

UNREPORTED
IN THE COURT OF SPECIAL APPEALS
OF MARYLAND

No. 2081

September Term, 2013

JAMAL M. KHAN

v.

EDWARD S. COHN, ET AL.

Meredith,
Leahy,
Sonner, Andrew L.
(Retired, Specially Assigned),

JJ.

Opinion by Sonner, J.

Filed: June 26, 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.

Following default on the applicable mortgage, real property, occupied by appellants, Jamal and Samina Khan (“the Khans”), at 1410 Meadowsweet Drive, Sandy Spring, Maryland (“the Property”), was sold at a foreclosure sale. The Khans filed, in the Circuit Court for Montgomery County, exceptions to the ratification of the sale; the court denied the exceptions and ratified the sale. The Khans appealed the ratification; we affirmed the ruling of the circuit court. Thereafter, appellees, trustees for the purchasers of the Property, filed a Motion for Possession. In response, the Khans filed a Motion to Vacate the foreclosure sale, in which they argued that the sale was invalid because its advertisement impermissibly mentioned that fees were applicable. The court denied the Khans’ motion and granted a judgment of possession in favor of appellees. This appeal followed.

The Khans present the following question for our review:¹

Did the court err by not vacating the subject foreclosure sale on the ground that it was illegally advertised?

For the reasons which follow, we shall affirm the judgment of the circuit court.

¹ In their brief, the Khans presented two questions:

- I. Whether the Appellees can illegally advertise fees in direct violation of *Maddox v. Cohn* . . . 424 Md. 379 (2012) and still be allowed to foreclose without consequences?
- II. Whether allowing Appellees to flaunt the law is proper public policy?

For clarity, we have consolidated the Khans’ questions into a single query.

FACTS AND PROCEEDINGS

On May 10, 2010, foreclosure proceedings were initiated after the Khans defaulted on the terms of the mortgage related to the Property. The subsequent foreclosure sale was advertised in the Montgomery Sentinel, a local weekly newspaper. The sale was conducted on August 4, 2010, at which time the Property sold for \$742,500; the purchaser was Citibank, N.A., for whom appellees act as trustees.

The Khans filed exceptions to the ratification of the sale. They claimed that the Property was sold for an “inadequate sum of money” given that it was purchased in 2006 for \$1,267,325, had most recently been assessed by the State Department of Assessment and Taxation as having a value of \$1,012,280, and the amount owed on the mortgage was \$750,000. Further, the Khans asserted, that they were misled by false representations that their mortgage would be modified in order to avoid foreclosure, that the Order to Docket the foreclosure action did not indicate that the Property was residential property as required by Maryland Rule 14-207(6), and that the note filed in the foreclosure action did not appear to be a copy of the note they executed.

A short time later, the Khans filed amended exceptions in which they contended that: (1) appellees lacked standing to pursue foreclosure; (2) “the note tendered to [the] court is unreliable and cannot be accepted [as] a basis for foreclosure action and sale”; (3) appellees did not have the right to issue a Notice of Intent to foreclose because they were not appointed as trustees until after the notice was issued; (4) the document appointing appellees as trustees was “dubious” as it did not establish that the individuals who appointed appellees had the power to do so; (5) it was “dubious” that “[a]ll documents

tendered regarding the foreclosure” were notarized by the indicated notary because it was “questionable” as to whether the officers of the institutions who executed the documents were present in Baltimore County, specifically on May 6, 2010, to do so; (6) the notice that an order to docket had been filed did not include a warning in fourteen-point type as required by law; and (7) the foreclosure sale occurred only two days after the last negotiation for loan modification, despite the fact that a foreclosure sale may only proceed thirty days after notice of the denial of loan modification is sent.

On May 9, 2011, the court ratified the subject foreclosure sale. The Khans appealed the sale order on June 7, 2011. This Court, in an unreported opinion, affirmed the sale order on February 7, 2013.²

On September 11, 2013, appellees filed a motion for possession of the Property. On September 24, 2013, the Khans filed an opposition to appellees’ motion for possession; they also filed a motion to vacate the sale of the Property. In the motion to vacate, the Khans contended that the sale of the Property was “contrary to public policy as enunciated in *Maddox v. Cohn*, [424 Md. 379 (2012)].” They asserted, specifically, that in the advertisement for the foreclosure sale of the Property, appellees “demand[ed] . . . additional legal fees” for their own benefit. As such, the Khans insisted that the sale was prejudicial because the impermissible advertisement may have “chilled would-be purchasers from bidding” and so the best price for the Property was not obtained, a violation of appellees’ duty to maximize proceeds from the foreclosure sale. The Khans stated that the only way

² *Khan v. Cohn*, No. 0781, Sept. Term, 2011 (filed Feb. 7, 2013).

to cure such an injustice was to vacate the sale, re-advertise, and resell the Property. In their opposition to appellees’ motion for possession, the Khans contended, in pertinent part:

1. [The Khans’] Motion to Vacate is well founded in law as enunciated in *Maddox v. Cohn*, [424 Md. 379]. This Motion is intended to cure miscarriage of justice.
2. Further proceedings in this case may complicate matters because third parties may get involved. A stay of proceedings would protect third parties from getting involved in these proceedings.
3. [Appellees] would not suffer any prejudice because they violated Maryland public policy in that they committed an impermissible abuse of discretion. [Appellees] included in the advertisement [of the foreclosure sale] a demand for additional legal fees for the benefit of [appellees] . . .

On November 18, 2013, the circuit court denied the Khans’ motion to vacate and granted a judgment for possession in favor of appellees.

DISCUSSION

The Khans contend that the advertisement for the foreclosure sale of the Property was “clearly illegal” because it noted several impermissible fees as being conditions of the sale. They point out that similar fees led to the invalidation of a foreclosure sale in *Maddox*, *supra*, and assert that the same result is required in this case. The Khans insist that “[a]t a minimum,” a remand is necessary so that “the Circuit Court [may] actually determine which rule or contract permits [the type of fee found in the subject foreclosure sale advertisement].”

By contrast, appellees contend that because the Khans did not note an exception to the foreclosure sale on the ground that the related advertisement was improper, that claim

is now precluded by *res judicata*.³ Appellees assert that *res judicata* serves to bar the instant appeal because the Khans already appealed the ratification of the subject foreclosure sale and this Court affirmed the sale. Appellees note that although the holding in *Maddox*, *supra*, applies retroactively, “retroactively-applicable case law does not break the barriers imposed by *res judicata*.” They insist that if it were concluded that retroactivity superseded *res judicata* in cases such as the one at bar, it “would have the effect of undoing an unknown and substantial number of real property transfers in Maryland, thus prejudicing countless Maryland landowners.” Appellees contend that even if this Court were to find that *res judicata* did not apply to bar the instant appeal, the circuit court would not have had the power to vacate the judgment because “[a]fter a judgment is enrolled, which occurs thirty days after its entry, a court has no authority to revise that judgment unless it determines under clear and convincing evidence that the judgment was entered as a result of fraud, mistake, or irregularity.” They point out that in this case, the foreclosure sale was ratified three years before the Khans moved to vacate it, and no claim of fraud, mistake, or irregularity, under Maryland Rule 2-535(b), was made. For those reasons, appellees request that this Court affirm the judgment of the circuit court.

In rebuttal, the Khans contend that *res judicata* does not bar their appeal because the issue they have raised could not have been decided at the time of the ratification of the foreclosure sale because *Maddox* had not yet been decided.

³ Similarly, appellees assert that the issue raised by the Khans was waived because it was not part of their exceptions to the subject foreclosure sale.

As to whether *res judicata* bars the sort of challenge raised by the Khans, our recent decision in *Bank of New York Mellon v. Nagaraj*, 220 Md. App. 698 (2014), is instructive. Conveniently, the core facts and proceedings in that case are nearly identical to those involved in the case at bar.

In *Bank of New York Mellon v. Nagaraj*, the Nagarajs filed exceptions to the ratification of the foreclosure sale of the property on which they had been the mortgagors; none of the exceptions referred to the impropriety of the advertisement for the foreclosure sale. *Id.* at 701. The exceptions were denied and the foreclosure sale was ratified. *Id.* at 702. The Nagarajs appealed the ratification of the sale; this Court affirmed the circuit court’s judgment. *Id.* at 702. After the ratification, the bank that purchased the property filed a motion for possession. *Id.* In turn, the Nagarajs filed a motion to vacate the ratification of the sale in which they asserted, in pertinent part, that, under *Maddox, supra*, the sale had been conducted contrary to public policy because the sale advertisement noted additional applicable fees for the benefit of the trustees, an act which prejudiced the Nagarajs because it violated the trustees’ duty to maximize sale proceeds. *Id.* at 703. Bank of New York Mellon filed an opposition to the motion in which it argued that the Nagarajs had not previously raised the issue of an improper advertisement, raising it for the first time over three years after the date of the sale and subsequent ratification. *Id.* at 703-04. As such, Bank of New York Mellon argued, in pertinent part, that the ratification was an enrolled judgment that could only be revised in the case of fraud, mistake, or irregularity. *Id.* at 704. At the subsequent hearing, Bank of New York Mellon argued that *Maddox, supra*, was distinguishable because in that case the foreclosure sale had not been ratified

and, further, *res judicata* applied because the Nagarajs had not raised the *Maddox* issue prior to ratification. *Id.* For their part, the Nagarajs admitted that they had not previously raised the *Maddox* issue, but contended that barring an appeal on that ground would cause them irreparable harm. *Id.* Ultimately, based on its reading of *Maddox*, the circuit court denied the motion for possession and vacated the ratification of sale. *Id.* at 704-05.

Thereafter, Bank of New York Mellon filed a motion for reconsideration in which it argued:

(1) the Nagarajs’ “collateral attacks” on the ratification of sale, affirmed by this Court, were barred by *res judicata*, and because the Nagarajs failed to allege fraud or illegality, they could not defeat “the *res judicata* effect of the ratification”; (2) the Nagarajs failed to contest the foreclosure sale; and (3) *Maddox* did not support the court’s conclusion because *Maddox* was distinguishable, and “it would be contrary to public policy to apply the holding in *Maddox* retroactively to post-ratification cases . . . or to foreclosure sales advertised prior to *Maddox*.”

Id. at 705.

The circuit court denied the motion for reconsideration and Bank of New York Mellon appealed that ruling to this Court. *Id.* Notably, the arguments raised by the parties in that appeal were essentially the same as those raised by the parties in the instant case. *Id.* at 706. Ultimately, we concluded that the circuit court had erred by vacating the ratification of sale for two reasons:

First, this Court previously has made clear that “the final ratification of the sale of property in foreclosure is *res judicata* as to the validity of such sale, except in case of fraud or illegality, and hence its regularity cannot be attacked in collateral proceedings.” *Manigan v. Burson*, 160 Md. App. 114, 120 (2004) (quoting *Ed Jacobsen, Jr., Inc. v. Barrick*, 252 Md. 507, 511 (1969)). The rationale behind this rule is as follows:

“Sound public policy requires that no person shall in a judicial proceeding be deprived of a right or charged with a default until he has been given a full and free opportunity of being heard in respect thereto, but the complement of that rule is that where one is given that opportunity, and elects to stand mute and allow the decision to go against him without protest or objection, that he is bound by it. There must of necessity be some end of litigation. The state can do no more than give the litigant ‘a day in court’; if he does not utilize it but suffers the decision to go against him by default, he is as conclusively and finally bound by it, as though he had actively contested it.”

Id. (quoting *Moss v. Annapolis Sav. Inst.*, 177 Md. 135, 143 (1939)).

. . . Principles of *res judicata* provide that “‘a judgment between the same parties or their privies upon the same cause of action is conclusive not only as to all matters that have been decided in the original suit, but as to all matters which with propriety could have been litigated in the first suit.’” *Chaires v. Chevy Chase Bank, F.S.B.*, 131 Md. App. 64, 75 (quoting *FWB Bank v. Richman*, 354 Md. 472, 493 (1999)), *cert. denied*, 359 Md. 334 (2000) (some quotations omitted). Thus, after final ratification of the foreclosure sale, the trial court was authorized to review the validity of the sale only upon a finding of fraud, mistake or irregularity. *Manigan*, 160 Md. App. at 120. *See* Md. Rule 2-535(b) (“On motion of any party filed at any time, the court may exercise revisory power and control over the judgment in case of fraud, mistake, or irregularity.”).

The circuit court here made no finding of fraud, mistake, or irregularity. Instead, it granted the motion to vacate based solely on the Court of Appeals’ decision in *Maddox*. In so ruling, the court erred because the Nagarajs[’] claims were barred by principles of *res judicata*.

Second, the circuit court had no authority to vacate the foreclosure sale here because this Court had already affirmed the ratification of foreclosure sale. In Maryland, “a trial court no longer has jurisdiction to modify a judgment after it has been affirmed on appeal.” *Buffin v. Hernandez*, 44 Md. App. 247, 252-53 (1979). As this Court explained:

“A sound public policy requires that there be an end of litigation between the same parties growing out of the same facts. In cases where there has been an adversary trial between the parties, a judgment rendered by the trial court, and that judgment affirmed by this court, without a remand for further

proceedings, it is an end of that litigation, and the trial court has no jurisdiction to strike out the judgment.”

Id. at 254 (quoting *Rent-A-Car Co. v. Globe & Rutgers Fire Ins. Co.*, 166 Md. 447, 449 (1934)). This rule, that a judgment cannot be revised after a decision by the appellate court, applies even where the ground raised was not addressed on appeal and where “fraud, mistake or irregularity is alleged.” *Id.* at 254-55.

Accordingly, because the foreclosure sale had been ratified, and this Court had already affirmed the ratification of the foreclosure sale, the circuit court was precluded from revisiting the validity of the sale. The circuit court erred in granting the motion to vacate the ratification of foreclosure sale, as well as denying the motion for possession of property in light of that ruling.

Id. at 707-09 (internal parallel citation omitted).

Given our analysis and holding in *Bank of New York Mellon v. Nagaraj*, we must conclude in kind that the *Maddox* issue raised by the Khans is barred by *res judicata* and so the circuit court did not err by denying the motion to vacate.

**JUDGMENT OF THE CIRCUIT
COURT FOR MONTGOMERY
COUNTY AFFIRMED. COSTS TO
BE PAID BY APPELLANTS.**