

STATE OF MICHIGAN
COURT OF APPEALS

WAYNEMON BROWN and MAE BROWN,

Plaintiffs-Appellants,

v

FREMONT INVESTMENT & LOAN,

Defendant-Appellee.

UNPUBLISHED

November 10, 2009

No. 288542

Genesee Circuit Court

LC No. 08-089316-CH

Before: Stephens, P.J., and Cavanagh and Owens, JJ.

PER CURIAM.

In this foreclosure case, plaintiffs appeal as of right from the trial court's order granting defendant's motion for summary disposition. We affirm. This appeal has been decided without oral argument pursuant to MCR 7.214(E).

The relevant facts are few and largely not in dispute. Plaintiffs defaulted on their mortgage, and defendant commenced foreclosure proceedings. Plaintiffs sued, alleging they had no notice by publication or posting until July 2008, after the sale had occurred and defendant attempted to evict them. Plaintiffs asked the court to void the sale, cancel any subsequent deeds, and set a new redemption period. In support of its motion for summary disposition, defendant provided an affidavit of posting, stating the property had been posted on December 3, 2007; an affidavit of publication, stating publication was made on November 21, November 28, December 5, and December 12, 2007, and including a copy of the notice; and a copy of a letter sent to plaintiffs by certified mail dated November 29, 2007, informing them of the date and time of the sale and the amount required for redemption.

At the motion hearing, the deputy sheriff who posted the property testified that he had been posting properties for 34 years. He did not specifically remember posting this property, but he was familiar with the house, having posted numerous properties in the neighborhood. Plaintiffs' counsel cross-examined him, but did not ask to call any witnesses himself. The trial court found that plaintiffs failed to show there was clear and convincing evidence the property was not posted, and granted defendant's motion. The trial court did not discuss plaintiffs' motion to amend the complaint.

On appeal, plaintiffs argue that the trial court made impermissible findings of fact by weighing the credibility of the competing affiants. The court did not allow plaintiffs to testify,

but it allowed the deputy sheriff plenty of time to give his side of the story. Plaintiffs should have been allowed more discovery time to get answers to their interrogatories. The trial court also erred by denying them the opportunity to amend their complaint to seek money damages. We disagree.

We review *de novo* a trial court's decision to grant or deny a motion for summary disposition. *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998). Although substantively admissible evidence submitted at the time of the motion must be viewed in the light most favorable to the party opposing the motion, the non-moving party must come forward with at least some evidentiary proof, some statement of specific fact upon which to base his case. *Maiden v Rozwood*, 461 Mich 109, 120-121; 597 NW2d 817 (1999); *Skinner v Square D Co*, 445 Mich 153, 161; 516 NW2d 475 (1994).

Under MCL 600.3208:

Notice that the mortgage will be foreclosed by a sale of the mortgaged premises, or some part of them, shall be given by publishing the same 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, or some part of them, are situated In every case within 15 days after the first publication of the notice, a true copy shall be posted in a conspicuous place upon any part of the premises described in the notice.

The party contending that the posting is insufficient has the burden of proof. *White v Burkhardt*, 338 Mich 235, 239; 60 NW2d 925 (1953). The fact that the party had no actual notice does not invalidate the proceedings as long as there is compliance with the statutory requirements. *Jennings v Arnold*, 272 Mich 599, 603; 262 NW 419 (1935).

The trial court did not err in granting defendant's motion for summary disposition. At best, plaintiffs have shown they did not have actual notice. But defendant is not required to ensure notice is actually given, all it has to do is publish and post the property in accordance with the statutory requirements. Plaintiffs' bare statements that they did not receive notice are not clear and convincing evidence that adequate notice was not given. The trial court did not decide the deputy sheriff was more credible than plaintiffs because plaintiffs provided no evidence that publication and posting did not happen in the manner the deputy sheriff averred.

The trial court did not prevent plaintiffs from testifying, as they claim. Plaintiffs' counsel did not ask to have any witnesses testify, and plaintiffs do not explain what their live testimony would have added to their affidavits. Nor do they explain what further discovery would have added support to their statements. Plaintiffs are correct that the trial court did not discuss plaintiffs' motion to amend their complaint, but the proposed amendments would not have changed the outcome. Plaintiffs sought to remove one count and to add that the matter involved "an amount in excess of \$25,000." Plaintiffs do not explain what legal theory would afford them monetary relief, or what facts would entitle them to such relief. The proposed changes are immaterial.

Affirmed.

/s/ Cynthia Diane Stephens

/s/ Mark J. Cavanagh

/s/ Donald S. Owens