STATE OF MICHIGAN

COURT OF APPEALS

BANK OF AMERICA, N.A., and BAC HOME LOANS SERVICING, L.P., Plaintiffs/Counter-Defendants-Appellees,	UNPUBLISHED August 20, 2013
v	No. 307840 Macomb Circuit Court
DRANE BERISHAJ, GJON BERISHAJ, DELA BERISHAJ and ZEF BERISHAJ, Defendants/Counter-Plaintiffs-Appellants.	LC No. 2010-000968-CH

Before: BOONSTRA, P.J., and SAWYER and MURRAY, JJ.

PER CURIAM.

Defendants appeal from an order of the circuit court granting summary disposition in favor of plaintiffs on the parties' cross motions for summary disposition. We affirm in part, reverse in part and remand with instructions to dismiss this action.

Defendants Gjon and Drane Berishaj are husband and wife. Defendant Zef Berishaj is their son and is married to defendant Dela Berishaj. All of the defendants share a home located in Washington Township. The property is titled in the names of Dela, Gjon and Drane. On February 28, 2003, Drane Berishaj executed a promissory note to Quicken Loans in the amount of $322,700.00. None of the other defendants signed the promissory note. The note was secured by a mortgage on the property granted by all three title holders. Zef Berishaj did not sign the mortgage. The proceeds of the mortgage paid off the existing mortgage and additional funds were paid to the three title holders. Plaintiffs are the successors in interest to Quicken Loans.

BAC filed this action in 2010. The complaint contains counts to Quiet Title and reform the mortgage, to establish an equitable mortgage, a claim of a breach of the mortgage covenants, and a claim for unjust enrichment. Defendants counterclaimed seeking a determination that the mortgage was invalid.

Plaintiffs' concern regarding the potential invalidity of the mortgage rests on the effect of MCL 600.6023(1)(h)[1] and the fact that Zef Berishaj had not signed the mortgage. Defendants' argument that the mortgage is, in fact, invalid is based upon the same statute.

Defendants raise a number of arguments on appeal. We agree with at least one of those arguments: that this entire litigation is premature. Defendants state in their brief on appeal, and plaintiffs do not dispute, that there is no foreclosure action pending. And it is certainly true that this action was not brought to execute on a judgment.

The prior MCL 600.6023(1)(h) provided as follows:

> The following property of the debtor and the debtor's dependents shall be exempt from levy and sale under an execution:
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> * * *
>
> (h) A homestead of not exceeding 40 acres of land and the dwelling house and appurtenances on that homestead, and not included in any recorded plat, city, or village, or, instead, and at the option of the owner, a quantity of land not exceeding in amount 1 lot, being within a recorded town plat, city, or village, and the dwelling house and appurtenances on that land, owned and occupied by any resident of this state, not exceeding in value $3,500.00. This exemption extends to any person owning and occupying any house on land not his or her own and which the person claims as a homestead. However, this exemption does not apply to any mortgage on the homestead, lawfully obtained, except that the mortgage is not valid without the signature of a married judgment debtor's spouse unless either of the following occurs:
>
> (i) The mortgage is given to secure the payment of the purchase money or a portion of the purchase money.
>
> (ii) The mortgage is recorded in the office of the register of deeds of the county in which the property is located, for a period of 25 years, and no notice of a claim of invalidity is filed in that office during the 25 years following the recording of the mortgage.

This statute is found in chapter 60 of the Revised Judicature Act of 1961. Chapter 60 deals with enforcement of judgments. As noted above, there is no judgment between the parties to be enforced by a levy on the subject property. As the Supreme Court noted in *Cross v Fruehauf Trailer Co*, 354 Mich 455, 463; 93 NW2d 233 (1958), the applicability of the homestead exemption must be determined at the time of the levy: "Whether real estate is exempt as a homestead from sale on execution must be determined as of the time of the levy rather than at the

[1] Following an amendment in 2012, this provision is now found in MCL 600.6023(1)(g) and is slightly reworded. 2012 PA 553.

time of the sale." Thus, whether the subject property is currently Zef Berishaj's homestead is irrelevant. What is relevant is whether it is his homestead at the time of a levy and execution.

This principle is reinforced by the fact that the statute refers to the necessity of the signature of "a married judgment debtor's spouse." That is, the validity or invalidity of a mortgage under this section is determined by whether a married judgment debtor's spouse also signed the mortgage. But in order for the married judgment debtor's spouse's signature to be present or absent, there must be a judgment debtor. This is reflective of the fact that the entire statute refers to what property is exempt from levy and sale upon the execution of a judgment.[2] Indeed, the purpose of the statute is to determine what property is exempt from levy and execution in the enforcement of a judgment, not to determine the validity of mortgages.

Simply put, until there is a judgment to be executed upon, MCL 600.6023 tells us nothing about the validity of the mortgage. If and when there is a judgment to be executed, we can determine whether Dela Berishaj is a judgment debtor and, therefore, whether Zef Berishaj is a married judgment debtor's spouse, and whether, at that point in time, it is his homestead. Then, and only then, can the rights of the parties be determined in light of the statute. In short, before there is a judgment, MCL 600.6023 does not invalidate any mortgage.

The parties speculate as to whether Dela Berishaj could become a judgment debtor and, therefore, whether Zef Berishaj would be a married judgment debtor's spouse. But at this point, all it is is mere speculation. This case is not yet ripe for determination. This Court discussed the ripeness requirement in *Huntington Woods v Detroit*, 279 Mich App 603, 615-616; 761 NW2d 127 (2008):

> The doctrine of ripeness is designed to prevent "the adjudication of hypothetical or contingent claims before an actual injury has been sustained. A claim is not ripe if it rests upon ' "contingent future events that may not occur as anticipated, or indeed may not occur at all." ' " *Michigan Chiropractic Counsel* [*v Comm'r of the Office of Fin & Ins Servs*, 475 Mich 363, 371 n 14; 716 NW2d 561 (2006)] (citations omitted). Hence, when considering the issue of ripeness, the timing of the action is the primary focus of concern.

The Court, 279 Mich App at 616, goes on to quote from *Detroit v Mich*, 262 Mich App 542, 550; 686 NW2d 514 (2004), wherein we stated: "The existence of an actual controversy is a condition precedent to invocation of declaratory relief and this requirement prevents a court from deciding hypothetical issues."

At this point there is no actual controversy to be resolved. Declaratory relief is appropriate in advance of actual injury where necessary "to guide or direct future conduct." *Huntington Woods*, 279 Mich App at 616. But there is no need to guide the parties' future

[2] This point is made even more clear in the 2012 amendment, where among the several stylistic changes to the statute were the insertion of the word "judgment" in front of "debtor" and "debtor's" in the opening sentence of paragraph (1).

conduct. Regardless whether MCL 600.6023 might apply in the future in the event of a default, the conduct of the parties in the present should remain the same: payments on the debt should continue to be made. And if a default does occur and an actual controversy regarding the applicability of MCL 600.6023 does arise at that time, plaintiffs are certainly free to raise all of the claims for equitable relief, such as reformation or equitable mortgage, at that time. And if Drane Berishaj continues to faithfully make payments on the debt until it is retired, the applicability of MCL 600.6023 will remain what is today: a hypothetical question.

For these reasons, to the extent that the trial court concluded that the mortgage is currently valid, we affirm that conclusion. There is no basis upon which to conclude that the mortgage is currently invalid. But to the extent that the trial court's opinion can be read as concluding that MCL 600.6023 will never be applicable in the future, the trial court's ruling is premature and we reverse that part of its ruling without expressing any opinion on the merits of the parties' arguments. Similarly, it was premature for the trial court to conclude that plaintiffs would be entitled to an equitable mortgage if the actual mortgage were invalid.

The trial court's determination that the mortgage is currently valid is affirmed. In all other respects, the trial court's decision is reversed, without prejudice to the parties to raise those arguments in the future if an actual controversy arises, and the matter is remanded to the trial court with directions to dismiss the action. We do not retain jurisdiction. No costs, neither party having prevailed in full.

/s/ Mark T. Boonstra
/s/ David H. Sawyer
/s/ Christopher M. Murray