

UNREPORTED
IN THE COURT OF SPECIAL APPEALS
OF MARYLAND

No. 0036

September Term, 2014

SANDRA L. BARCUS

v.

JEFFREY NADEL, *et al.*
SUBSTITUTE TRUSTEES

Meredith,
Berger,
Kenney, James A., III
(Retired, Specially Assigned),

JJ.

Opinion by Meredith, J.

Filed: December 23, 2015

* This is an unreported opinion, and it may not be cited in any paper, brief, motion, or other document filed in this Court or any other Maryland Court as either precedent within the rule of stare decisis or as persuasive authority. Md. Rule 1-104.

Four days prior to the foreclosure sale of her home, Sandra Barcus, appellant, filed an untimely motion for stay, pursuant to Maryland Rule 14-211, in the Circuit Court for Frederick County. The motion was not ruled upon before the sale occurred, but, following the sale, the court held a hearing to consider appellant’s objections to the foreclosure. At the conclusion of the hearing, the court denied appellant’s objections and ratified the sale. This appeal followed.

QUESTION PRESENTED

Appellant presents a single question to this Court, which we set forth verbatim:

Was the trial court classification of my pre-sale motion as Post-sale exceptions an improper procedural irregularity leading to improper, unjust and inequitable result?

We answer that question “no,” and we affirm.

FACTS AND PROCEDURAL HISTORY

The record of proceedings from the Circuit Court for Frederick County reflects the following. On April 29, 2013, Jeffrey Nadel and Scott Nadel, Substitute Trustees, the appellees, filed an Order to Docket Suit pursuant to Maryland Rule 14-204. Attached to the Order to Docket were the documents required by Maryland Code (1974, 2010 Repl. Vol.) Real Property Article (“RP”), § 7-105.1, which section sets out the procedure to be followed in the foreclosure of residential property. On the bottom of the Order to Docket Suit was printed, in bold letters, “STATEMENT: THE PARTIES HAVE NOT ELECTED TO PARTICIPATE IN PREFILE MEDIATION.” Appellees filed affidavits of service on July 11, 2013, averring that appellant had been served via posting with the Order to Docket

and attachments on May 13, 2013, and served via certified mail, return receipt requested, on May 24, 2013, and also served via first-class mail. Appellant does not dispute that she was served with the Order to Docket and attachments.

On July 11, 2013, appellees filed with the court a Final Loss Mitigation Affidavit, reflecting that the secured party had conducted a loss mitigation analysis, but that it had determined on January 10, 2012, that appellant should be denied a loan modification because of her “fail[ure] to send payment within the required timeframe.” The certificate of service reflected that the Final Loss Mitigation Affidavit and a copy of the Notice of Foreclosure Action had been mailed to appellant on July 8, 2013.

Pursuant to Maryland Rule 14-211, a borrower facing foreclosure may file a motion to stay the sale of the property and dismiss the foreclosure action. Rule 14-211(a)(2)(A)(i) provides: “In an action to foreclose a lien on owner-occupied residential property, a motion by a borrower to stay the sale and dismiss the action shall be filed **no later than 15 days after . . . the date the final loss mitigation affidavit is filed.**” (Although Rule 14-211(a)(2)(A) also provides certain other triggering events, appellant has never contested appellees’ assertion that the deadline for filing the motion for stay in this case began to run when appellees filed the final loss mitigation affidavit.) The final loss mitigation affidavit was filed in this case on July 11, 2013. Therefore, any motion to stay or dismiss the foreclosure action pursuant to Rule 14-211 had to be filed by July 26, 2013, in order to comply with the deadline set forth in Rule 14-211(a)(2)(A).

The appellees scheduled the foreclosure sale for November 18, 2013. On November 12, 2013, the appellees filed the affidavits of notice required by RP §§ 7-105.2, 7-105.3, and 14-126, and Rules 14-209, 14-209.1, and 14-210, affirming that they had mailed the notices to appellant on November 5, 2013.

On November 14, 2013, appellant filed a document asserting the following:

MOTION FOR challenge chain of title defects, promissory note. Incorrect amount owed, incorrect fees and fraudulent activity by several lender on the above address. Honorable Judge please review Frederick County civil system. Foreclosure case #10C07001869 filed on 07/05/2007 Bierman v. Barcus. Case disposition lack of prosecution. Disposition date 10/1/2008, Foreclosure case #10C10001245 filed on 4/6/2010 Geesing v. Barcus. Case disposition: voluntary dismissal. Disposition date: 11/04/2010. Foreclosure case #10C13001374 filed on 4/29/2013 Nadel v. Barcus. I recently received documents from Jeffrey Nadel stating the above mentioned property will be auctioned on November 18, 2013 @ 10:55 AM see attached. Also my loan was with Countrywide Home Loans, then to Fredmont [sic], then to Litton Loan Service now with Ocwen Loan Servicing.

The circuit court did not take any action with respect to appellant's motion prior to the time the property was sold to the note holder at foreclosure auction on November 18, 2013. On December 4, 2013, appellees filed the requisite post-sale paperwork, including the report of sale, affidavits of the purchaser and auctioneer, a copy of the sales contract, and a copy of a notice advertising the sale which had been published in the *Frederick News-Post* on November 1, 8, and 15, 2013.

A hearing on appellant’s motion was conducted on February 7, 2014, at the conclusion of which the court denied appellant’s objections and ratified the sale. Appellant’s February 21, 2014, motion for reconsideration was denied, and this appeal followed.¹

STANDARD OF REVIEW

In any action tried without a jury, our review is conducted pursuant to Maryland Rule 8-131(c), which provides:

When an action has been tried without a jury, the appellate court will review the case on both the law and the evidence. It will not set aside the judgment of the trial court on the evidence unless clearly erroneous, and will give due regard to the opportunity of the trial court to judge the credibility of the witnesses.

With respect to challenges to foreclosure sales, the Court of Appeals observed in *Thomas v. Nadel*, 427 Md. 441, 443-44 (2010):

Prior to the sale, a borrower may file a motion to stay the sale and dismiss the foreclosure action under Maryland Rule 14–211. After holding a hearing on the merits of such a motion, the court may dismiss the foreclosure action if it finds “that the lien or the lien instrument is invalid or that the plaintiff has no right to foreclose in the pending action.” Maryland Rule 14–211(e).

. . . Following a sale, . . . a borrower may file written exceptions that describe any alleged “irregularity with particularity.” Maryland Rule 14–305(d). The rule further provides that the court is to ratify the sale if (1) no exceptions are filed within the 30–day period or any that were made have been overruled and

¹In her motion for reconsideration, appellant represented that “on or about 11/19/2013 the clerk of this court issued a hearing notice indicating in (Error) that my motion was to be treated as a post-sale motion for exceptions.” According to the docket entries, on December 19, 2013, the court issued a hearing notice establishing a hearing on January 23, 2014. The hearing notice that should be at D.E. 13000 is absent from the record. The January 23 date for the motion hearing was later continued to February 7 at the request of appellees.

(2) the court is satisfied that “the sale was fairly and properly made.” Maryland Rule 14–305(e). If the court does not find that the sale was “fairly and properly made”, it may issue an “appropriate” order. Maryland Rule 14–305(e).

(Footnotes omitted.)

In *Fagnani v. Fisher*, 418 Md. 371 (2011), the Court of Appeals provided this comment on the foreclosure process:

One who borrows money from a lender/creditor or mortgagee is designated as a borrower/debtor or mortgagor. In order to ensure repayment, a lender or creditor may require the debtor to convey property to the creditor to be held as collateral to secure the debt. The conveyance ensures that the creditor will either be repaid the loan or retain ownership of the collateral. See *Simard v. White*, 383 Md. 257, 270–271, 859 A.2d 168, 176 (2004). Where the legal relationship exists between only the debtor and the lender, it is evidenced by a mortgage document; however, where the debtor conveys the property to a third party trustee rather than the lender, it is evidenced by a deed of trust. 383 Md. at 281, 859 A.2d at 182 (quoting Ricard M. Venable, *The Law of Real Property* 179 (1892)). A deed of trust is a “security interest device [that] transfers the legal title from a property owner to one or more trustees to be held for the benefit of a beneficiary.” *Springhill Lake Investors Ltd. P’ship v. Prince George’s County*, 114 Md. App. 420, 428, 690 A.2d 535, 539, cert. denied, 346 Md. 240, 695 A.2d 1229 (1997). The conveyance transfers the estate of the debtor to the trustee, giving the trustee legal title to the property. The debtor retains an “equity of redemption” or the right “to reassert complete [] ownership of the land, upon payment of debt and any other charges rightly assessed under the terms of the lien instrument.” 383 Md. at 272 n. 12, 859 A.2d at 177 n. 12 (internal citations omitted). The conveyance can then be “defeated on the performance of a condition subsequent (the payment of the money).” *Simard*, 383 Md. at 271, 859 A.2d at 176 (quoting *Venable*, 177); see also *Williams v. Safe Deposit & Trust Co.*, 167 Md. 499, 504, 175 A. 331, 333 (1934) (“[A] mortgage conveys the whole legal estate to the mortgagee, subject, generally, to the condition subsequent that, upon due payment of the mortgage debt and a performance of all the covenants by the mortgagor, the mortgage deed is avoided.”).

Not unlike a mortgage, the deed of trust may contain a power of sale. In a deed of trust, the power of sale enables the trustee to sell the property upon the debtor's default, in order to reimburse the lender for the debt. 383

Md. at 281, 859 A.2d at 182. Pursuant to the power of sale provision, a trustee may institute a foreclosure action, in which the trustee may “order and direct that the mortgaged premises, or so much thereof as may be necessary to discharge the money due and costs, be sold for ready money.” 383 Md. at 276–77, 859 A.2d at 180–81 (internal citations omitted).

A foreclosure sale is governed by Md. Code (1974, 1996 Repl. Vol. 1999 Supp.), § 7–105 of the Real Property Article, and the Maryland Rules. Maryland Rule 14–305(d) provides that if a party perceives an irregularity in the foreclosure sale, it may file exceptions to the sale of the property. **The ratification of a foreclosure sale is, however, presumed to be valid.** *Webster v. Archer*, 176 Md. 245, 253, 4 A.2d 434, 437–438 (1939). **It is settled law that, “there is a presumption that the sale was fairly made, and that the antecedent proceedings, if regular on the face of the record, were adequate and proper, and the burden is upon one attacking the sale to prove the contrary.”** *Id.* **The party excepting to the sale bears the burden of showing that the sale was invalid, and must show that any claimed errors caused prejudice.** *Ten Hills Co. v. Ten Hills Corp.*, 176 Md. 444, 449, 5 A.2d 830, 832 (1939). Additionally, “[i]n reviewing a court’s ratification of a foreclosure sale, we will disturb the circuit court’s findings of fact only when they are clearly erroneous.” *Fagnani*, 190 Md. App. at 470, 988 A.2d at 1138 (relying on *Jones v. Rosenberg*, 178 Md. App. 54, 68–69, 940 A.2d 1109 (2008)). Further, **“if a mortgagee or his assignee complies with the terms of the power of sale in the mortgage, and conducts the foreclosure sale properly, the court will not set aside the sale merely because it brings loss and hardship upon the mortgagor.”** *Bachrach v. Washington United Cooperative, Inc.*, 181 Md. 315, 324, 29 A.2d 822, 827 (1943).

(Emphasis added.)

DISCUSSION

In *Bates v. Cohn*, 417 Md. 309, 318-19 (2010), the Court of Appeals noted the proper order of objections a homeowner may make to a foreclosure:

Before a foreclosure sale takes place, the defaulting borrower may file a motion to ‘stay the sale of the property and dismiss the foreclosure action.’” Md. Rule 14–211(a)(1). The borrower, in other words, may petition the court for injunctive relief, challenging ‘the validity of the lien or . . . the right of the [lender] to foreclose in the pending action.’” Md. Rule 14–211(a)(3)(B).

* * *

Once the property is sold at foreclosure, the borrower may file a claim pursuant to Rule 14–305 only as to “exceptions to the *sale*.” (Emphasis added.) In doing so, he or she must “set forth the alleged irregularity with particularity. . . .”

In *Johnson v. Nadel*, 217 Md. App. 455, 466 (2014), we discussed some of the “irregularities” that may be raised in post-sale exceptions, noting:

This Court has spoken to the nature of “procedural irregularities” which are the focus of Rule 14–305(d) exceptions:

The procedural irregularities might include: “allegations such as the advertisement of sale was insufficient or misdescribed the property, the creditor committed a fraud by preventing someone from bidding or by chilling the bidding, challenging the price as unconscionable, etc.” . . . **There is a presumption in favor of the validity of a judicial sale, and the burden is on the exceptant to establish to the contrary.**

Jones v. Rosenberg, 178 Md. App. at 69, 940 A.2d 1109 (citation omitted). **“Rule 14–305 is not an open portal through which any and all pre-sale objections may be filed as exceptions, without regard to the nature of the objection or when the operative basis underlying the objection arose and was known to the borrower.”** *Bates v. Cohn*, 417 Md. 309, 327, 9 A.3d 846 (2010). See *Thomas v. Nadel*, 427 Md. 441, 449, 48 A.3d 276 (2012).

(Emphasis added.)

In this appeal, appellant’s only challenge is to the court’s characterization of her November 14, 2013, motion as exceptions rather than pre-sale objections to the right of the lender to foreclose. We see no merit in the argument. Although appellant filed her motion too late for the court to rule upon it prior to the sale, the court did eventually provide her a full hearing at which she was given an opportunity to argue why the sale should not have

taken place. She provided the court no meritorious reason for setting aside the sale. Accordingly, the court properly ratified the sale pursuant to Rule 14-305(e), which provides:

The court shall ratify the sale if (1) the time for filing exceptions pursuant to section (d) of this Rule has expired and exceptions to the report either were not filed or were filed but overruled, and (2) the court is satisfied that the sale was fairly and properly made. If the court is not satisfied that the sale was fairly and properly made, it may enter any order that it deems appropriate.

In her brief, appellant argues that her November 14 motion was “allowed by Maryland [R]ule 14-211,” which “permits for the filing of this motion to stay and dismiss after mediation but, it should be done within fifteen days after mediation date where good cause exist. I the [appellant] presented to the lower court that good cause existed in this case.” The circuit court considered the points raised in her motion even though appellant’s motion did not comply with the provisions of Rule 14-211(a)(3), which requires a motion to stay and dismiss to:

- (A) be under oath or supported by affidavit;
- (B) state with particularity the factual and legal basis of each defense that the moving party has to the validity of the lien or the lien instrument or to the right of the plaintiff to foreclose in the pending action;
- (C) be accompanied by any supporting documents or other material in the possession or control of the moving party and any request for the discovery of any specific supporting documents in the possession or control of the plaintiff or the secured party;
- (D) state whether there are any collateral actions involving the property and, to the extent known, the nature of each action, the name of the court in which it is pending, and the caption and docket number of the case;
- (E) state the date the moving party was served or, if not served, when and how the moving party first became aware of the action; and

- (F) if the motion was not filed within the time set forth in subsection (a)(2) of this Rule, state with particularity the reasons why the motion was not filed timely.

Appellant's November 14 motion was neither under oath nor supported by affidavit; it did not state with particularity any factual or legal defense to the validity of the lien or the lien instrument or the right of the appellees to foreclose; it was not accompanied by any supporting documentation; it mentioned two other foreclosures that had been filed against appellant, but did not provide any explanation or argument as to why that was significant; it did not state when appellant was served; and it failed to explain why there was any good cause that the motion was not filed within 15 days of the date the final loss mitigation affidavit was filed, as required by Rule 14-211(a)(2)(A)(i).

Rule 14-211(b) directs the court, in mandatory terms, to deny a motion that is either procedurally defective or fails to state a valid defense:

- (1) The court **shall** deny the motion, with or without a hearing, if the court concludes from the record before it that the motion:
- (A) was not timely filed and does not show good cause for excusing non-compliance with subsection (a)(2) of this Rule;
 - (B) does not substantially comply with the requirements of this Rule; **or**
 - (C) does not on its face state a valid defense to the validity of the lien or the lien instrument or to the right of the plaintiff to foreclose in the pending action.

(Emphasis added). Nevertheless, the court provided appellant a hearing in February 2014 at which the court permitted appellant to make any argument and present any evidence she

wished. Appellant provided no meritorious reason — either procedural or factual — for the court to conclude the appellees did not have the right to conduct the sale on November 18, 2013.

As for the specific contention appellant makes in her brief that the court erred in characterizing the November 14 motion as exceptions, it is a moot point at best. Appellant argues:

[T]he court’s erroneous classification and the treatment of my pre-sale motion as post sale exceptions was significantly confusing to me. Specifically, the lower Court’s actions lead me to believe that the time for filing exceptions to a foreclosure sale had not yet begun to run because the court had not yet ruled on my Rule 14-211 motion. As this court is aware, under *Bates v. Cohn*, 9 A.3d 846-2010 a homeowner can only raise as exceptions to a foreclosure sale those issues that have to do with the sale itself. This is a different and essentially much stricter standard than that used for pre-sale motions under Rule 14-211. Thus the lower court used the wrong standard to rule on my 14-211 motion which had the effect of effectually depriving me of my rights under Maryland law.

Specifically this court allowed a sale to move forward and be ratified without properly ruling on my request for pre-sale relief. Furthermore the improper court[’]s classification of my pre-sale motion as post-sale exceptions had the effect of closing off my ability to bring a proper post-sale motion in a timely manner. The court’s improper actions amount to irregularity in the judicial process resulting in an unfair and inequitable outcome.

Appellant has shown no prejudice that could have flowed from the manner in which the circuit court labeled her motion regardless of whether we were to agree with her that the court’s “classification of [appellant’s] pre-sale motion” was an “irregularity.” Appellant’s motion was devoid of merit whether it was classified as a pre-sale motion or post-sale exceptions. And appellant has never proffered any meritorious post-sale exceptions she

could have filed if the court had not indicated it would consider her November 14 motion as post-sale exceptions. We detect no error by the circuit court, and affirm.

**JUDGMENT OF THE CIRCUIT
COURT FOR FREDERICK
COUNTY AFFIRMED. COSTS
TO BE PAID BY APPELLANT.**