

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 701

SEPTEMBER TERM, 2015

AMT HOMES, LLC

v.

KEITH YACKO, ET AL.

Eyler, Deborah S.,
Berger,
Reed,

JJ.

Opinion by Eyler, Deborah S., J.

Filed: May 19, 2016

*This is an unreported opinion and therefore may not be cited either as precedent or as persuasive authority in any paper, brief, motion, or other document filed in this Court or any other Maryland court. Md. Rule 1-104.

This is an appeal by AMT Homes, Inc. (“AMT”), the appellant, of an order by the Circuit Court for Prince George’s County denying its motion for abatement of interest and other costs, in connection with its purchase at a foreclosure sale of residential property known as 10403 Campus Way South, in Upper Marlboro (“the Property”). The appellees, Substitute Trustees on a deed of trust against the Property, did not file a response or any opposition to the motion for abatement and have not filed a brief in this Court.¹

AMT presents two questions for review, which we have combined: Did the circuit court err or abuse its discretion by denying the motion for abatement? For the following reasons, we shall vacate the circuit court’s order and remand the matter for further proceedings.

FACTS AND PROCEEDINGS

On January 22, 2014, the Substitute Trustees filed an Order to Docket foreclosure action for the Property. As it appears in the record, the Order to Docket has as attachments an “Affidavit Certifying Ownership of Debt Instrument With Copy of Debt Instrument,” as required by Md. Code (1974, 2015 Repl. Vol.), section 7-105.1(e)(2)(iii) of the Real Property Article (“RP”); an “Affidavit Pursuant to Maryland Rule 14-207,” attesting to the accuracy of the attached Deed of Trust and Deed of Appointment of Substitute Trustee; an “Affidavit Pursuant to Section 7-105.1(e)(1)(ii) Concerning

¹ The Substitute Trustees are Keith Yacko, Gene Jung, James Inabinett, Jr., Jason Hamlin, Thomas Gartner, and Robert Frazier.

Default And Notice of Intent to Foreclose,” with attached related documents; an “Affidavit of Debt and Right to Foreclose Pursuant to Section 7-105.1(e)(2)(ii) and Rule 14-207(b)(2)”); a “Status Report Pursuant to Servicemembers Civil Relief Act” showing that the homeowner, Denise Butler, was not on active duty status as of January 20, 2014; a copy of the “Notice of Foreclosure Action” with loss mitigation application documents; and a “Preliminary Loss Mitigation Affidavit.”

The Order to Docket lists its attachments, but describes the attachment regarding active duty status as an “Affidavit concerning the Servicemembers Civil Relief Act.” There is no such affidavit attached to the Order to Docket in the record.

An affidavit of Service was received by the court on March 10, 2014, and entered on the docket on March 19, 2014. A Final Loss Mitigation Affidavit was received by the court on April 18, 2014, and entered on April 23, 2014.

The foreclosure sale was scheduled for June 6, 2014. It was advertised in The Enquirer Gazette, a local newspaper, on May 22, May 29, and June 5, 2014. One of the “Terms of Sale” as advertised was: “There will be no abatement of interest due from the purchaser in the event additional funds are tendered before settlement or settlement is delayed for any reason.” The sale went forward as scheduled. As noted, AMT purchased the Property. The purchase price was \$92,000, with \$9,500 paid on June 6 and the remaining \$82,500, with interest, due at settlement on August 14, 2014.

On that same day (June 6, 2014), the Substitute Trustees filed a Bond for \$25,000 and an “Affidavit of Notice in Compliance” with RP sections 7-105.2(b) and (c), 7-

105.3(b) and (d), 7-105.9(b) and (c), and Rules 14-209, 14-210, and 14-126. The filings were entered on June 12, 2014.

A “Report of Sale Package” was received by the court on July 3, 2014, and entered on the docket on July 14, 2014. It was comprised of an “Affidavit Of Fairness Of Sale And Truth Of Report Of Sale,” an “Auctioneer’s Affidavit,” an “Affidavit Of Notice Required By Local Law In Compliance with Maryland Rule 14-209,” and an “Affidavit Of Purchaser,” signed by a representative of AMT.

On July 14, 2014, the clerk of court issued and entered a “Notice” stating that the sale would be ratified and confirmed “unless cause to the contrary be shown on or before the 14th day of August, 2014, provided a copy of this Notice be inserted in The Enquirer Gazette” for three successive weeks before then. On August 1, 2014, the Substitute Trustees filed a “Certification Of Publication” of the “Notice,” by The Enquirer Gazette, stating that it was run on July 17, 24, and 31, 2014. No exceptions were filed.

Settlement did not take place on August 14, 2014, or anytime soon thereafter. On October 28, 2014, the Substitute Trustees filed a “Certification Of Publication,” by The Enquirer Gazette, of the advertisement of the foreclosure sale that was run on May 22 and 29, and June 5, 2014. This “Certificate of Publication” was entered on November 10, 2014. Then, on December 3, 2014, the Substitute Trustees filed a Bond for \$67,000. It was entered on December 11, 2014.

On January 8, 2015, the Substitute Trustees filed a “Line,” stating:

DEAR CLERK:

Attached please find the Servicemembers Civil Relief Act Affidavit which was previously filed with the Order to Docket in the above captioned case, as well as a copy of the recorded Deed of Appointment of Substitute Trustee. Please file these documents and forward them to the judge's chambers for review.

The Servicemembers Civil Relief Act Affidavit bears a stamp reflecting that it was filed in the circuit court on January 22, 2014, the same day the Order to Docket was filed. As noted above, the Order to Docket in the record does not include the affidavit as an attachment. The affidavit, as submitted with the "Line," was entered on the docket on January 16, 2015.

The Deed of Appointment of Substitute Trustee that is attached to the Order to Docket does not bear a date stamp and does not show that it was recorded in the land records. The "recorded Deed of Appointment of Substitute Trustee" provided to the court with the "Line" reflects that it was recorded in the land records. It also bears a date stamp from the circuit court of January 22, 2014, the day the Order to Docket was filed. The "recorded Deed of Appointment of Substitute Trustee" filed with the "Line" on January 8, 2015, was entered in the docket twice: once on January 20, 2015, and once on February 10, 2015. The "Line" itself was entered on the docket on February 24, 2015.

Apparently, once the Servicemembers Civil Relief Act Affidavit was entered on January 16, 2015, and the "recorded Deed of Appointment of Substitute Trustee" was entered on January 20, 2015, the case was forwarded to a judge. On January 22, 2015, the court issued an "Order of Ratification," which was entered on January 28, 2015. Settlement on the sale of the Property took place on February 23, 2015.

On March 11, 2015, the Substitute Trustees filed a “Suggested Audit Of Foreclosure Sale Under Deed of Trust.” It charged to AMT, as the purchaser, interest of \$3,518.96, from June 6, 2014, to February 25, 2015. The suggested audit was entered on March 13, 2015.

On March 18, 2015, AMT filed a motion for abatement. It alleged that it had been “ready, willing, and able to settle on the Property” on August 14, 2014, but “[t]he failure of the Court to meet the requirements of the Rules, the delayed filing of the printer’s certificate on Trustees’ Sale Notice, the delay in the filing of the recorded deed of appointment of substitute trustees and the further delays in ratification of the sale cause [sic] increased expense to [AMT].” It asked the court to equitably abate \$4,212.39, which was comprised of \$2,217.61 in interest from August 14, 2014, to January 28, 2015; real estate taxes of \$1,938.87, for the same period; and water charges of \$55.91, from October 13, 2014, to January 28, 2015.

The Substitute Trustees did not oppose the motion for abatement.

On April 2, 2015, the “Report of Auditor” was filed. It credited to the Substitute Trustees \$3,518.96 in “Interest on unpaid sales price.” The Auditor’s Report was entered on April 3, 2015.

The circuit court issued an order denying AMT’s motion for abatement, on May 1, 2015. The order, entered on May 4, 2015, is brief and gives no reasons for the court’s decision. On May 6, 2015, the court issued its order ratifying the Auditor’s Report. That order was entered on May 7, 2015.

AMT filed its Notice of Appeal on June 3, 2015.

DISCUSSION

The “general rule is that if the purchaser of a property at a foreclosure sale fails to make timely payment of the purchase price he thereby becomes obligated to pay interest on the unpaid balance.” *Thomas v. Dore*, 183 Md. App. 388, 389 (2008). The purchaser

will be excused from requirement [sic] to pay interest . . . for the period between the time fixed for settlement and the date of actual settlement only when the delay [1)] stems from neglect on the part of the trustee; [2)] was caused by necessary appellate review of lower court determinations; or [3)] was caused by conduct of other persons beyond the power of the purchaser to control or ameliorate.

Donald v. Chaney, 302 Md. 465, 477 (1985) (citations omitted).

The controlling cases on abatement of interest in judicial sales are *Donald*, *Baltrotsky v. Kugler*, 395 Md. 468 (2006), and *Thomas*. In *Donald*, after synthesizing prior case law and formulating the general rule and three exceptions, the Court held that the delay in settlement, having been caused by the purchaser’s difficulty in obtaining financing, did not fall within any of the exceptions.

In *Baltrotsky*, three properties subject to a single deed of trust were sold by the trustees at foreclosure. For eleven months thereafter, the owner, acting *pro se*, filed a myriad of motions and collateral proceedings, and a petition in bankruptcy, seeking to maintain his ownership of the properties. All were found to be without merit or rejected on procedural grounds. The foreclosure purchasers filed a motion for abatement of interest, which the circuit court granted.

On appeal, the owner challenged the abatement decision, arguing that a term in the published notice of foreclosure sale forbidding the abatement of interest controlled. Rejecting that argument, the Court explained that the decision whether to abate interest is discretionary (so long as one of the three exceptions applies) and that, although, “generally speaking, the express terms of a contract bind the parties” and the courts should not interfere, the “general rule is tempered . . . by the caveat that ‘fraud, duress, mistake or some countervailing public policy’ may serve as occasions to modify or excise certain terms of a contract.” 395 Md. at 480 (quoting *Calomaris v. Woods*, 353 Md. 425, 445 (1999)). The Court held that, as a matter of public policy, the circuit court properly exercised its discretion, “pursuant to the equitable principles articulated in *Donald*,” to excuse the purchaser from having to pay interest for the delay period. *Id.*

Finally, in *Thomas*, the court’s ratification of a foreclosure sale was delayed for slightly more than two months because the owner filed exceptions. After the exceptions were overruled and the sale was ratified, the purchaser moved for an equitable abatement of interest and “a variety of other late charges, such as escrow advances, corporate advances for prior legal fees, property taxes, and condominium assessments.” *Id.* at 392. The trustees on the deed of trust opposed the motion, arguing that the delay was not their fault but the fault of the owner. In the alternative, they argued that the purchaser was contractually bound by the “Terms of Sale,” which appeared in the newspaper advertisement for the foreclosure sale and expressly precluded an abatement of interest. In a “bare-bones order,” the circuit court denied the motion for abatement “on the ground

that the [foreclosure purchaser] was contractually prohibited [by the ‘Terms of Sale’] from receiving the relief he sought.” *Id.* at 398.

On appeal, this Court reversed. Recognizing that, under *Baltrotsky*, equitable considerations may trump a contractual provision prohibiting abatement of interest and that the decision whether to “abate the payment of interest by a purchaser” is “entrusted to the discretion of the hearing judge,” we held the circuit court had failed to exercise any discretion “on the merits of an abatement.” *Id.* at 405–06. We reversed the judgment and remanded for the court to consider the purchaser’s motion for abatement on its merits.

In the case at bar, we cannot discern from the court’s one-line order denying the motion to abate interest whether the court exercised any discretion in reaching its ruling. The motion for abatement and the record reflect that the Substitute Trustees did not file a certificate evidencing that notice had been given by publication before the sale, as required by Rule 14-210(e), until October 28, 2014, almost five months after the sale and two months after the date originally scheduled for settlement. They further reflect that the Substitute Trustees did not increase the amount of the bond to the amount of the sale price, as required by Rule 14-213, until December 3, 2014, six months after the sale. That rule specifies that the bond shall be increased “before the sale is ratified,” *i.e.*, that ratification cannot happen until after the bond has been increased. Thus, delayed filings by the Substitute Trustees account for the delay in settlement at least until December 3, 2014.

Thereafter, in mid-January 2015, the Substitute Trustees supplemented the record with the Servicemembers Civil Relief Act Affidavit and recorded Deed of Appointment of Substitute Trustee that were not in the record. Regardless of why they were not in the record, parties have a duty to keep abreast of the status of their case, *see, e.g., Estime v. King*, 196 Md. App. 296, 304 (2010) (litigants have responsibility to monitor dockets); *Henderson v. Jackson*, 77 Md. App. 393, 397 n.6 (1988) (noting that “counsel is responsible for the contents of the court file”); and ratification could not take place until all that was required to be in the record, including those two documents, in fact was in the record.

As noted above, the Substitute Trustees did not file an opposition to the motion to abate (nor have they participated in this appeal). All that was before the circuit court was the information recited above, which could support a finding that all or most of the delay in settlement stemmed from neglect on the part of the Substitute Trustees. Again, we cannot tell from the court’s one-line order denying the motion to abate whether it exercised discretion (or merely denied the motion based on the non-abatement language in the Terms of Sale), and if it exercised discretion, the basis for its decision. Accordingly, we shall vacate the order and remand for further proceedings.

MAY 1, 2015 ORDER OF THE CIRCUIT COURT FOR PRINCE GEORGE’S COUNTY DENYING THE MOTION TO ABATE VACATED. CASE REMANDED FOR FURTHER PROCEEDINGS NOT INCONSISTENT WITH THIS OPINION. COSTS TO BE PAID BY THE APPELLEES.