

STATE OF MICHIGAN
IN THE SUPREME COURT

Appeal from the Washtenaw County Circuit Court,
Honorable Archie C. Brown

DAN-KAI TUS and NU CHEN YEN TUS,

Plaintiffs/Counter Defendants-
Appellants,

v

Docket No. 139769

SHIRLEY HURT f/k/a SHIRLEY ROBBINS,

Defendant,

and

STERLING MORTGAGE AND
INVESTMENT COMPANY,

Defendant/Counter Plaintiff-
Appellee.

REPLY BRIEF ON APPEAL — APPELLANTS

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LAW OFFICES MADDIN, HAUSER, WARTELL, ROTH & HELLER, P.C.

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REPLY

Preliminary Statement

The Appellee, Sterling Mortgage and Investment Company, asserts that “Appellants repeatedly refer to Appellee as ‘Sterling Bank which is incorrect’ and that the difference “must be made clear.” (Appellee Brief at p. 1, n 1). Although the Tuses did make four references to “Sterling Bank” at p. 4 of their main brief, that term is found nowhere else in the brief, which contains more than 80 references to “Sterling Mortgage” (not counting its use in citations to the record and pages i-xi). The misnomer at p. 4 was inadvertent and not intended to create a false impression. In fact, as noted below in Part A, it would not be in the Tuses’ interest to do so.

A. — Regarding Sterling Mortgage’s Statement of Facts

The facts stated at p. 1 of Sterling Mortgage’s brief have never been in dispute. But Sterling Mortgage dances around a critical fact, one that goes to the very heart of this matter. Rather than remind the Court that it allowed the default to continue *for almost 15 years*, it states only that it “eventually” foreclosed the Mortgage.

Sterling Mortgage has never offered a plausible explanation for having sat on its rights all that time — but the Tuses have; the relatively small balance owing at the time of the default might have been paid off had Sterling Mortgage acted promptly. By taking no action at all, however, Sterling Mortgage placed itself in a “win-win” position to make a much greater profit (in regard to which it is significant that William Hurt (the mortgagor) had reduced the balance owed on the \$76,500.00 to \$8,040.88 in a mere seven months, meaning that Sterling Mortgage had earned very little interest on the loan by the time of the default.). And that is why it is significant that this is not big old “Sterling Bank” but poor little Sterling Mortgage and Investment Company, “a small Michigan corporation with one stockholder” (Appellee Brief at p.

1, n 1). Given the size of Sterling Mortgage, it is hardly likely (or credible) that a default simply went unnoticed and “just happened” to have been discovered— just in time to avoid being barred by the statute of limitations. Based upon the record, the finder of fact could easily infer that the delay was intentional (and unconscionable) and that Sterling Mortgage would be “unjustly enriched” by the resultant windfall.

B. — Regarding Sterling Mortgage’s Standing to Appeal

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Sterling Mortgage’s argument on the issue of standing to appeal reinforces the Tuses’ position. Sterling Mortgage asserts, *almost* correctly, that it was left with only two options: to “either accept the [tendered] funds and forfeit its right to appeal, or reject the funds without justification in order to preserve appeal” (Appellee Brief at p. 7). To claim that rejection of the tender would be “without justification” is, however, totally inconsistent with Sterling Mortgage’s position on appeal, *i.e.* that the Tuses *had no right* to redeem after the redemption period expired and the trial court improperly extended the redemption period. If that is true (and if Sterling Mortgage truly believes it to be true), then *that in itself* would justify rejection of the funds. As the Tuses have said all along, Sterling Mortgage chose not to reject the funds but rather, to ask the court to escrow the funds so that it could eat its cake and have it, too. Therefore, the Tuses continue to believe that having the trial court hold the tendered funds in escrow operated, in every practical sense, as an acceptance *disguised as* rejection, just as paying money into escrow does not constitute *tender* of the funds.¹

The fundamental flaw in Sterling Mortgage’s argument is its failure to recognize the difference between rejecting the *tender of payment* and rejecting *the judgment itself*. Rejecting

¹ See, *e.g.*, *Flynn v Korneffel*, 451 Mich 186; 547 NW2d 249 (1996) (placement of funds in escrow on final day of redemption period did not constitute redemption, as money was not “paid” to vendors; placement of judgment amount in escrow did not amount to tender).

tender merely maintains the status quo — which was radically altered by, in effect, compelling the appellee to post an appeal bond. Rejecting the tender based on a desire to appeal would in no way have adversely affect Sterling Mortgage’s right to enforce a judgment upholding the foreclosure (*i.e.* reversing the trial court). In short, Sterling Mortgage’s “motion for instructions” sought relief to which it was not entitled and the trial court should have instructed it *to return the funds* if it intended to appeal.

Finally, it is true that the Tuses did not appeal the order granting Sterling Mortgage’s motion for instructions but that was only because the court’s error was harmless. If the Tuses prevail, then Sterling Mortgage will get the funds anyway; and if Sterling Mortgage prevails, then it will get *the property* and the Tuses will get the redemption funds back.

C. — Regarding Extension of the Redemption Period

There is no logic or legal merit to Sterling Mortgage’s assertion that the trial court erred in putting the redemption period “on hold” pending determination of the parties’ rights [Apx. p. 2a] without having made a finding of fraud, accident, or mistake (Appellee Brief at p. 24). As noted above, if there is one “central fact” in this litigation it is *whether there was* fraud, accident, mistake — or the equivalent (see Appellants’ main brief at pp. 16-18). Thus, the substance of Sterling Mortgage’s argument is that the trial court erred *by not having found the ultimate fact* at the very outset of the litigation and before the parties had even completed discovery, as a prerequisite to granting preliminary, *interim* relief that merely preserved the status quo ante. The Tuses submit that, having made out a prima facie case in their complaint, preservation of the status quo was, in itself, sufficient ground for the court’s action.

It is also worth noting, particularly in regard to Sterling Mortgage's claim that it was prejudiced by the extension of the redemption period (Appellee Brief at p. 27), that it did not seek leave to appeal that order.

D. — Regarding Constructive Notice of the Mortgage

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Sterling Mortgage's extensive discussion of the notice effect of having recorded its Mortgage does not touch on any disputed fact. That the Tuses had notice of the Mortgage has never been disputed. What *is* in dispute is whether Sterling Mortgage *should be allowed to foreclose* the Mortgage and take title to property worth many times the amount owed at the time of the default, nearly 15 years after the default, and almost six years after telling a subsequent purchaser who made reasonable inquiry that the Mortgage had been paid off. Were it not for that last, critical fact, this dispute would never have arisen and, despite Sterling Mortgage's insistence that it never occurred, there is admissible contravening evidence on the record. And given the undisputed fact that no payments had been made on the Mortgage for more than nine years at the time when the representation was made, it was entirely reasonable to believe that the representation was true.

Indeed, reading Sterling Mortgage's argument one might think that it is entirely unheard of for a mortgagee to fail to record a discharge of mortgage. As Sterling Mortgage itself says, however, it is a small operation. Thus, routine "paperwork" like recording a discharge might "fall through the cracks" but it is hard to imagine that a default would pass unnoticed for almost 15 years. There is more than enough evidence to support the inference that Sterling Mortgage *intentionally* allowed the default to continue to gain the benefit of an additional 15 years interest at 15.5% or even more — the property itself, which would be a *huge windfall*. That leads to the next point.

E. — Regarding the Tuses' Belief that the Mortgage Had Been Paid Off

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Sterling Mortgage argues, in essence, that the Tuses had notice of the Mortgage and, therefore, could not reasonably have believed that there was no such encumbrance. That argument, however, conflates two distinct concepts. That the Tuses had notice of the Mortgage is undisputed; the Tuses have admitted from the outset that the Mortgage actually showed up in the title search performed by the title insurance agency. But having notice, or even actual knowledge, that a mortgage *had been recorded* does not compel the inference that the debt secured by the mortgage remains unsatisfied. And where, as here, diligent inquiry leads to *credible and authoritative* evidence that the mortgage has been paid off, it is not unreasonable to believe that to be true.

No one has ever asserted that the Tuses themselves possess the ability to evaluate the state of title to real property and they don't; they relied upon a title insurance agency which does have that ability and which concluded (based upon information obtained directly from Sterling Mortgage) that the Mortgage at issue was paid off and would be discharged of record. Given the source of that information, it was also reasonable for the title insurance agency to believe that the property was not actually encumbered by the Mortgage. Thus, even if the title agency's knowledge were to be imputed to the Tuses under principles of agency law,² the result is the same.

F. — Regarding the Statute of Limitations

Sterling Mortgage's discussion of the statute of limitations (Appellee Brief at pp. 28-29) evidences either its inability to comprehend or its refusal to acknowledge what the Tuses have

² See, e.g., *MCA Financial Corp v Grant Thornton, LLP*, 263 Mich App 152, 164; 687 NW2d 850 (2004), lv den 472 Mich 878 (2005) (act of an agent is imputed to the principal if agent is acting, even in part, for principals' interest).

said all along; *there is no statute of limitations issue. It is undisputed* that Sterling Mortgage commenced the foreclosure proceeding within the *maximum* time allowed by statute (the “limitation”). In other words, the foreclosure was not barred *by the statute of limitations*. But the real question is whether the statute of limitations provides *an absolute right* to foreclose a mortgage *at any time preceding* the expiration of the limitation period, *without regard to any other material circumstances* (such as sleeping on one’s rights for almost 15 years and misrepresenting a material fact to a subsequent party in interest to the extreme prejudice of that party, resulting in a substantial windfall to the party asserting the right). As noted in the Tuses’ main brief, the case law makes it clear that a person may forfeit his rights *before* the expiration of a statutory limitation period by his own inequitable conduct.

G. — Regarding the Foreclosure

The trial court did not conclude, as Sterling Mortgage repeatedly asserts, that Sterling Mortgage “was entitled to foreclose” or “lawfully foreclosed” the Mortgage (see, *e.g.*, Appellee Brief at pp. 4, 5, 23, 25, 31, 32, 34). What the court said is that Sterling Mortgage “had the statutory authority *to start a foreclosure proceeding*” (emphasis added) [Apx. p. 320a, ¶ 2, Judgment]. That conclusion reflects the fact that Sterling Mortgage acted within the 15-year statutory limitation period.³ But “the statutory authority to start a foreclosure proceeding” does not bar the owner of the property from asserting *defenses* to foreclosure. And if the owner asserts a *valid* defense, then the mortgagee is not “entitled *to foreclose*.” This seemingly minor semantic difference therefore makes a world of substantive difference.

³ MCL 600.5803.

H. — Regarding the Trial Court’s Finding of Unjust Enrichment

The trial court’s finding that Sterling Mortgage’s *delay in enforcing* its rights would cause it to be “unjustly enriched” [Apx. 313(iv)a, Judgment] is not related to the Tuses’ *claim* of unjust enrichment. Viewed in light of the preceding Parts D and E and the nature of the relief granted [Apx. p. 313(iv-v)a], the trial court’s finding that Sterling Mortgage would be unjustly enriched makes perfect sense. In a nutshell, the court’s determination that “the evidence supports [the Tuses’] claims for unjust enrichment *and quiet title*” (emphasis added) [Apx. p. 313(iv)a, ¶ 3] is, in the truest sense, a finding of fact, *i.e.* that Sterling Mortgage would obtain a *windfall* — a benefit to which it was not entitled *due to its own inequitable conduct*.⁴ And both the court’s judgment *on the Tuses’ quiet title claim* and the relief it granted are consistent with that finding.

I. — Regarding the Amendment of the Tuses’ Complaint

Sterling Mortgage asserts, in essence, that the amendment of the Tuses’ complaint was the result of a nefarious scheme by which the Tuses invented facts to support their claims (Appellee Brief at pp. 39-40). The reality, however, is more mundane. The allegation in the original complaint that “[t]he debt secured by the Sterling Mortgage was paid in full on June 28, 2000” [Apx. p. 4a, ¶ 19] was based upon the best information available at that time, after reasonable investigation. It was amended when the Tuses learned (from Greg Ottaviani) *why they had been led to believe* that the Mortgage had been paid off [Apx. p. 15a-16a, affidavit of Greg Ottaviani].

⁴ See, *e.g.*, *Chapman v Chapman*, 31 Mich App 576, 579; 188 NW2d 21 (1971), quoting *Kent v Klein*, 352 Mich 652; 91 NW2d 1 (1958):

It is enough to compel the surrender, *that one feed and grow fat on that which ingood conscience belongs to another, that he enjoy a windfall resulting in his unjust enrichment*, that he reap a profit in a situation where honor itself furnishes rich reward, where profit, the mainspring of the market place, is both foreign and inimical to the trust imposed. (Emphasis added.)

Furthermore, this was not, as Sterling Mortgage states, “the central disputed fact during the course of this action” (Appellee Brief at p. 3). It was, indeed, *a* disputed fact and a material one, but not the only one. In making that statement Sterling Mortgage overlooks the significance of its own inequitable conduct in allowing the default to continue for nearly fifteen years. *That* is the heart of this action.

Finally, Sterling Mortgage’s attempt to draw an analogy between a plaintiff amending a pleading and an insurance company asserting a new ground for denying coverage is without merit. Even the cases that Sterling Mortgage quotes⁵ expressly incorporate language defining the distinction: “Where a party gives a reason for his conduct and decision ... he cannot, *after litigation has begun*, change his ground”⁶ (Emphasis added.) Sterling Mortgage cites no authority for applying the principle in the circumstances presented here, *i.e.* amending a pleading in litigation that is already pending.

J. — Regarding the Imposition of Sanctions against the Tuses

The Court should note at the outset of this argument that Sterling Mortgage has never denied and has, in fact, admitted that it filed its amended defenses without the Tuses’ consent and without seeking or obtaining leave, in violation of MCR 2.118(A)(2). Further, in attempting to justify the trial court’s imposition of sanctions against the Tuses for filing a motion to strike the amended defenses, Sterling Mortgage actually reinforces the Tuses’ position, stating that:

[The Tuses] delayed in asking that the defenses be stricken *and further had made an argument regarding the defenses in their opposition to [Sterling Mortgage’s] Motion for Summary Disposition*. Clearly, the trial court heard *what it needed to hear when it granted partial summary disposition and denied partial summary disposition*. (Appellee Brief at pp. 41-42; emphasis added).

⁵ *Ohio & M R Co v McCarthy*, 96 US 258; 6 Otto 258 (1877), *C E Tackels, Inc v Fantin*, 341 Mich 119; 67 NW2d 71 (1954).

⁶ *Ohio & M R Co v McCarthy*, *supra*, quoted at p. 40 of Appellee Brief).

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Sterling Mortgage thus acknowledges that the Tuses responded *immediately* to the amended defenses by addressing (and objecting to) them in their April 6, 2007 response to the motion in which they were first raised — *before they were even filed* (Sterling Mortgage filed the amended defenses on May 4, 2007 [Apx. p. 178a-179a], *because* the Tuses had objected to their having been raised for the first time in Sterling Mortgage’s motion and without leave under MCR 2.118(A)(2) [Apx. p. 150a]). And the Tuses’ motion to strike the improperly filed amended defenses was only necessary because *the trial court failed to address the issue*; its judgment makes it clear that the court did not consider that issue to be something it “needed to hear” in ruling on the motion. But by failing to address the issue, the court left it hanging in the wind, so to speak, free to float back into the Tuses’ face at trial.

The Tuses, having realized in the course of preparing for trial that the issue had not been resolved, made the decision to *get* it resolved *before* trial rather than having to raise objections *at* trial. What is conspicuously absent from Sterling Mortgage’s argument is any suggestion *that it was prejudiced* in any way by the Tuses’ “delay” in filing their motion to strike the amended defenses, *i.e.* the time between the court’s decision on the motion for summary disposition (May 22, 2007) and the filing of the motion to strike (July 25, 2007).

Furthermore, as noted in the Tuses’ main brief (at p. 33) the Court of Appeals declined to even address the issue presented on cross appeal on the ground that the Tuses failed to provide citation to authority to support their position. The Tuses then pointed out the total absence of support *for* the imposition of sanctions (*id.*). Like the Court of Appeals, Sterling Mortgage has not identified any support — legal or factual — *for* the imposition of sanctions. *Sterling Mortgage improperly* raised issues that had never been pleaded, in a dispositive motion, and *improperly* filed an amended pleading; the Tuses *properly* objected to the raising of new

defenses for the first time in a dispositive motion and *properly* filed a motion to strike because the trial court failed to address the impropriety of Sterling Mortgage's double barreled misconduct. Neither Sterling Mortgage nor the Court of Appeals has offered the slightest suggestion as to how *the Tuses'* act was inappropriate or improper — or sanctionable. No matter how much "acrimony" the trial court is claimed to have observed (Appellee Brief at p. 42), the filing of a motion seeking relief to which the moving party believes itself to be (and is) entitled does not constitute "brinksmanship." It is, and the lower courts should have recognized it as, an appropriate pre-trial procedure to promote efficiency in the actual trial of the case. To sanction a party for making a proper response to a series of improper acts by an adverse party is not, by any stretch of imagination, a reasonable and principled outcome.

CONCLUSION

The conclusions to be drawn are, with the following addition, the same as those stated in the Tuses' main brief.

F. The Judgment is fair and equitable as it leaves both parties in the same position they would have been in had the Tuses redeemed without contesting Sterling Mortgage's right to foreclose the Mortgage after sitting on its hands for 15 years so as to reap the benefit of an extra 15 years' interest at 15.5%, which amounted to \$19,310.68 on a debt of \$8,040.88.

Respectfully submitted,
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