoting *Quinto v Cross & Peters Co*, 451 Mich 358, 362; 547 NW2d 314 (1996). At the time of the hearing, BNY provided evidence showing that plaintiffs had failed to provide all of the requested documents and that evidence remained completely unrebutted, entitling BNY to summary disposition on the issue. *Id*. at 370, 375. Plaintiffs' protestations that the denial of discovery precluded their claims are particularly difficult to reconcile with the fact that all of the emails attached to the affidavit they provided with the motion for reconsideration were within their possession and, thus, "should have [been] presented . . . at the prior hearings."

Lastly, plaintiffs provide a cursory attack on the legal basis of BNY's motion, with no substantive analysis, and simply assert that BNY "cannot be allowed to unilaterally manufacture a defect in the loan modification process under 3204(4) and 3205a to give it authority to avoid the remedy provided in the statute that a judicial foreclosure is appropriate." Nevertheless, MCL 600.3205b(2) expressly permitted BNY to take the actions it did.

> Within 10 days after being contacted by a borrower or housing counselor under subsection (1), the person designated under section 3205a(1)(c) may request the borrower to provide any documents that are necessary to determine whether the borrower is eligible for a modification under 3205c. *The borrower shall give the person designated under section 3205a(1)(c) copies of any documents requested under this section within 60 days after the notice under section 3205a is mailed to the borrower. If the borrower does not provide the documents requested as required by this subsection, a party entitled to foreclose may proceed with the foreclosure.* [MCL 600.3205b(2) (emphasis added).]

The language is clearly intended to permit a truncation of the 90-day window found in MCL 600.3205a(1)(e) to induce prompt compliance by borrowers to any document requests. Because BNY provided evidence that it requested documents from plaintiffs, but never received them, and plaintiffs provided no evidence to the contrary, either in their written response, or at the time of the hearing, the trial court properly granted summary disposition to BNY on the ground that MCL 600.3205b(2) authorized BNY as "a party entitled to foreclose" to "proceed with the foreclosure." The trial court properly granted summary disposition in BNY's favor pursuant to MCR 2.116(C)(10).

Plaintiffs next allege that summary disposition was erroneous because questions of fact existed concerning whether BNY had the authority to foreclose, whether MERS had the corporate authority to execute the assignment, and whether Kurel's signature was fraudulent. However, the trial court granted summary disposition to these defendants under (C)(8), not (C)(10). Thus, the existence of a question of fact is irrelevant if plaintiffs have failed to state a claim. In any event, plaintiffs' protestations that the assignments were invalid would be irrelevant regardless of their accuracy, because the long-settled rule in Michigan is that a person who is not a party to an assignment lacks standing to challenge it. *Bowles v Oakman*, 246 Mich 674, 678; 225 NW 613 (1929). Plaintiffs were not parties to the assignments of either the note or the mortgage. Furthermore, Michigan law permits a blank endorsement and the document simply becomes a bearer instrument. MCL 440.3205(2). BNY asserted that it had the note in its possession, and the record provided unrebutted support for that assertion.

Likewise, the record chain of title unambiguously reflected that plaintiffs executed the mortgage in favor of MERS, MERS subsequently assigned the mortgage to BNY, and all such assignments were recorded. Thus, the record chain of title evidenced "the assignment of the mortgage to the party foreclosing the mortgage." MCL 600.3204(3). Plaintiffs' position was that the interim transfers among MERS lenders, including Flagstar, were required to be recorded before BNY had a perfected chain of title. The trial court did not explicitly address this argument, but its necessarily implied rejection thereof was correct.

As noted above, MCL 600.3204(3) provides, "If the party foreclosing a mortgage by advertisement is not the original *mortgagee*, a record chain of title shall exist prior to the date of the sale under section 3216 evidencing the assignment of the mortgage to the party foreclosing the mortgage (emphasis added)." In *Kim v JP Morgan Chase Bank, NA*, 493 Mich 98, 113; 825 NW2d 329 (2012), our Supreme Court held that, pursuant to MCL 600.3204(3), if a foreclosing party acquires a mortgage through a voluntary transfer and is not the original mortgagee, it is required "to record the assignment of the mortgage to it before foreclosing." In this case, the mortgage provided that MERS was the mortgagee, as nominee for the "Lender." Although the ownership interest in the mortgage shifted, the mortgagee only changed when MERS assigned the mortgage to BNY. That assignment was recorded, so the recorded chain of title consisted of plaintiffs' original mortgage with MERS as mortgagee and MERS's assignment to BNY. Consequently, there is no break in the chain, and BNY, as the foreclosing party, provided evidence of the assignment of the mortgage to it. Nothing in the statutory language or the caselaw interpreting it required the recording of the intermediate transfers of the mortgage interest among MERS lenders while MERS remained the mortgagee.

Plaintiffs did not have standing to challenge the validity of the assignments to which they were not a party; and, without any challenge to the assignments, the record before the trial court clearly established that BNY owned both the note and the mortgage. The trial court properly granted summary disposition under (C)(8) to BNY, MERS, and Kurel.

Plaintiffs next assert that the trial court improperly granted summary disposition in favor of Flagstar pursuant to MCR 2.116(C)(10).[4] Plaintiffs argue that the trial court should not have considered statements made by Flagstar's counsel to have been judicial admissions and that the trial court should not have relied on an affidavit submitted by Flagstar.

In both the instant matter and in the 2011 case, Flagstar's counsel verbally represented to the trial court, on the record in open court, that it had no interest in the note or mortgage and, therefore, had no claim against plaintiffs. Plaintiffs correctly contend that statements by counsel are generally not evidence. See *Papke v Tribbey*, 68 Mich App 130, 137; 242 NW2d 38 (1976). However, an attorney can make a "judicial admission" to dispense with the necessity of some fact at trial. *Radtke v Miller, Canfield, Paddock & Stone*, 453 Mich 413, 420; 551 NW2d 698 (1996); *Ortega v Lenderink*, 382 Mich 218, 222-223; 169 NW2d 470 (1969). "Judicial" admissions "are formal concessions in the pleadings in the case or stipulations by a party or its counsel that have the effect of withdrawing a fact from issue and dispensing wholly with the need for proof of the fact." *Radtke*, 453 Mich at 420, quoting 2 McCormick, Evidence (4th ed, § 254, p 142). In this case, Flagstar's counsel was making a judicial admission because it was conceding it had no interest in the mortgage or note.

Plaintiffs assert that counsel's statements were "not a stipulation of fact as to what rights Flagstar ever had in the loans to allow it to breach the mortgage contract and break the chain of

[4] We address plaintiffs' arguments regarding sanctions in Flagstar's favor *infra* in analyzing the appeal in Docket No. 315283. For the moment, we address only whether summary disposition in Flagstar's favor was proper.

title necessary" under the foreclosure statute. Plaintiffs are correct insofar as counsel's statements did not establish what interest Flagstar ever had in the mortgage and note. However, Flagstar made no attempt to deny that it had *ever* had an interest in the mortgage or note. Rather, the statements were a stipulation of fact that Flagstar did not *currently* possess an interest in the mortgage or note, so it was not a necessary party to either action. Plaintiffs rely on an argument to the effect that Flagstar had somehow claimed ownership of the mortgage simultaneously with BNY, but the assignment to BNY is unambiguously dated more than four years after Flagstar divested itself of any rights to the mortgage. Plaintiffs presume that Flagstar must claim ownership because the transfer to the trust was allegedly impermissible at the time of the transfer, but as noted, plaintiffs lack standing to challenge that assignment.

Plaintiffs assert that Flagstar's affidavit, made by Courtney Chang, was not made with personal knowledge and, somewhat incomprehensibly, "does not assert or aver to any facts which support a finding that FLAGSTAR is owner of the note or mortgage at issue." The affidavit establishes Chang's position with Flagstar, that she is authorized to make the affidavit, that she has access to the relevant records, and is "familiar with how each document attached to this Affidavit was retrieved and complied" and "personally viewed each document." Clearly, the affidavit was made with personal knowledge.

Plaintiffs' latter assertion presumably refers to Flagstar's prior ownership, but because plaintiffs have not alleged that any of the endorsements on the note are fraudulent, the note itself establishes on its face Flagstar's prior ownership and subsequent transfer of ownership in the note. There was no need for the affidavit to contain a statement in that regard. The record contains no document other than the MERS Milestones Report to show Flagstar's interest in the mortgage because of the nature of how mortgage interests are transferred when MERS is the mortgagee. See *Residential Funding Co LLC*, 292 Mich App at 328-329. The Report was attached to Chang's affidavit, in which she attested that it was a business record; in any event, during a summary disposition hearing, the trial court may rely on evidence that is not in admissible form so long as it is substantively admissible. *Barnard Mfg*, 285 Mich App at 373. The MERS Milestones Report was sufficient to establish that Flagstar received an interest in the mortgage, which it subsequently transferred to BAC. Furthermore, the contents of the Report were substantively admissible, so the fact that the document had yet to be authenticated was irrelevant. Accordingly, the trial court did not err in relying on either the judicial admissions or Chang's affidavit in granting summary disposition to Flagstar.

II. DOCKET NO. 315283

In Docket No. 315242, plaintiffs' claims all relate to the trial court's determination that their complaint against Flagstar was frivolous and its decision to award sanctions against plaintiffs' counsel.

Plaintiffs first contend that the trial court erroneously relied on its case notes from the 2011 case. The long-standing rule in Michigan provides that "a circuit judge may take judicial notice of the files and records of the court in which he sits." *Knowlton v City of Port Huron*, 355 Mich 448, 452; 94 NW2d 824 (1959). See also *In re Jones*, 286 Mich App 156, 129; 777 NW2d 728 (2009) ("a court may take judicial notice of its own files and records"). Accordingly, there

is no legal basis to plaintiffs' argument that the trial court erred in the use of its notes from the 2011 case.

Moreover, it is evident that counsel has misunderstood what the trial court stated on the record. Counsel's argument is premised on his belief that the trial court held that counsel conceded that there was no claim against Flagstar. At the October 8, 2012 hearing, the trial court stated:

> Says here in my notes from July 25, 2011, Jasinski/Flagstar haven't owned mortgage since 2006, wants to reserve right to claim attorney fees under 2.114 if a new action is filed; I said we'll have a clean dismissal without prejudice, thinking nobody in the face of that would sue Flagstar, would they, when you've got a statement we do not have a right against you and then they filed the suit against you and they don't have anything, I can't understand.

It is clear from the context of the statement, and the record as a whole, that the trial court was referring to Flagstar's judicial admissions on the record in the 2011 case that *Flagstar* had no claim against *plaintiffs* because it had no interest in the mortgage or note. Accordingly, the factual basis of plaintiffs' argument—that the trial court supposedly relied on an alleged concession by plaintiffs' counsel—is also without merit. Consequently, there is neither legal nor factual merit to plaintiffs' objection to the trial court's use of notes from the 2011 case.

Plaintiffs next claim that the trial court erred when it concluded that its claims against Flagstar were frivolous. This Court reviews a trial court's finding that a lawsuit is frivolous for clear error. *Kitchen v Kitchen*, 465 Mich 654, 661; 641 NW2d 245 (2002). "A decision is clearly erroneous where, although there is evidence to support it, the reviewing court is left with a definite and firm conviction that a mistake has been made." *Id.* at 661-662. Under MCL 600.2591(3)(a) and under MCR 2.114(D)(2), in relevant part, a claim is frivolous if the party making it has no good basis for believing that it is factually supported or legally supportable. See *id*. at 662. The trial court effectively concluded that plaintiffs' counsel was subject to sanctions pursuant to MCR 2.114 for filing claims against Flagstar that were ungrounded in law or fact.

Plaintiffs first assert that their arguments were good-faith arguments for the extension of *Kim*, 493 Mich 98, because they were requesting a declaratory judgment that interim assignments of mortgages had to be recorded and, therefore, the failure of Flagstar to record its alleged acquisition and subsequent conveyance of interest in the mortgage and note resulted in a break in the chain of title that precluded BNY from foreclosing on the property. However, plaintiffs' complaint was filed months before our Supreme Court's decision in *Kim*. Plaintiffs may have intended to refer to this Court's decision which held, in part, that a foreclosure was void *ab initio* if the mortgage interest was not recorded before the sheriff's sale and that even mortgage interests acquired by operation of law must be recorded. *Kim v JP Morgan Chase Bank, NA*, 295 Mich App 200, 205-206, 208; 813 NW2d 778, overruled in part 493 Mich 98 (2012). Nonetheless, neither case referred to interim transfers, and Flagstar clearly did not acquire its interest in the mortgage through operation of law.

Accordingly, given the absence of any caselaw directly related to interim transfers, plaintiffs had an arguable claim that BNY did not have the authority to foreclose because there was a break in the chain of title on the Mortgage due to a lack of recording the interim transfers among MERS lenders.[5] In addition, because this Court's decision in *Kim* ruled that a foreclosure is void *ab initio* for lack of a record title after the 2011 case was dismissed, but before the instant case was filed, plaintiffs arguably had new law on which to rely to conclude that the foreclosure was void. However, the sanctions were not based on a conclusion that the entire complaint was frivolous, but rather only the claims against Flagstar. More specifically, whether it was frivolous for plaintiffs to have concluded that Flagstar was a necessary party as an entity with an interest adverse to plaintiffs.

As discussed above, the statements made by Flagstar's counsel were judicial admissions that Flagstar had no interest in the mortgage or note. Therefore, title could have been quieted in plaintiffs or any other party without Flagstar's presence in the lawsuit. In addition, nothing in the documentary record required Flagstar's inclusion. The endorsements on the note show that Flagstar had transferred its interest to Countrywide, which in turn had endorsed the note in blank, resulting in the note becoming a bearer instrument. MCL 440.3205(2). BNY represented that it actually held the note and provided a copy of it, and there was no evidence in the record that disputed their possession. Moreover, regardless of the truth of BNY's possession, the record was clear that Flagstar held no interest in the note.

Regarding the mortgage, the trial court could have plausibly reached opposite conclusions regarding BNY's chain of title, but neither would have required Flagstar to be a party. The trial court apparently concluded, properly, that the plain language of MCL 600.3204(3) only required transfers to be recorded when the mortgagee changes, so BNY had perfected its chain of title and Flagstar had no interest. Alternatively, the trial court could have agreed with plaintiffs' position that all voluntary assignments must be recorded irrespective of whether the mortgagee changes, in which case BNY would not have been permitted to foreclose, but Flagstar would nevertheless not have retained an interest. Rather, the mortgage on its face shows the "Lender" to be Great Lakes and does not show that mortgage interest changing, and the MERS Milestones Report shows that BAC was the immediately-prior holder of the mortgage interest before BNY. Therefore, the mortgage would revert either to BAC or to Great Lakes, but in no event to Flagstar. Either way, Flagstar would not have had an interest adverse to plaintiffs and therefore would not have been a necessary party. Plaintiffs' claims against Flagstar based on the alleged actions of Kurel and MERS were meritless because neither could have acted on behalf of Flagstar over four years after Flagstar had transferred its interest to BAC.[6]

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[5] Although both we and the trial court concluded that the argument was not supported by the language of the statute, because no case has expressly decided this issue, the legal basis for the claim is not wholly without merit.

[6] Curiously, plaintiffs did not sue Great Lakes or BAC, the two entities that could conceivably have still had an interest in the mortgage.

We agree with plaintiffs that the trial court did not explicitly state on the record that it found counsel's inquiry into the factual and legal viability of the claims against Flagstar to be objectively unreasonable. See *Attorney General v Harkins*, 257 Mich App 564, 576; 669 NW2d 296 (2003). However, the trial court appears to have considered the issue, and it clearly expressed an opinion that counsel's actions defied rational belief. As discussed, no set of facts or law could have vested in Flagstar any interest in the property, so little, if any, investigation would have been necessary to determine that plaintiffs had no basis for bringing any claims against Flagstar. Accordingly, we find that the record adequately reflects the trial court's finding that counsel's inquiry was objectively unreasonable.

Finally, plaintiffs object to the trial court's award of sanctions without an evidentiary hearing to determine the reasonableness of the attorney fees and expenses requested by Flagstar. This Court reviews a trial court's award of attorney fees and costs for an abuse of discretion. *Smith v Khouri*, 481 Mich 519, 526; 751 NW2d 472 (2008). "An abuse of discretion occurs when the trial court's decision is outside the range of reasonable and principled outcomes." *Id.*

Plaintiffs are correct that "[i]f a factual dispute exists over the reasonableness of the hours billed or hourly rate claimed by the fee applicant, the party opposing the fee request is entitled to an evidentiary hearing to challenge the applicant's evidence and to present any countervailing evidence." *Id.* at 532. However, the record in this case does not establish that plaintiffs ever created a factual dispute. Plaintiffs' entire objection consisted of two paragraphs with only generalized statements. Plaintiffs never made any specific objections and simply claimed that the rates and hours were unreasonable altogether. Such general, nonspecific statements are insufficient to create a level of dispute that necessitates an evidentiary hearing. Accordingly, the trial court's decision to deny the request does not appear to be an abuse of discretion.

Plaintiffs argue that the trial court erred by failing to consider all of the factors in *Smith* to determine the reasonableness of the requested fees. Plaintiffs' argument is not properly before this Court, because plaintiffs' sought relief is an evidentiary hearing, and as noted, the trial court did not err in denying an evidentiary hearing in the first place. *Mich Ed Ass'n v Secretary of State*, 280 Mich App 477, 488; 761 NW2d 234 (2008), aff'd 489 Mich 194 (2011) ("[W]e generally do not consider any issues not set forth in the statement of questions presented."). In any event, also as discussed, plaintiffs made no specific objections, with the possible exception of 17 hours for reviewing the prior complaint and a generalized assertion that Flagstar's contention of frivolity could not possibly have warranted an expenditure of so much time. Consequently, there was little for the trial court to assess, and the trial court in fact did reduce Flagstar's requested hourly rate, which plaintiffs do not contend to be unreasonable. Therefore, we find no abuse of discretion in the trial court's failure to hold an evidentiary hearing.

III. CONCLUSION

In Docket No. 315242, the trial court properly granted summary disposition to BNY, MERS, Kurel, and Flagstar. In Docket No. 315283, the trial court's decision that plaintiffs' claims against Flagstar were frivolous was not erroneous, and plaintiffs were not entitled to an evidentiary hearing.

Affirmed.

/s/ Jane M. Beckering
/s/ Amy Ronayne Krause
/s/ Mark T. Boonstra