DA 18-0439

IN THE SUPREME COURT OF THE STATE OF MONTANA

2019 MT 114N

FEDERAL NATIONAL MORTGAGE ASSOCIATION,

Plaintiff and Appellee,

v.

GAIL STAFFORD,

Defendant, Counter-Claimant and Appellant,

v.

FEDERAL NATIONAL MORTGAGE ASSOCIATION, and JOHN DOES 1-50,

Counter-Defendants and Appellees.

APPEAL FROM: District Court of the Second Judicial District,
In and For the County of Butte/Silver Bow, Cause No. DV-13-204
Honorable Brad Newman, Presiding Judge

COUNSEL OF RECORD:

For Appellant:

Adam H. Owens, Gregory G. Costanza, Granite Peak Law, PLLC, Bozeman, Montana

For Appellee:

Mark D. Etchart, Browning, Kaleczyc, Berry & Hoven, P.C., Helena, Montana

Submitted on Briefs: March 27, 2019

Decided: May 14, 2019

Filed:

Clerk

Justice Laurie McKinnon delivered the Opinion of the Court.

¶1 Pursuant to Section I, Paragraph 3(c), Montana Supreme Court Internal Operating Rules, this case is decided by memorandum opinion and shall not be cited and does not serve as precedent. Its case title, cause number, and disposition shall be included in this Court's quarterly list of noncitable cases published in the Pacific Reporter and Montana Reports.

¶2 Gail Stafford appeals from an order of the Second Judicial District Court, Butte-Silver Bow County, granting Federal National Mortgage Association's (Fannie Mae) motion to dismiss and denying Stafford's motion for leave to amend her pleading. We affirm.

¶3 In January 2010, Stafford began leasing a house on a property located at 86 Elkhorn Lane in Butte, Montana. According to Stafford, she and the property owner at that time signed a hand-written residential landlord-tenant agreement for a period of one year with a month-to-month option at the end of the year. Stafford never retained a copy of the agreement. A couple years later, the property owner died, and a mortgage on the property fell into default.

¶4 A trustee's sale was held at the county courthouse to auction off the property on December 14, 2012. Stafford alleges she and two other potential bidders attended the sale and no Fannie Mae representatives were present. That afternoon, Joseph Nowakowski, an auctioneer, approached the potential bidders and commenced the auction. According to Stafford, she was the only potential bidder to make a bid, and her bid was one dollar above Nowakowki's starting price. However, Stafford alleges Nowakowki told Stafford her bid

was too low and abruptly ended the auction. Stafford did not learn who purchased the property until some time later when she examined the clerk and recorder's records and saw that they listed Fannie Mae as having purchased the property at the auction.

¶5 On March 13, 2013, Fannie Mae served Stafford a notice that her tenancy would expire on April 13, 2013. Stafford, however, refused to vacate the property and held over her tenancy. In June 2013, Fannie Mae filed this action against Stafford for unlawful detainer, seeking possession of the property with costs. In response, Stafford filed an answer and a counterclaim wherein she denied that Fannie Mae had standing to bring a lawsuit for unlawful detainer because it did not legally own the property. She argued Fannie Mae could not have purchased the property because it did not have a representative present at the public auction. Through her counterclaim, she also asked the District Court to "enter a declaratory judgment quieting title in her name as to a leasehold interest in the property for a period of one year." Stafford made no other counterclaims at that time.

¶6 In January 2014, Fannie Mae moved for summary judgment, and the District Court stayed consideration of the motion until the parties could complete discovery. Stafford served Fannie Mae with discovery requests in February and March 2014. Fannie Mae, however, never replied to Stafford's requests. Stafford therefore filed a motion to compel and a motion for summary judgment in May 2014. The District Court granted Stafford's motion to compel. Fannie Mae responded to Stafford's motion for summary judgment, but it still did not comply with Stafford's earlier discovery requests. On September 5, 2014, Fannie Mae filed an affidavit from Nowakowski, the auctioneer, wherein he stated the only bid he received at the public auction in December 2012 was Fannie Mae's. Fannie Mae

still did not comply with Stafford's discovery requests. On September 8, 2014, Stafford filed a motion to dismiss Fannie Mae's complaint and for an entry of default against Fannie Mae on her counterclaim as a sanction for Fannie Mae's discovery violations. That same day, the District Court heard oral arguments on the parties' cross-motions for summary judgment. However, the District Court never ruled on the motions for over three years, despite receiving several additional motions and notices of issue from the parties.

¶7 In January 2018, Fannie Mae quitclaimed the property to a third-party purchaser. In March, Fannie Mae moved to dismiss its original complaint and Stafford's counterclaim with prejudice, arguing that because it no longer owned the property, its unlawful detainer action and Stafford's counterclaim seeking to establish a leasehold interest were no longer appropriate. Stafford objected to the motion later that month. Stafford also filed a motion for leave to amend her counterclaim to add a claim for, among other things, a declaratory judgment quieting title for a complete ownership interest in the property—no longer just a leasehold interest—in her favor. Stafford also sought to add several defendants including the third-party purchaser whom Fannie Mae conveyed the property to. Fannie Mae objected to Stafford's motion for leave to amend. In July 2018, the District Court denied Stafford's motion for leave to amend and granted Fannie Mae's motion to dismiss. The court concluded there was no longer a justiciable controversy between the parties. It also concluded that granting Stafford leave to amend was inappropriate because Stafford knew of the potential additional parties and claims for many years and only filed her motion after Fannie Mae filed its motion to dismiss. Stafford appeals.

¶8 Mootness, an issue of justiciability, presents a question of law that we review de novo. *Montanans Against Assisted Suicide v. Bd. of Med. Examiners*, 2015 MT 112, ¶ 7, 379 Mont. 11, 347 P.3d 1244. We review a district court's decision denying leave to amend for abuse of discretion. *Griffin v. Moseley*, 2010 MT 132, ¶ 22, 356 Mont. 393, 234 P.3d 869.

¶9 Stafford first raises an issue of whether the District Court erred by granting Fannie Mae's motion to dismiss. She asserts she retained claims against Fannie Mae that existed independently of Fannie Mae's interest in the property, and she argues Fannie Mae's sale of the property constitutes a voluntary cessation to which mootness does not apply.

¶10 "If the issue presented at the outset of the action has ceased to exist or is no longer 'live,' or if the court is unable due to an intervening event or change in circumstances to grant effective relief or to restore the parties to their original position, then the issue before the court is moot." *Plan Helena, Inc. v. Helena Reg'l Airport Auth. Bd.*, 2010 MT 26, ¶ 10, 355 Mont. 142, 226 P.3d 567. A party asserting a claim must have a personal interest in the outcome of the case at all points during litigation. *Plan Helena, Inc.*, ¶ 10. A case is moot through a defendant's voluntary conduct only when it is "absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur." *Havre Daily News, LLC v. City of Havre*, 2006 MT 215, ¶ 38, 333 Mont. 331, 142 P.3d 864 (quoting *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. Inc.*, 528 U.S. 167, 189, 120 S. Ct. 693, 708 (2000)). Due to the concern that the defendant may utilize voluntary cessation to manipulate the litigation process, a defendant who voluntarily ceases challenged conduct

bears a heavy burden of persuading the court that the challenged conduct cannot reasonably reoccur. *Havre Daily News, LLC*, ¶ 34.

¶11 As much as Stafford attempts to obfuscate her original counterclaim with her proposed additional claims, the fact remains that for the first five years of litigation, Stafford only requested the District Court find her entitled to a one-year *leasehold* interest in the property. Stafford originally raised the issue of whether Fannie Mae lawfully owned the property only to challenge whether Fannie Mae had standing to evict her. Whether Fannie Mae lawfully owned the property was only tangentially related to Stafford's primary issue—whether she was entitled to a one-year leasehold interest. Stafford did in fact remain on the property for one year (and every year since). Thus, regardless of Stafford's complaints about the property's public auction, because Stafford already received the relief she requested, the District Court correctly found that it could no longer provide her relief, rendering her counterclaim moot.

¶12 Furthermore, Fannie Mae's action to evict Stafford cannot reasonably reoccur because Fannie Mae no longer claims an ownership interest in the property. Fannie Mae cannot seek to evict a tenant from property it does not own. Likewise, when Fannie Mae sought to evict Stafford, its action initially threatened Stafford's claimed leasehold interest in the property, but when Fannie Mae quitclaimed its interest to a third party, it voluntarily ceased that challenge. Fannie Mae has met its burden and has shown the conduct giving rise to Stafford's counterclaim cannot reasonably reoccur. Accordingly, we conclude the voluntary cessation exception to the mootness doctrine is inapplicable here. The District Court did not err when it granted Fannie Mae's motion to dismiss the case for mootness.

¶13 Stafford next claims the District Court abused its discretion by denying her leave to amend. "A court abuses its discretion if it acts arbitrarily without the employment of conscientious judgment or exceeds the bounds of reason, resulting in substantial injustice." *State v. Derbyshire*, 2009 MT 27, ¶ 19, 349 Mont. 114, 201 P.3d 811. Pursuant to M. R. Civ. P. 15(a)(2), a court may grant a party leave to amend its pleading and "should freely give leave when justice so requires." A district court "is justified in denying a motion for an apparent reason such as undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by allowance of the amendment, futility of the amendment, etc." *Farmers Coop. Ass'n v. Amsden, LLC*, 2007 MT 286, ¶ 12, 339 Mont. 445, 171 P.3d 690 (quoting *Bitterroot Inter. Sys. v. West. Star Trucks*, 2007 MT 48, ¶ 50, 336 Mont. 145, 153 P.3d 627). A party's prolonged delay in adopting a new legal theory is prejudicial to the opposing party, especially where the party waits until after the opposing party files a motion for summary judgment or a motion to dismiss. *Bardsley v. Pluger*, 2015 MT 301, ¶ 21, 381 Mont. 284, 358 P.3d 907; *see Peuse v. Malkuch*, 275 Mont. 221, 228, 911 P.2d 1153, 1157 (1996) ("Litigants should be allowed to change legal theories after a motion for summary judgment has been filed only in extraordinary cases.").

¶14 The District Court acted within its discretion in denying Stafford's motion for leave to amend her pleading. The court found the timing and nature of Stafford's proposed amendments problematic. It found Stafford knew about the potential additional parties and claims several years before filing her motion and took issue with the fact that she only filed her motion to amend after Fannie Mae filed its motion to dismiss. The District Court thus

concluded the "liberal freedom to amend pleadings contemplated by [M. R. Civ. P. 15], does not afford any relief to [Stafford] under the circumstances." Stafford also offered no meaningful justification for failing to move to amend her pleading earlier. Accordingly, even though the length of the litigation was not Stafford's fault, based on the District Court's findings and conclusions, we hold the court did not abuse its discretion by denying Stafford's motion for leave to amend.

¶15 Stafford also argues the parties tried the claims she sought to add to her pleading by implied consent. "When an issue not raised by the pleadings is tried by the parties' express or implied consent, it must be treated in all respects as if raised in the pleadings." M. R. Civ. P. 15(b)(2). In order for a court to find the parties tried an issue by implied consent, the nonmovant must have had notice that the issue was raised, and the parties must have actually tried the issue. *Bates v. Neva*, 2013 MT 246, ¶ 15, 371 Mont. 466, 308 P.3d 114; *see Reilly v. Maw*, 146 Mont. 145, 155, 405 P.2d 440, 446 (1965) ("[A]n amendment after judgment is not permissible which brings in some entirely extrinsic issue or changes the theory on which the case was actually tried, even though there is evidence in the record—introduced as relevant to some other issue—which would support the amendment.").

¶16 In September 2014, when the District Court held a hearing for the parties' cross-motions for summary judgment, Stafford questioned the legitimacy of Fannie Mae's ownership interest in the property. She alleged a leasehold interest in the property and contended Fannie Mae lacked standing to evict her because it failed to properly acquire the property title. Critically, however, Stafford did not claim an ownership interest in the

property herself. After the District Court asked for clarification about the interest she claimed, Stafford's counsel informed the court, "Her standing is based on her claim of a leasehold interest that's never been terminated." Stafford's counsel further explained, "She does not claim any fee ownership of the property."

¶17 Nearly five years later, Stafford sought leave to bring additional counterclaims for fraud, negligent misrepresentation, unjust enrichment, compensatory and punitive damages, violations of the Montana Unfair Trade Practices and Consumer Protection Act, and a declaratory judgment to quiet title in Stafford's favor—all claims rooted in the belief that Stafford was entitled to rightful ownership and possession of the property. Until that time, Stafford had explicitly represented to both the District Court and Fannie Mae that she was not asserting an ownership interest in the property. Fannie Mae did not have notice that Stafford was claiming an ownership interest or that she was seeking to raise issues related to any other claims. Moreover, Fannie Mae did not expressly or impliedly consent to try those issues before Stafford attempted to bring her additional claims. M. R. Civ. P. 15(b)(2) is therefore inapplicable.

¶18 Finally, Stafford argues the District Court abused its discretion by denying her motion for leave to amend under M. R. Civ. P. 15(d) which provides:

> On motion and reasonable notice, the court may, on just terms, permit a party to serve a supplemental pleading setting out any transaction, occurrence, or event that happened after the date of the pleading to be supplemented. The court may permit supplementation even though the original pleading is defective in stating a claim or defense.

After Fannie Mae sold the property, the third-party purchaser would have become a relevant party in any lawsuit that sought to establish ownership of the property. The fact

remains, however, that Stafford only sought to establish a leasehold interest in the property with her initial counterclaim. She did not assert an ownership interest until she filed her motion for leave to amend, and therefore, the District Court did not abuse its discretion by denying her motion under this theory.

¶19 The District Court did not err when it held the initial action was moot, and it did not abuse its discretion by denying Stafford leave to amend her pleading. We affirm the court's decision to grant Fannie Mae's motion to dismiss and to deny Stafford's motion for leave to amend her pleading.

¶20 We have determined to decide this case pursuant to Section I, Paragraph 3(c) of our Internal Operating Rules, which provides for memorandum opinions. This appeal presents no constitutional issues, no issues of first impression, and does not establish new precedent or modify existing precedent.

/S/ LAURIE McKINNON

We concur:

/S/ DIRK M. SANDEFUR
/S/ JAMES JEREMIAH SHEA
/S/ JIM RICE
/S/ INGRID GUSTAFSON