

STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF OAKLAND

CHRISTOPHER MERRILL,

Plaintiff,

Case No. 2015-147116-CB
Hon. Wendy Potts

v

TIMES REALTY, LLC, a Michigan
Limited Liability Company,

Defendant,

and

TIMES REALTY, LLC, a Michigan
Limited Liability Company,

Third Party Plaintiff,

v

NBS REAL ESTATE, LLC, and
FANNIE MAE, INC.,

Third Party Defendants.

OPINION AND ORDER RE: DEFENDANT FANNIE MAE'S MOTION FOR SUMMARY
DISPOSITION and DEFENDANT NBS REAL ESTATE, LLC'S MOTION FOR SUMMARY
DISPOSITION AGAINST TIMES REALTY, LLC

At a session of Court
Held in Pontiac, Michigan

MAR 31 2016

This matter is before the Court on Third Party Defendant NBS Real Estate, LLC's motion for summary disposition against Times Realty, LLC and Third Party Defendant Fannie Mae's motion for summary disposition against Times Realty, LLC. For purposes of background information, Plaintiff Christopher Merrill previously filed a complaint in the Oakland County

Circuit Court on December 10, 2013 against Defendants Fannie Mae, Inc., NBS Real Estate, LLC, and Times Realty, LLC. That complaint was assigned case number 2013-137789-CZ. That cause of action arose from the sale of real property located at 5056 Pheasant Road, Waterford, Michigan. On July 17, 2014, a Stipulation and Order to Dismiss Defendant Fannie Mae, Inc. with prejudice was entered. Also on July 17, 2014, a Stipulation and Order to Dismiss Defendant NBS Real Estate, LLC with prejudice was entered. The remaining claims were dismissed without prejudice pursuant to Court Order on March 26, 2015. The prior case was not appealed.

Plaintiff Christopher Merrill filed the instant complaint against Defendant Times Realty, LLC on May 19, 2015. On July 9, 2015, Defendant and Third Party Plaintiff Times Realty, LLC filed a Third Party Complaint against Third Party Defendant NBS Real Estate, LLC and Third Party Defendant Fannie Mae, Inc. and stated a cause of action arising from the same sale of real property located at 5056 Pheasant Road, Waterford, Michigan as in the prior case, 2013-137789-CZ. The cause of action in the present case arises from the same transaction and occurrence as the prior case.

Third Party Defendants NBS and Fannie Mae now each move for summary disposition. NBS moves for summary disposition based on MCR 2.116(C)(7), (C)(8), and (C)(10). Fannie Mae moves for summary disposition based on MCR 2.116(C)(8) and (C)(10). The parties appeared and the Court heard oral arguments on Defendants' motions for summary disposition on March 16, 2016.

Both NBS and Fannie Mae request that the Court summarily dismiss Third Party Plaintiff Times Realty's claims based on the legal doctrine of collateral estoppel. "Generally, for collateral estoppel to apply three elements must be satisfied: (1) a question of fact essential to the

judgment must have been actually litigated and determined by a valid and final judgment; (2) the same parties must have had a full and fair opportunity to litigate the issue, and (3) there must be mutuality of estoppel. Mutuality of estoppel requires that in order for a party to estop an adversary from relitigating an issue that party must have been a party, or in privy to a party, in the previous action. In other words, the estoppel is mutual if the one taking advantage of the earlier adjudication would have been bound by it, had it gone against him.” *Monat v State Farm Ins Co*, 469 Mich 679, 683-685; 677 NW2d 843 (2004), (internal quotation marks and citations omitted).

The Court will first address the first requirement—whether a question of fact essential to the judgment was actually litigated and determined by a valid and final judgment. An issue is actually litigated where it is put into issue by the pleading, submitted to the trier of fact, and thereafter determined. *Cogan v Cogan*, 149 Mich App 375, 379; 385 NW2d 793 (1986). Collateral estoppel applies only to issues that were “necessarily determined” in the prior action, i.e., essential to the resulting judgment. “[A] finding upon which the judgment did not depend cannot support collateral estoppel.” *Eaton Co Bd of Road Com'rs v Schultz*, 205 Mich App 371, 377; 521 NW2d 847 (1994). From the pleadings, it is clear that the same parties are involved in the instant case as were involved in the 2013 case. However, in the prior case, the issues were not submitted to the trier of fact, and, therefore, the issues in the prior action were not necessarily determined. In the prior action, the claims as to NBS and Fannie Mae were dismissed per stipulation and order, without being submitted to the trier of fact and thereafter determined. *Cogan*, 149 Mich App at 379. Accordingly, NBS and Fannie Mae’s defenses of collateral estoppel fail.

NBS and Fannie Mae next move for summary disposition pursuant to MCR 2.116(C)(8). A motion under MCR 2.116(C)(8) tests the legal sufficiency of the pleadings. *Maiden v Rozwood*, 461 Mich 109, 119-120; 597 NW2d 817 (1999). Both NBS and Fannie Mae claim they had no duty to disclose under the Sellers Disclosure Act, MCL 565.951 *et seq.*

The applicable provisions of the Sellers Disclosure Act provide:

The seller disclosure requirements of sections 4 to 13 do not apply to any of the following:

(a) Transfers pursuant to court order, including, but not limited to, transfers ordered by a probate court in administration of an estate, transfers pursuant to a writ of execution, transfers by any foreclosure sale, transfers by a trustee in bankruptcy, transfers by eminent domain, and transfers resulting from a decree for specific performance.

(c) Transfers by a sale under a power of sale or any foreclosure sale under a decree of foreclosure after default in an obligation secured by a mortgage or deed of trust or secured by another other instrument containing a power of sale, or transfers by a mortgagee or a beneficiary under a deed of trust who has acquired the real property at a sale conducted pursuant to a power of sale under a mortgage or deed of trust or a sale pursuant to a decree of foreclosure of has acquired the real property by a deed in lieu of foreclosure.

MCL 565.953.

Interpretation of an unambiguous statute is a question of law. *Reed v Yackell*, 473 Mich 520, 528; 703 NW2d 1 (2005). The fundamental goal of statutory interpretation is to ascertain

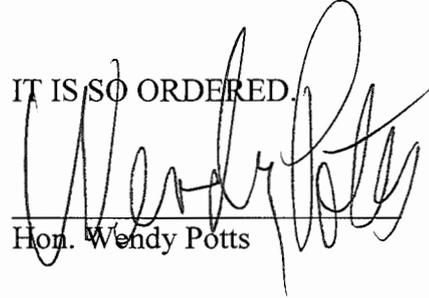
the legislative intent as inferred from the words of the statute. “If the statute is unambiguous, judicial construction is neither required nor permitted.” *Id* at 528-529. The statute specifically states that the seller disclosure requirements of sections 4 to 13 do not apply to transfers from a foreclosure sale. Times Realty argues that the sale of the real property was not a foreclosure sale because the redemption period had run, but provides no case law to support this proposition. Michigan law is clear that, “A party may not merely announce a position and leave it to [the] Court to discover and rationalize the basis for the claim.” *National Waterworks, Inc v International Fidelity & Surety, Ltd*, 275 Mich App 256, 265; 739 NW2d 121 (2007). In the instant matter, Bank of America initiated foreclosure proceedings on a mortgage owned by Fannie Mae which had fallen into default. Fannie Mae acquired the property pursuant to a foreclosure action. NBS served as the listing agent for Fannie Mae for the property that was sold to Merrill as a result of the foreclosure.

The applicable statute provides that “The seller disclosure requirements of sections 4 to 13 do not apply to any of the following: (c) Transfers by a sale under a power of sale or any foreclosure sale under a decree of foreclosure after default in an obligation secured by a mortgage or deed of trust or secured by any other instrument containing a power of sale, or transfers by a mortgagee or a beneficiary under a deed of trust who has acquired the real property at a sale conducted pursuant to a power of sale under a mortgage or deed of trust or a sale pursuant to a decree of foreclosure or has acquired the real property by a deed in lieu of foreclosure.” MCL 565.953(c). The statute exempts property transferred or acquired by a foreclosure sale under a decree of foreclosure after default in an obligation secured by a mortgage or deed. Thus, Times Realty’s argument the exemption under MCL 565.953 is not applicable is without merit.

The plain language of the statute exempts NBS and Fannie Mae from the disclosure requirement under which Times Realty makes its claims. Thus, considering only the pleadings, and accepting all well-pled factual allegations as true, the Court finds that Times Realty, LLC's claims against NBS and Fannie Mae are so clearly unenforceable as a matter of law that no factual development could justify recovery. Accordingly, NBS Real Estate's and Fannie Mae, Inc.'s motions for summary disposition of Times Realty, LLC's claims are granted and the third party complaint is dismissed.

Dated: **MAR 31 2016**

IT IS SO ORDERED.


Hon. Wendy Potts