Circuit Court for Montgomery County
Case No. C-15-CV-22-000920

UNREPORTED*

IN THE APPELLATE COURT

OF MARYLAND

No. 1789

September Term, 2022

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JANET L. DARVISH

v.

RALPH J. DIPIETRO, ET AL.

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Wells, C.J.,
Zic,
Raker, Irma S,
(Senior Judge, Specially Assigned),

JJ.

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Opinion by Wells, C.J.

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Filed: December 12, 2023

Janet L. Darvish ("Darvish"), appellant, appeals the Circuit Court for Montgomery County's denial of her motion to dismiss or stay a foreclosure proceeding initiated by appellees Ralph DiPietro and Scott Robinson. Appellees are Substitute Trustees appointed by the secured party, 1 Oak Advisory, LLC ("1 Oak Advisory"), as successor by merger to 1 Oak Ace Fund, LLC ("1 Oak Ace"), owner of the note and beneficiary of the Deed of Trust ("DOT") secured by Darvish's property.

Darvish moved for dismissal or stay of the foreclosure on January 11, 2023, arguing that lender licensing provisions of the Commercial Law and Financial Instruments Articles of the Maryland Code invalidated the lien or otherwise limited Appellees in foreclosing upon the secured debt. On December 5, 2022, the circuit court ruled that the relevant provisions of Maryland Code, Commercial Law ("CL") § 12-901 *et seq.*, Credit Grantor Revolving Credit Provisions ("OPEC")[1], did not require 1 Oak Ace to comply with credit grantor licensing, and that Darvish therefore failed to establish that the action must be stayed or dismissed.

Darvish timely appealed and submits the following issues for our review:

1. Does a defined credit grantor under the OPEC, who is not licensed as required by CL § 12-915 and [Maryland Code, Financial Instruments ("FI")] § 11-504 or expressly exempt from those statutes, have the right to directly or indirectly collect and foreclose through an Order to Docket proceeding in a Maryland court?

2. Is a defined credit grantor under OPEC entitled to greater rights to foreclose than its predecessors had to give it?

[1] Title 12, Subtitle 9 is referred to as "OPEC" because its provisions pertain to "open end credit." *See Bolling v. Bay Country Consumer Fin., Inc.*, 251 Md. App. 575, 599 (2021).

Darvish also presented the following "Alternative, Conditional Questions Presented if the Court does not answer the first or second questions in the negative and Reverse the Circuit Court's Judgment," which we have slightly rephrased:[2]

> 3. May the owner of a debt seek to collect by foreclosure consumer debt that was allegedly due and owing more than three years before the commencement of the action?
>
> 4. Does the owner of a debt have the right to utilize the Order to Docket foreclosure procedures to collect upon a consumer home equity line of credit ("HELOC") mortgage loan based upon a blank endorsement of the note?

Appellees respond that the statute governing HELOC licensing categorically did not apply to 1 Oak Advisory or 1 Oak Ace under the circumstances of the case, and that this court should therefore not reach the questions presented by Darvish. They also argue that Darvish failed to present her "Alternative, Conditional Questions Presented" to the circuit court and thereby failed to preserve them for our review.

For the reasons discussed below, we hold that the circuit court was correct to find that the provisions of OPEC requiring licensing were inapplicable to 1 Oak Advisory, though for a different reason than the one the court provided: it was not a "credit grantor,"

[2] Darvish's questions presented, verbatim, read:

> 3. May a zombie debt buyer seek to collect by foreclosure sums claimed to be owed related to a consumer debt that were alleged due and owing more three years before the commencement of the action?
>
> 4. Does a zombie debt buyer have the right to utilize the Order to Docket foreclosure procedures to collect upon a consumer HELOC mortgage loan based upon a blank endorsement of the note?

as defined by CL §12-901, at the time that the foreclosure proceeding was initiated. We will decline to approach the merits of Darvish's questions presented and affirm the order of the circuit court.

## FACTUAL AND PROCEDURAL BACKGROUND

In January 2007, Darvish and Resource Bank executed a HELOC agreement secured by a DOT encumbering Darvish's real property, located at 1632 Belvedere Boulevard, Silver Spring, Maryland 20902, in favor of Resource Bank. The DOT provided that Darvish would be in default if she "fail[ed] to make a payment when due." It also provided Resource Bank with the right to foreclose upon the subject property in case of default and that the terms of the DOT bound the parties' successors and assigns. The HELOC agreement provided that, during the "draw period" in which Darvish was entitled to request advances on the line of credit, that Resource Bank would advance the amount requested.

Ownership of the HELOC note and DOT passed through several parties' hands by assignment, most recently 1 Oak Ace on September 25, 2019. On July 12, 2020, Darvish and 1 Oak Ace entered into a Discounted Payoff Agreement, reducing Darvish's total indebtedness to $185,000.00. On November 19, 2021, 1 Oak Advisory, successor by merger to 1 Oak Ace, executed a Deed of Appointment designating Appellees as 1 Oak Ace's Substitute Trustees, with "all rights, powers, trusts and duties of the Trustees" under the DOT.

On February 25, 2022, Appellees initiated the instant foreclosure action by filing an Order to Docket Suit in the Circuit Court for Montgomery County. By affidavit attached to the Order to Docket, Appellees alleged that Darvish defaulted on the debt secured by the DOT on September 21, 2011. Darvish filed a counterclaim and third-party complaint on June 30, 2022, which she voluntarily dismissed on December 15, 2022.

Darvish filed a Motion to Dismiss and/or Stay the Foreclosure Action on July 22, 2022. The parties appeared for oral argument before the Honorable Karla N. Smith on November 14, 2022, who issued a written order denying Darvish's Motion on December 5, 2022. This appeal timely followed.

We will supply additional details where they are relevant to our analysis.

## STANDARD OF REVIEW

The general standard of review for the denial of a motion to dismiss is "whether the trial court was legally correct." *Davis v. Frostburg Facility Operations, LLC*, 457 Md. 275, 284 (2018) (citing *RRC Ne., LLC v. BAA Maryland, Inc.*, 413 Md. 638, 643–44 (2010)). In a foreclosure action, Md. Rule 14-211 states that the borrower "may file in the action a motion to stay the sale of the property and dismiss the foreclosure action." Md. Rule 14-211(a). For a motion to stay, Rule 14-211(c) provides:

> (1) *Entry of Stay; Conditions.* If the hearing on the merits cannot be held prior to the date of sale, the court shall enter an order that temporarily stays the sale on terms and conditions that the court finds reasonable and necessary to protect the property and the interest of the plaintiff. Conditions may include assurance that (1) the property will remain covered by adequate insurance, (2) the property will be adequately maintained, (3) property taxes, ground rent, and other charges relating to the property that become due prior to the hearing will be paid, and (4) periodic payments of principal and interest

> that the parties agree or that the court preliminarily finds will become due prior to the hearing are timely paid in a manner prescribed by the court. The court may require the moving party to provide reasonable security for compliance with the conditions it sets and may revoke the stay upon a finding of non-compliance.
>
> (2) *Hearing on Conditions.* The court may, on its own initiative, and shall, on request of a party, hold a hearing with respect to the setting of appropriate conditions. The hearing may be conducted by telephonic or electronic means.

For a motion to dismiss, Rule 14-211(e) also provides:

> After the hearing on the merits, if the court finds that the moving party has established that the lien or the lien instrument is invalid or that the plaintiff has no right to foreclose in the pending action, it shall grant the motion and, unless it finds good cause to the contrary, dismiss the foreclosure action. If the court finds otherwise, it shall deny the motion.

Here, Darvish argued that stay or dismissal of the action was mandated due to the secured party's non-compliance with licensing provisions mandated by the Commercial Law and Financial Institutions Articles of the Maryland Code. The circuit court denied the motions because it found that the relevant provisions were inapplicable as a matter of law. Because the circuit court's ruling was based solely upon issues of law, we review the circuit court's decision *de novo*. *See Blackstone v. Sharma*, 461 Md. 87, 110–11 (2018) (cleaned up). Where we must consider disputed issues of fact, we will "accept all well-pled facts in the complaint, and reasonable inferences drawn from them, in a light most favorable to the non-moving party[.]" *Sprenger v. Pub. Serv. Comm'n of Maryland*, 400 Md. 1, 21 (2007) (quoting *Converge Servs. Grp., LLC v. Curran*, 383 Md. 462, 475 (2004)).

## DISCUSSION

### I. Maryland Code, Commercial Law § 12-915 Did Not Require 1 Oak Advisory to be Licensed.

#### A. Parties' Contentions

The Appellees argue the circuit court was correct in declining to reach the merits of Darvish's arguments because, even if a lender's failure to register as required by the Financial Institutions Article of Maryland Code were grounds for stay or dismissal of a foreclosure action, 1 Oak Advisory would only be required to be licensed if it made a loan or extended credit to Darvish.

Darvish responds that the plain language of CL § 12-915 required 1 Oak Advisory to conform with the licensing schemes found in the Financial Institutions Article in order to proceed with foreclosure of the subject property, and that we would create an impermissible judicial exemption to the statute by not enforcing that requirement.

#### B. Analysis

The question before us requires that we interpret provisions of the Commercial Law Article of the Maryland Code, Title 12, Subtitle 9, CL § 12-901 *et seq.*, otherwise known as "OPEC." The parties agree that OPEC applies to the HELOC agreement at issue in this case.

In determining the meaning of a statutory provision, we consider only the text's plain meaning unless it is ambiguous. *See, e.g.*, *Stanley v. State*, 390 Md. 175, 184, 887 A.2d 1078, 1083 (2005) (quoting *Moore v. Miley*, 372 Md. 663, 677, 814 A.2d 557, 566 (2003) ("'Where the words of a statute, construed according to their common and everyday

meaning, are clear and unambiguous and express a plain meaning,' the Court will give effect to the statute as the language is written."). We also read statutory provisions with the aim of effectuating their purpose, as well as the purpose of the overall statutory scheme of which an individual provision is part. *See Lockshin v. Semsker*, 412 Md. 257, 274 ("A court's primary goal in interpreting statutory language is to discern the legislative purpose, the ends to be accomplished, or the evils to be remedied by the statutory provision under scrutiny.") (cleaned up); *Berry v. Queen*, 469 Md. 674, 679 (2020) ("as with any exercise of statutory interpretation, we view the phrase in the context and purpose of the larger statutory scheme.").

CL § 12-915 requires that a credit grantor must comply with certain licensing, investigatory, enforcement, and penalty provisions of Title 11, Subtitle 3 of the Financial Institutions Article, but conditions the circumstances under which the credit grantor must do so. That provision reads:

> (a) A credit grantor **making a loan or extension of credit** under this subtitle is subject to the licensing, investigatory, enforcement and penalty provisions of Title 11, Subtitle 3 of the Financial Institutions Article unless the credit grantor or the loan or extension of credit is exempt under Title 11, Subtitle 3 of the Financial Institutions Article.
>
> (b) In addition to any license which may be required by subsection (a) of this section, a credit grantor **making a loan or extension of credit** under this subtitle secured by any lien on residential real property is subject to the licensing, investigatory, enforcement and penalty provisions of Title 11, Subtitle 5 of the Financial Institutions Article unless the credit grantor or the

> loan or extension of credit is exempt under Title 11, Subtitle 5 of the Financial Institutions Article.

CL § 12-915(a)–(b) (emphasis added).

The circuit court held that the conditional language "making a loan or extension of credit" did not apply under the facts of this case. However, CL § 12-915 only applies to debt owned by a "credit grantor," defined by CL § 12-901:

> (f)(1) "Credit grantor" means any individual, corporation, business trust, statutory trust, estate, trust, partnership, association, two or more persons having a joint or common interest, or any other legal or commercial entity making a loan or other extension of credit under this subtitle which is incorporated, chartered, or licensed pursuant to State or federal law, the lending operations of which are subject to supervision, examination, and regulation by a State or federal agency or which is licensed under Title 12, Subtitle 4 of the Financial Institutions Article or is a retailer.
>
> (2) "Credit grantor" includes:
>
> (i) Any bank, trust company, depository institution, or savings bank having a branch in this State;
>
> (ii) Any subsidiary of a bank holding company, as defined in the federal Bank Holding Company Act of 1956, as amended, which is domiciled, doing business, and offering a revolving credit plan involving the issuance of credit devices in this State; and
>
> **(iii) Any person who acquires or obtains the assignment of a revolving credit plan made under this subtitle.**

*Id.* at (f). Subsection (f)(1) only applies to covered entities, to include an assignee, when they make a loan or other extension of credit. However, Darvish notes that Subsection (f)(2)(iii) brings "[a]ny person who *acquires or obtains the assignment* of a revolving credit plan made under this subtitle" (emphasis added) within the scope of the definition of "credit grantor." Because Subsection (f)(2) does not include the same conditional language as (f)(1), the plain language of the statute must be read to include assignees of a revolving credit plan regardless of whether they extend credit.

However, on the facts presented in this matter, 1 Oak Advisory was not a "credit grantor" at the time that it initiated the foreclosure proceeding. The initial HELOC agreement was "supersede[d] and replace[d]" by the Discounted Payoff Agreement executed by Darvish and 1 Oak Ace Fund on July 12, 2020.

While there is no dispute that 1 Oak Ace was the assignee of a revolving credit plan prior to July 12, 2020, the HELOC agreement ceased to exist upon execution of the Discounted Payoff Agreement. Nothing in the text of the Discounted Payoff Agreement provided for 1 Oak Ace to extend credit to Darvish in any way. Even were the text not explicit that the original agreement was superseded and no longer governed the rights and duties of the parties, a modification amounts to the creation of a new contract. *See Berringer v. Steele*, 133 Md. App. 442, 504 (2000). As a matter of law, 1 Oak Ace or 1 Oak Advisory were not "credit grantors" pursuant to CL § 12-901 after the HELOC was superseded.

Because 1 Oak Advisory was not the assignee of a revolving credit agreement, and therefore not a "credit grantor," at the time the foreclosure proceeding was initiated, the circuit court need not have approached whether it was required to comply with CL § 12-915 when it filed its Order to Docket. We therefore need not consider whether failure to comply would have prevented 1 Oak Advisory from foreclosing, nor whether such a bar on foreclosure would have required the circuit court to stay or dismiss. We hold that the

circuit court did not err in denying the motions to stay or dismiss the action on the basis of the Financial Institutions Article licensing provisions.

## II. Darvish Failed to Preserve Her "Alternative, Conditional Questions Presented" For Our Review.

### A. Parties' Contentions

Appellees argue Darvish waived the questions presented regarding the statute of limitations and endorsement of the note by failing to argue them before the circuit court. Darvish responds that these are actually issues of subject matter jurisdiction which, pursuant to Maryland Code, Courts & Judicial Proceedings § 5-1202, may be raised initially on appeal.

### B. Analysis

Issues typically must be argued before the circuit court to be preserved for our review. Pursuant to Maryland Rule 8-131(a), "[o]rdinarily, an appellate court will not decide any other issue unless it plainly appears by the record to have been raised in or decided by the trial court, but the Court may decide such an issue if necessary or desirable to guide the trial court or to avoid the expense and delay of another appeal."

Darvish did not raise her arguments regarding the statute of limitations below but argues that this is truly an issue of subject matter jurisdiction, and, therefore, may be raised for the first time on appeal. It is true that a party may challenge subject matter jurisdiction

at any stage of litigation, including raising the issue for the first time on appeal. *Cnty. Council of Prince George's Cnty. v. Dutcher*, 365 Md. 399, 405 n.4 (2001).

However, Darvish's issue relating to the statute of limitations does not implicate whether the circuit court had subject matter jurisdiction. The Supreme Court has held that, where an action is barred by the statute of limitations, the court may still have "fundamental" subject matter jurisdiction over a claim. *See LVNV Funding LLC v. Finch*, 463 Md. 586, 609 (2019) (quoting *Cnty. Comm'rs of Carroll Cnty. v. Carroll Craft Retail, Inc.*, 384 Md. 23, 45 (2004)) ("this Court has repeatedly declined to hold void court or agency decisions that exceeded statutory limits but fell within the basic or fundamental jurisdiction of the court or agency."); *see also Eng'g Mgmt. Servs., Inc. v. State Highway Admin.*, 375 Md. 211, 241–42 (2003) (statute of limitations was "a factual question to be determined during a full hearing on the merits, and not a jurisdictional bar to the pursuit of a . . . claim."). Therefore, an argument that the statute of limitations applies is not coextensive with an argument that the court lacks subject matter jurisdiction over the action, and Darvish's argument is therefore unavailing. She waived her statute of limitations argument by failing to argue it below.

As to whether blank endorsement of the note bars Appellees from using the Order to Docket procedure, Darvish argues that a party "cannot acquire the jurisdiction of a court to establish that a non-negotiable instrument secured in blank operate[s] as a negotiable instrument." Her argument is, essentially, that the endorsement in blank renders the

instrument fraudulent, placing foreclosure outside the power of the circuit court. Therefore, she argues, this is also an issue of subject matter jurisdiction.

The circuit court has "general equity jurisdiction over mortgage foreclosure proceedings." *Voge v. Olin*, 69 Md. App. 508, 514 (1986). One of the various issues that might arise in such a proceeding is whether the instrument or instruments giving rise to a right to foreclose was valid and enforceable. As such, rather than being a jurisdictional question, what effect the endorsement of an instrument has upon a party's right to foreclose is an issue of the *merits* of a foreclosure proceeding. In fact, we note that there is a long history of Maryland courts considering the legal effect of blank endorsements. *See, e.g.*, *Ringgold v. Tyson*, 3 H. & J. 172, 172 (1810) ("The endorsee or holder of a promissory note can not recover in his own name on an endorsement in blank[.]").

We are aware of no legal authority, and Darvish provides none, holding that the effect of a blank endorsement is to deprive the circuit court of subject matter jurisdiction over a foreclosure proceeding.[3] We therefore do not find that a question of subject matter

[3] Darvish cites *Attorney Grievance Commission of Maryland v. Geesing*, 436 Md. 56 (2013), as authority. However, that case merely considered whether a ninety-day suspension for "robo-signing" affidavits in foreclosure proceedings was an appropriate sanction for attorney misconduct. As such, it is not relevant to the question at hand.

jurisdiction is properly before us. Pursuant to Rule 8-131, we decline to consider Darvish's question presented regarding blank endorsement of the HELOC agreement.

## CONCLUSION

As a matter of law, 1 Oak Advisory was not required to be licensed under the Commercial Law and Financial Institutions Articles of the Maryland Code. The circuit court thus did not err in denying Darvish's motion to stay or dismiss.

**THE JUDGMENT OF THE CIRCUIT COURT FOR MONTGOMERY COUNTY IS AFFIRMED. APPELLANT TO PAY THE COSTS.**