UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 2201

September Term, 2015

ANTHONY HOLLAND

v.

CARRIE WARD, et al.
SUBSTITUTE TRUSTEES

Wright,
Beachley,
Salmon, James P.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Beachley, J.

Filed: December 23, 2016

After Anthony Holland, appellant, defaulted on loan repayments for his home, the Substitute Trustees, appellees, began foreclosure proceedings. Appellant moved to stay and dismiss the foreclosure proceedings, and the Circuit Court for Prince George's County denied the motion, and in so doing, denied appellant's request for a hearing. Appellant asks us to consider: 1) Whether the trial court committed error in denying his request for a hearing; and 2) Whether the trial court erred in granting the Substitute Trustees' request for a protective order. We affirm.

FACTS AND PROCEEDINGS

On October 26, 2007, appellant executed a promissory note ("Note") for $417,000 in favor of Mason-Dixon Funding, Inc. ("Mason-Dixon"), the lender. Appellant also executed a deed of trust ("Deed of Trust") with Mason-Dixon, which Mason-Dixon assigned as nominee to Mortgage Electronic Registration Systems, Inc. ("MERS") on October 26, 2007. Appellant executed these instruments in order to secure a loan against his property at 2603 Brookeville Landing Road, Bowie, Maryland 20721. MERS recorded the Deed of Trust on November 15, 2007.

MERS subsequently assigned the Deed of Trust to CitiMortgage, Inc. ("CitiMortgage") on March 28, 2012, recorded on April 28, 2012. CitiMortgage assigned the Deed of Trust to Federal National Mortgage Association ("Fannie Mae") on February 20, 2014, recorded on March 10, 2014. In a letter dated April 2, 2014, Seterus, Inc. ("Seterus") informed appellant of its status as the new servicer of the loan on behalf

of Fannie Mae. Seterus, acting as the authorized subservicer for Fannie Mae, appointed appellees as Substitute Trustees on December 16, 2014.

Appellant defaulted on his loan on December 2, 2011. On June 5, 2015, the Substitute Trustees filed an Order to Docket a foreclosure proceeding in the Circuit Court for Prince George's County. The Order to Docket contained numerous filings, including a copy of the Note, and an affidavit certifying both ownership, and accuracy of that copy. The copy of the Note shows an indorsement in blank from CitiMortgage, but on the back of the Note. The affidavit certifying ownership and truth and accuracy of the copy states that the copy accurately portrays the original Note.

On July 8, 2015, appellant requested mediation. An unsuccessful mediation session was held on August 21, 2015. Thereafter, on September 4, 2015, appellant filed a Verified Motion to Stay and Dismiss Foreclosure Proceedings (the "Motion to Stay") in which he challenged the Substitute Trustees' right to foreclose on his property. The Substitute Trustees filed an opposition on September 18, 2015.

Appellant replied to the Substitute Trustees' opposition on October 20, 2015, and proceeded to propound the Substitute Trustees with discovery requests. The Substitute Trustees moved for a protective order in response to appellant's discovery requests. On November 12, 2015, appellant filed a Motion for Temporary Restraining Order or Temporary Stay, urging the court to stay the sale until it ruled on his Motion to Stay. The following day, the Substitute Trustees filed their opposition. The trial court entered a Memorandum of Court on November 19, 2015, finding that the Substitute Trustees had the

legal right to foreclose, and that appellant's requests for production of documents were neither necessary nor appropriate. Appellant timely appealed on December 10, 2015.

STANDARD OF REVIEW

We review whether the trial court erred in declining to hold a hearing on appellant's Motion to Stay *de novo*. *Buckingham v. Fisher*, 223 Md. App. 82, 93 (2015) ("[W]e review the circuit court's decision to decline to hold an evidentiary hearing on the merits to determine whether or not it was legally correct."). In determining whether the trial court erred in denying appellant's request for the production of discovery material, we apply an abuse of discretion standard. *Jones v. Rosenberg*, 178 Md. App. 54, 67 (2010) (citing *Beyond Systems, Inc. v. Realtime Gaming Holding Co., LLC*, 388 Md. 1, 28 (2005)).

DISCUSSION

I. Holding a Hearing on the Verified Motion to Stay or Dismiss Foreclosure Proceedings

Appellant argues that the trial court should have held a hearing on his Motion to Stay. In that motion, appellant raised the following three defenses to the Substitute Trustees' right to foreclose: 1) the Substitute Trustees failed to provide notice as required pursuant to the Deed of Trust; 2) the Note was not properly indorsed in blank; and 3) the owner of the Note failed to prove its transfer history and the validity of the indorsements. Appellant argues that he sufficiently challenged the right of the Substitute Trustees to foreclose on his property and that the trial court, therefore, should have held a hearing.

Maryland Rule 14-211(b)(2) sets forth when a trial court must grant a hearing on a motion to stay or dismiss a foreclosure action:

> (2) *Hearing on the Merits.* If the court concludes from the record before it that the motion:
>
> > (A) was timely filed or there is good cause for excusing non-compliance with subsection (a)(2) of this Rule,
> >
> > (B) substantially complies with the requirements of this Rule, and
> >
> > (C) states on its face a defense to the validity of the lien or the lien instrument or to the right of the plaintiff to foreclose in the pending action, the court *shall* set the matter for a hearing on the merits of the alleged defense. The hearing shall be scheduled for a time prior to the date of sale, if practicable, otherwise within 60 days after the originally scheduled date of sale.

(Emphasis added). We pay particular attention to the word "shall" regarding whether the trial court must hold a hearing on the merits. The Court of Appeals has held the word "shall" to be unambiguous.

> It remains a well-settled principle of this Court that "[w]hen a legislative body commands that something be done, using words such as 'shall' or 'must,' rather than 'may' or 'should,' we must assume, absent some evidence to the contrary, that it was serious and that it meant for the thing to be done in the manner it directed."

Walzer v. Osborne, 395 Md. 563, 580 (2006) (quoting *Thanos v. State*, 332 Md. 511, 522 (1993). "Under settled principles of statutory construction, the word 'shall' is ordinarily presumed to have a mandatory meaning." *Motor Vehicle Admin. v. Dove*, 413 Md. 70, 87, (2010) (quoting *State v. Werkheiser*, 299 Md. 529, 533 (1984). The trial court, therefore, was required to hold a hearing if appellant timely filed a motion which, on its face, stated

a defense to the Substitute Trustees' right to foreclose.[1] From the record before it, the trial court correctly determined that the Motion to Stay failed to sufficiently state a defense to the Substitute Trustees' right to foreclose.

A. The Substitute Trustees Provided Sufficient Notice Pursuant to the Deed of Trust

Appellant first challenges the Substitute Trustees' right to foreclose by arguing that he did not receive sufficient notice of acceleration as required by the Deed of Trust. Paragraph 22 of the Deed of Trust requires the lender to notify borrower of acceleration prior to the following:

> (a) the default; (b) the action required to cure the default; (c) a date, not less than 30 days from the date the notice is given to Borrower, by which the default must be cured; and (d) that failure to cure the default on or before the date specified in the notice may result in acceleration of the sums secured by [the Deed of Trust]. The notice shall further inform Borrower of the right to reinstate after acceleration and the right to assert in the foreclosure proceeding the non-existence of a default or any other defense or Borrower to acceleration and sale.

In a letter dated April 3, 2015, Seterus mailed appellant a Notice of Intent to Foreclose (the "Notice"). The Notice provided: (a) the date of default as December 2, 2011; (b) that $121,771.21 was required to cure the default; (c) that full payment of the default was due within forty-five days of the date of the notice; and (d) that failure to cure the default would result in acceleration. The Notice also informed appellant of his right to

[1] We note that the Substitute Trustees do not dispute the timeliness of appellant's motion, nor do they contend that the motion does not substantially comply with Rule 14-211.

reinstate the loan after acceleration as well as his right to bring a court action challenging the existence of the default or any other defenses to acceleration and sale.

Not only does the record reflect that appellant received sufficient notice pursuant to the Deed of Trust, it shows that appellant acknowledged receipt of the Notice. On April 26, 2015, appellant wrote back to Seterus in which he stated, "Please accept this letter as confirmation of the receipt of your 'Notice of Intent to Foreclose' mailing dated April 3, 2015." The Notice complied with the requirements of Paragraph 22 of the Deed of Trust, and appellant received the Notice. Appellant failed to state a facial challenge to the Substitute Trustees' right to foreclose based on notice, and a hearing was not required for this issue.

B. The Indorsements Were Valid

Appellant next challenges the Substitute Trustees' right to foreclose based on the indorsements that appear on the Note. This contention lacks merit.

In *Deutsche Bank Nat. Trust Co. v. Brock*, the Court of Appeals held that possession of a note indorsed in blank, with no gaps in indorsement, made that party a holder entitled to enforce the note. 430 Md. 714, 732 (2013). Here, Seterus, as subservicer for Fannie Mae, appointed the Substitute Trustees to enforce the rights vested pursuant to the Deed of Trust. Pursuant to that appointment, the Substitute Trustees, who are in possession of the Note, seek foreclosure.

1. The Indorsement on the Back of the Note

In his Motion to Stay, appellant argued that Fannie Mae failed to prove it was a holder in possession of the Note. Specifically, appellant stated that he did not "concede that the indorsement in blank by CitiMortgage on a plain piece of paper is a proper indorsement or negotiation of the Note." Appellant then cited several cases, none of which are binding in Maryland, for the proposition that an allonge[2] must be dated and attached.

Appellant's allegation that the indorsement in blank from CitiMortgage does not appear on the Note itself lacks merit. In the Order to Docket, Seterus, acting for Fannie Mae, submitted an affidavit certifying both its ownership of the Note, and also that the copy of the Note attached accurately reflects the original Note. The attached copy of the Note indicates that CitiMortgage's blank indorsement appears on the back of the Note. The indorsement, therefore, appears on the Note, rather than an allonge, and no Maryland court has held that the indorsement must appear on the front side of a Note.

2. The Alleged Forged Signature

Appellant also argued in his Motion to Stay that the indorsement from Mason-Dixon to CitiMortgage is invalid in that the CitiMortgage signature of Kathleen Powell on the

[2] "An allonge is generally a 'slip of paper sometimes attached to a negotiable instrument for the purpose of receiving further indorsements when the original paper is filled with indorsements.'" *Deutsche Bank*, 430 Md. at 719 n. 3, (first quoting *Anderson v. Burson*, 424 Md. 232, 240 n. 10 (2011); then quoting Black's Law Dictionary 88 (9th ed. 2004)).

Note does not match the signature on the Assignment of the Deed of Trust. This allegation does not state, on its face, a defense to the Substitute Trustees' right to foreclose.

We need not consider whether the signature is a forgery to disregard appellant's contention because it does not affect the Substitute Trustees' right to foreclose. Not only is the assignment at issue unrecorded, but we have previously stated that a "deed of trust secures a negotiable note, whoever may be the holder. The deed of trust need not and properly speaking cannot be assigned like a mortgage, but the note can be transferred freely, and when transferred, carries with it the security, if any, of the deed of trust." *Svrcek v. Rosenberg*, 203 Md. App. 705, 272 (2012). Therefore, it is proper possession of the Note, and not an unrecorded assignment of a deed of trust, that decides whether a party can enforce its rights. As noted above, the Substitute Trustees certified with an affidavit that they are in possession of the Note.

C. Affiant's Personal Knowledge

The Motion to Stay also argued that the affidavits provided were not based upon personal knowledge, as required under *Deutsche Bank*. This argument presupposes that the affidavits filed in an order to docket must be based on personal knowledge, and misreads both the holding and context of *Deutsche Bank*.

In *Deutsche Bank*, prior to a foreclosure sale, a borrower filed suit against the lender for "compensatory damages and declaratory and injunctive relief." 430 Md. at 717. The lender filed a motion for summary judgment, arguing that no genuine dispute of material fact existed, and that the lender held the right to foreclose on the property. *Id.* The trial

court granted the motion for summary judgment, dismissing the case, and a panel of this Court reversed. *Id*. The Court of Appeals granted certiorari. *Id*.

One of borrower's arguments in *Deutsche Bank* concerned the existence of the trust allegedly in possession of the note. *Id*. at 724. To establish its right to foreclose, the lender relied on affidavits stating the existence of the trust and the ownership of the note. *Id*. at 722. In reversing the trial court's granting of summary judgment, a panel of this Court, in an unreported opinion, held that the affidavits lacked personal knowledge, and that a genuine dispute of material fact precluded summary judgment. *Id*. at 725.

Appellant cannot rely on what a panel of this Court held in an unreported opinion in *Deutsche Bank* to challenge the affidavit of ownership here. First, in *Deutsche Bank*, a panel of this Court considered the arguments within the context of a motion for summary judgment. In a motion for summary judgment, Maryland Rule 2-501(c) requires an affidavit to be made upon personal knowledge. However, the affidavit in question here is not governed by the rules for summary judgment. Instead, Rule 14-207(b)(3) controls. Unlike in a motion for summary judgment, Rule 14-207(b)(3) only requires the affidavit to state that the copy of the note "is a true and accurate copy" and that the affiant certifies ownership of the debt instrument.

Furthermore, the Court of Appeals did not decide *Deutsche Bank* based on whether affidavits in a foreclosure action require personal knowledge—no reasonable reading of *Deutsche Bank* can support this conclusion. Deutsche Bank did not even discuss affidavits of ownership pursuant to Rule 14-207(b)(3). Instead, the Court of Appeals held that a party

in possession of an instrument, properly indorsed in blank, is a holder generally entitled to enforce that instrument. *Id*. at 729-30. Appellant's reliance on *Deutsche Bank* is therefore misplaced. The affidavits in the Order to Docket here were proper, and appellant did not state a defense to the Substitute Trustees' right to foreclose.

Appellant failed to present, in his Motion to Stay, a defense to the validity of the Substitute Trustees' right to foreclose pursuant to Maryland Rule 14-211. We affirm the trial court's denial of a hearing.

II. Granting the Substitute Trustees' Motion for Protective Order

Appellant also argues that the trial court improperly granted the Substitute Trustees' request for a protective order in response to appellant's discovery requests. On October 20, 2015, more than a month after filing his Motion to Stay filed on September 4, 2015, appellant propounded discovery requests upon the Substitute Trustees. The Substitute Trustees moved for a protective order on November 4, 2015, which the trial court granted in its Memorandum of Court.

Maryland Rule 14-211(a)(3)(C) states that a motion to stay and dismiss a foreclosure proceeding shall:

> (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.

Pursuant to the rule, a request for documents or other materials must accompany the motion to stay or dismiss the sale. Appellant's motion did not contain these discovery requests—rather, he requested discovery more than a month after filing his motion. The trial court

did not abuse its discretion in granting the Substitute Trustees' motion for a protective order as to these discovery requests.

CONCLUSION

Because appellant failed to state a defense to the Substitute Trustees' right to foreclose on his property, the trial court correctly denied the hearing. Additionally, the trial court correctly granted the Substitute Trustees' motion for a protective order as to appellant's discovery requests. For these reasons, we affirm.

JUDGMENT OF THE CIRCUIT COURT FOR PRINCE GEORGE'S COUNTY AFFIRMED. COSTS TO BE PAID BY APPELLANT.