UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1690

September Term, 2014

DELORES JOHNSON

v.

DIANE ROSENBERG, et al.,
SUBSTITUTE TRUSTEES

Meredith,
Nazarian,
Friedman,

JJ.

Opinion by Meredith, J.

Filed: August 19, 2016

* 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.

In April 2005, Delores I. Johnson, appellant, refinanced the outstanding mortgage upon the real property known as 5540 Thurso Court in Howard County. The new loan was secured by a deed of trust against her property. A default was declared in April 2011 after appellant failed to make all required monthly payments. Diane Rosenberg & Associates, LLC, appellees, were appointed to serve as substitute trustees under the deed of trust. In August 2013, appellees initiated foreclosure proceedings in the Circuit Court for Howard County, and the property was ultimately sold to the secured party at auction in October 2013. The sale was ratified in April 2014.

In July 2014, appellant filed a motion to alter or amend or revise the judgment. The circuit court denied the motion, and appellant noted this appeal from that ruling.

QUESTION PRESENTED

Appellant presents the following question for our review:

> When certified-mail notice of a home mortgage foreclosure sale is sent to the homeowner and returned undelivered, is the failure to take any additional steps to notify the owner excused because regular-mail notice had been sent at the same time, and to the same destination as the certified mail that was returned?

Perceiving no reversible error, we shall affirm.

FACTS AND PROCEDURAL HISTORY

In 2005, appellant refinanced the outstanding debt owed on a mortgage secured by a lien against the real property located at 5540 Thurso Court in Columbia, Maryland. The new loan was evidenced by a promissory note in the amount of $172,000.00 executed by appellant in favor of World Savings Bank, FSB, the lender. Appellant's obligations under the 2005 note were secured by the lien of a deed of trust on the property. The deed of trust

was recorded among the land records of Howard County, Maryland. On April 15, 2005, appellant executed a "Rider to Security Instrument and Modification to Note." Wells Fargo Bank, NA ("Wells Fargo") subsequently acquired the note. On April 2, 2011, after appellant failed to make all required monthly payments on the note, a default was declared.

On August 2, 2013, appellees initiated foreclosure proceedings by filing an Order to Docket in the circuit court. The Order to Docket contained the affidavits and other documents required by Maryland Code (1974, 2010 Repl. Vol., 2012 Supp.), Real Property Article ("RP"), § 7-105.1(e), including a Notice of Intent to Foreclose dated October 11, 2011. On August 12, 2013, an Affidavit of Service was docketed, stating that Cheryl Harris, appellant's daughter, was served by a process server with the documents filed in the foreclosure action. According to the affidavit, Harris acknowledged that she was between the ages of 31 and 35, was Delores Johnson's daughter, and was a resident of 5540 Thurso Court, which is the property subject to the deed of trust, and "the defendant's residence, dwelling house, or usual place of abode." *See* Maryland Rule 14-209(a), stating that personal service may be made "by leaving the papers with a resident of suitable age and discretion at the dwelling house or usual place of abode of each person served."

On August 14, 2013, appellant filed in the circuit court a letter dated January 28, 2013, addressed to "Wells Fargo Home Mortgage/Endorsee/True Owner/True Holder of the Note," and copied to appellees. On the cover sheet directed to the Clerk of Court, appellant stated: "I am filing the response to the mailing received from Rosenberg & Associates, LLC

and Wells Fargo Home Mortgage." Appellant's letter dated January 28, 2013, provided, *inter alia*:

> I am exercising my rights under **U.C.C. - ARTICLE 3 - §[]3-501 (b) 2 (1)** to personally inspect the original Wet Ink Note, Allonge and Original Wet Ink Trust. I am entitled to demand presentation of the negotiable instrument under RESPA. Please contact me to arrange a time for me, my attorney and a finger print expert to come to the location where the Original Wet Ink Note, Original Wet Ink Trust and Allonge are being held.
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> * * *
>
> Effective immediately I am exercising my rights under RESPA and TILA to receive full disclosure. Please respond to the attached RESPA Qualified Written Request, Complaint, Dispute of Debt & Validation of Debt Letter and TILA Request. . . . [T]his debt is now officially in dispute. By law, all collection activities must cease and no foreclosure action can be brought against me until this dispute is resolved.

(Boldface type in original.) Neither appellant's "response" nor the accompanying letter purported to be a motion to stay or dismiss the action pursuant to Maryland Rule 14-211. In fact, *appellant never filed any request for any action by the circuit court until she filed her motion to alter or amend or revise three months after the court entered its April 2014 Final Order of Ratification of Sale*.

On August 21, 2013, appellees mailed a notice of foreclosure by first-class mail to "All Occupants" of the property, and on August 22, 2013, an "Affidavit of Service [of] Notice to Occupant" was docketed.

At an auction held on October 28, 2013, Wells Fargo purchased the property for $233,000.00. On November 21, 2013, the circuit court docketed the report of sale, a purchaser's affidavit, an auctioneer's affidavit, and proof that notice of the foreclosure sale

was published in the Washington Post on October 11, 2013, October 18, 2013, and October 25, 2013. Additionally, appellees filed a certificate of service (certifying that the report of sale and the attachments referenced above were mailed to appellant by first-class mail), and an "Affidavit of Notice Pursuant to Maryland Rule 14-210 and Maryland Real Property Code Ann. Section 7-105 et. seq." The Affidavit of Notice represented that notice of the time, place, and terms of the foreclosure sale were mailed by certified and regular mail to: appellant; "All Occupants" of 5540 Thurso Court; the State of Maryland Tax Office as a subordinate lien holder; and the County Attorney for Howard County. On January 2, 2014, appellees filed a certification that notice of the impending ratification of the sale was published in the Howard County Times on November 28, 2013, December 5, 2013, and December 12, 2013.

On March 20, 2014, appellant appeared without counsel at a status conference. Appellees were not present. At that proceeding, appellant stated: "I got a letter saying that [the property] had been [sold] and I responded to it. Because, I'm waiting for a court date because there's a disagreement as far as the status, as far as their right to sell." When the status conference judge asked appellant whether the substitute trustees had received appellant's letter disputing the amount of the debt and appellees' right to foreclose, the following dialogue occurred:

> [APPELLANT]: I got the green card back that they received, whatever I mailed to them they received it.
>
> THE COURT: Oh, you do?

> [APPELLANT]: I got the green card back. And that has — I haven't gotten anything from them since my last filing, I think that was around November 1st, somewhere around there, and then I went into the hospital on the 12th.
>
> THE COURT: Is that right?
>
> [APPELLANT]: I was in the hospital then in rehab.
>
> And until I got a letter from this court it's the first thing — first time I've had anything in regard to this matter.
>
> THE COURT: And I see that — so you did provide a copy of that motion to Wells Fargo through Rosenberg?
>
> [APPELLANT]: Yes.

The judge determined that a postponement of the status conference had been requested by the appellees, but that the judge's denial of that postponement may not have been received by appellees by the hearing date. Accordingly, the judge stated that he would "issue a show cause for them to explain why they didn't appear here today and to have this matter rescheduled after they've explained why they didn't appear today."

In response to the show cause order, counsel for appellees explained that there had been a calendering error that caused them to miss the March 2014 status conference. But counsel also provided the court with this status report on the case:

> 1. That on or about August 2, 2013 the Substitute Trustees docketed an Order to Docket Suit in this matter.
>
> 2. On or about August 6, 2013 the Defendant was personally served with the Order to Docket.
>
> 3. The Order to Docket was filed with a Final Loss Mitigation Affidavit which stated that a loss mitigation analysis had been conducted and that the borrower was not eligible for the HAMP modification program. Also attached to the Order to Docket was a mediation request form.

> 4. No mediation request was filed with the Court and a foreclosure sale was subsequently scheduled for October 28, 2013 at 9:30 am. Notice of sale was sent and the sale was advertised pursuant to Maryland Rule 14-210.
>
> 5. At the sale, the noteholder, Wells Fargo Bank, NA, was the high bidder and purchased the property for $233,000.00.
>
> 6. On November 20, 2013 the Substitute Trustees filed the report of sale, affidavit of notice, auctioneer's affidavit and purchaser's affidavit.
>
> 7. On or about November 21, 2013 the Order *NISI* was issued and was subsequent[ly] published in the Howard County Times on November 28, December 5 and December 12, 2013. The notice stated that any exceptions to the sale were to be filed with the Court by December 23, 2013.
>
> 8. No exceptions to the sale were filed by any party.
>
> * * *
>
> 17. The Substitute Trustees would also submit that the case should not be dismissed as the case is ripe for resolution as the ratification is outstanding and no exceptions to the sale have been filed.

By order entered on April 21, 2014, the circuit court ratified the sale, and ordered that the matter be referred to the court auditor for an accounting.

Approximately three months later, on July 18, 2014, appellant filed a motion captioned "Rule 2-533. Motion for New Trial[.] Rule 2-534. Motion to Alter or Amend a Judgment – Court Decision[.] Rule 2-535. Revisory Power." Appellant alleged that the sale of the property was improper due to a failure on the part of the substitute trustees to (a) provide adequate notice of the foreclosure proceedings; and (b) respond to appellant's letter dated January 28, 2013, disputing the amount of the debt and seeking to verify the authenticity of the promissory note. In the motion, appellant asserted, in part:

> During this time and because of my health issues, Defendant had to temporarily move out of my home located at 5540 Thurso Court, Columbia Maryland [21045] and stayed with Alecia Polson[](daughter) at 226 Walgrove Ave, Reisterstown Maryland 21113. While not knowing of the outcome of my health condition. Defendant was in receipt of the Plaintiffs Dunning letters and Defendant had responded by engaging the Plaintiff in matters of alternative dispute resolutions such as Exhibit B (Debt Validation Notice) that was sent via Notary and certified mail #70113500000200782981.
>
> To date, the Plaintiff has not responded to my efforts to resolve this dispute and or has filed unclear or incomplete validation of debt notices.
>
> The Plaintiff did not clearly convey the total amount alleged to be owed set forth in the notice or an amount that included interest, fees, etc. and has not provided the defendant with any verifiable accounting to support the plaintiff's claims.
>
> The Defendant being a least sophisticated consumer would not and could not have known whether the alleged total amount disclosed was owed set forth in the letter from the Plaintiff.
>
> In the Plaintiff[']s Order to Docket, Exhibit C, it states on or about August 6[,] 2013, [t]he Defendant was personally served the Order to Docket and all other related court documents. This is false, deceptive or misleading because further examination discloses that the Order to Docket was served to Cheryl Harris[](Defendant[']s daughter) see Exhibit D (Affidavit of Service).

(Emphasis removed.) Appellant also attached to her motion documents reflecting that she had received medical services for breast cancer between April 2013 and February 2014.

Appellees opposed the motion on the grounds that it was filed untimely pursuant to Maryland Rules 2-533, 2-534 and 2-535(a). Appellees further argued that appellant failed to offer evidence of fraud, mistake, or irregularity as required to obtain relief pursuant to Rule 2-535(b). Appellant filed a reply. Appellant's motion was denied by an order dated September 18, 2014. On October 9, 2014, appellant noted this appeal.

STANDARD OF REVIEW

In *Jones v. Rosenberg*, 178 Md. App. 54 (2008), we explained the standard of review that applies to a circuit court's decision to deny a motion to alter or amend or to exercise revisory control over a judgment as follows:

> We review the circuit court's decision to deny a request to revise its final judgment under the abuse of discretion standard. *See Mullaney v. Aude*, 126 Md. App. 639, 666 (1999). The effect of a final ratification of sale is *res judicata* as to the validity of such sale, except in the case of fraud or illegality. *See Bachrach v. Wash. United Co-op.*, 181 Md. 315, 320 (1943); *Manigan v. Burson*, 160 Md. App. 114, 120 (2004) (citations omitted). The burden of proof in establishing fraud, mistake, or irregularity is clear and convincing evidence. *See Billingsley v. Lawson*, 43 Md. App. 713, 718 (1979).

178 Md. App. at 72.

To establish an abuse of discretion, a party must persuade the appellate court that "no reasonable person would share the view taken by the trial judge." *In re Adoption Guardianship No. 3598*, 347 Md. 295, 312 (1997).

DISCUSSION

Appellant asserts in her brief that "[t]his is an appeal from a circuit court to set aside a home mortgage foreclosure sale on the basis of constitutionally defective notice procedures." But, because appellant failed to file any pre-sale motion for stay, failed to file any exceptions to the sale, and failed to timely appeal the final judgment ratifying the foreclosure sale, the scope of our review is limited to whether the circuit court abused its discretion in denying appellant's post-ratification motion filed pursuant to Maryland Rules 2-533, 2-534, and 2-535. We conclude that it did not.

In the circuit court, appellant did not file a Rule 14-211 motion to stay the sale and dismiss the action; nor did she file any post-sale exceptions pursuant to Rule 14-305(d). Rule 14-211 requires a homeowner to file a motion raising any available defenses to a proposed or scheduled foreclosure sale, including any challenge to the lender's right to foreclose, *prior to the sale*. Specifically, Maryland Rule 14-211(a)(3) provides: "A motion to stay and dismiss shall . . . 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 [lender] to foreclose in the pending action." Appellant did not file such a motion prior to the sale.

After a foreclosure sale has taken place, a borrower may challenge procedural irregularities in the sale by filing post-sale exceptions pursuant to Maryland Rule 14-305(d); however, post-sale exceptions may only challenge procedural irregularities at the sale or the statement of indebtedness. *Bates v. Cohn*, 417 Md. 309, 327 (2010); *Jones v. Rosenberg*, 178 Md. App. 52, 69 (2011) ("After a foreclosure sale, a debtor's right to redemption ends[;] however, a debtor may file exceptions challenging only procedural irregularities in the foreclosure sale[.]"). Appellant did not file any timely post-sale exceptions.

Moreover, appellant failed to timely appeal after the court entered a "final judgment" ratifying the foreclosure sale. Maryland Rule 8-202(a) provides, in pertinent part: "Except as provided in this Rule or by law, the notice of appeal shall be filed within 30 days after entry of the judgment or order from which the appeal is taken." Here, the sale was ratified on April 21, 2014. Appellant did not file any notice of appeal in the circuit court until

October 9, 2014. Consequently, the notice of appeal was untimely for raising any challenge to the final order ratifying the sale.

Between the ratification of the sale on April 21 and the October 9 filing of the notice of appeal, appellant moved on July 18 for the court to revise the judgment. This motion was not filed within 10 days of the final judgment. Therefore, the motion to alter or amend pursuant to Rule 2-534, or for a new trial pursuant to Maryland Rule 2-533, was untimely, and did not extend the time to appeal the judgment ratifying the sale. Maryland Rule 8-202(c). Similarly, because the motion was not filed within 30 days after entry of the order of ratification, the motion was not a timely request for revision pursuant to Rule 2-535(a).

As noted previously, the appellant's July 2014 motion for reconsideration was denied on September 18, 2014. On October 9, 2014, appellant noted this appeal. Accordingly, the scope of our review is limited to whether the circuit court abused its discretion in denying the July 18, 2014, motion. To the extent the motion sought relief pursuant to Maryland Rules 2-533, 2-534, or 2-535(a), the motion was clearly untimely, and the circuit court did not abuse its discretion in denying that relief.

But the July 18, 2014, motion also invoked Maryland Rule 2-535(b). A request for relief under that rule would have been timely. Maryland Rule 2-535(b) provides: "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." Accordingly, a motion seeking relief pursuant to Maryland Rule 2-535(b) is not barred by any specific time limit set forth in that

rule, and we shall consider appellant's motion as one filed in part seeking relief under that rule.

Nevertheless, we agree with appellees' assertion that appellant has not satisfied her burden of offering proof that the judgment was the result of fraud, mistake, or irregularity as required by Maryland Rule 2-535(b). In *Pelletier v. Burson*, 213 Md. App. 284 (2013), we rejected a motion to reopen a mortgage foreclosure proceeding pursuant to Maryland Rule 2-535(b), and explained various limitations upon the relief that is available pursuant to that rule. We explained:

> Maryland Rule 2-535(a) provides, in pertinent part: "On motion of any party filed within 30 days after entry of judgment, the court may exercise revisory power and control over the judgment. . . ." Md. Rule 2-535(b) is an exception to the general rule and provides: "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 existence of fraud, mistake, or irregularity must be shown by 'clear and convincing evidence.' "** *Davis v. Attorney Gen.*, 187 Md. App. 110, 123–124, 975 A.2d 362 (2009) (quoting Das v. Das, 133 Md. App. 1, 18, 754 A.2d. 441 (2000)). **"Maryland courts have narrowly defined and strictly applied the terms fraud mistake, [and] irregularity, in order to ensure finality of judgments."** *Thacker v. Hale*, 146 Md. App. 203, 217, 806 A.2d 751 (2002).
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> * * *
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> "To establish fraud under Rule 2–535(b), **a movant must show extrinsic fraud**, not intrinsic fraud." *Jones*, 178 Md. App. at 72, 940 A.2d 1109. "**Fraud is extrinsic when it actually prevents an adversarial trial** but is intrinsic when it is employed during the course of the hearing which provides the forum for the truth to appear, albeit, the truth was distorted by the complained of fraud." *Id*. at 73, 940 A.2d 1109. The rationale is that
>
>> [O]nce parties have had the opportunity to present before a court a matter for investigation and determination, and once the decision has been rendered and the litigants, if they so choose, have exhausted every means of reviewing it, the public

> policy of this State demands that there be an end to that litigation . . . [.] This policy favoring finality and conclusiveness can be outweighed only by a showing that the jurisdiction of the court has been imposed upon, or that the prevailing party, by some extrinsic or collateral fraud, has prevented a fair submission of the controversy.
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> *Id*. (internal quotation marks omitted).
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> "Under Maryland law, an enrolled judgment can be set aside for mistake or irregularity. Mistake is limited, however, to jurisdictional error, such as where the Court lacks the power to enter judgment." *Green v. Ford Motor Credit Co.*, 152 Md. App. 32, 51, 828 A.2d 821 (2003).
>
> Appellant has not argued any irregularity with the foreclosure process or procedure. Indeed, the record is devoid of even a hint of irregularity that would warrant the re-opening of this ratified foreclosure sale.
>
> **Appellant's assertions of fraud related to what she believes to have been fraudulent signatures and affidavits, do not rise to the level of extrinsic fraud. The alleged fraud did not prevent an adversarial trial**, but, had such existed, would have been contained within the trial itself.
>
> Finally, appellant makes no allegations of jurisdictional mistake.
>
> In narrowly construing the terms of irregularity, fraud, and mistake, and considering the public policy favoring finality of judgments, we conclude that the facts do not warrant the setting aside of the ratified foreclosure proceedings. Accordingly, the circuit court did not abuse its discretion by denying appellant's motions.

213 Md. App. at 289–92 (emphasis added) (footnotes omitted).

In the motion filed by appellant in the circuit court, appellant did not argue that the foreclosure sale was tainted by fraud, despite having made such a claim in a presuit letter dated January 28, 2013. Moreover, the motion pointed to no evidence that could persuade the circuit court that the order ratifying the sale was the product of extrinsic fraud, mistake,

or irregularity. Accordingly, the circuit court did not abuse its discretion in denying the motion pursuant to Rule 2-535(b).

Furthermore, even if appellant's contention that notice was somehow insufficient was properly before us, the circuit court was satisfied that appellees complied with the applicable notice provisions, and the record supports that conclusion. Appellees point out that appellant's brief appears to raise the same arguments that the Court of Appeals rejected in *Griffin v. Bierman*, 403 Md. 186 (2008). In *Griffin*, the Court of Appeals explained that, although "[t]here may be merit, as a policy matter, to requiring that mortgagees personally serve property owners with notice of foreclosure[, i]t is not, however, required to satisfy the constitutional requirements of due process." 403 Md. at 206. In that case, the Court of Appeals rejected Griffin's argument that the mortgagees were required to personally serve her with process when the certified mail notices of the foreclosure were returned "unclaimed." The Court of Appeals concluded that

> the only fact distinguishing the instant case from the typical foreclosure case is that the trial judge found as a matter of fact that Griffin did not receive actual notice of the pending foreclosure sale. The fact that Griffin did not receive actual notice does not render the law unconstitutional as applied to her. **It is well settled that due process of law is not violated in application because the interested party did not receive actual notice**.

403 Md. at 208 (emphasis added).

Maryland Rule 14-209, which governs service of process and notice in actions to foreclose on residential property, expressly permits effecting personal service in the manner that was employed when the process server left the papers with appellant's adult daughter at appellant's abode:

(a) Service on Borrower and Record Owner by Personal Delivery. When an action to foreclose a lien on residential property is filed, the plaintiff shall serve on the borrower and the record owner a copy of all papers filed to commence the action, accompanied (1) by the documents required by Code, Real Property Article, § 7-105.1(h) and (2) if the action to foreclose is based on a certificate of vacancy or a certificate of property unfit for human habitation issued pursuant to Code, Real Property Article, § 7-105.11, by a copy of the certificate and a description of the procedure to challenge the certificate. Except as otherwise provided by section (b) of this Rule, **service shall be by personal delivery of the papers or by leaving the papers with a resident of suitable age and discretion at the dwelling house or usual place of abode of each person served.**

*** * ***

(c) Notice to All Occupants by First-Class Mail. When an action to foreclose on residential property is filed, the plaintiff shall send by first-class mail addressed to "All Occupants" at the address of the property the notice required by Code, Real Property Article, § 7-105.9(b).

* * *

(e) Affidavit of Service, Mailing, and Notice. (1) *Time for Filing.* An affidavit of service under section (a) or (b) of this Rule and mailing under section (c) of this Rule, and notice under section (d) of this Rule shall be filed promptly and in any event before the date of sale.

(2) *Service by an Individual Other Than a Sheriff.* If service is made by an individual other than a sheriff, the affidavit shall include, in addition to other requirements contained in this section, the name address, and telephone number of the affiant and a statement that the affiant is 18 years of age or older.

(3) *Contents of Affidavit of Service by Personal Delivery.* An affidavit of service by personal delivery shall set forth the name of person served and the date and particular place of service. If service was effected on a person other than the borrower or record owner, the affidavit also shall include a description of the individual served (including the individual's name and address, if known) and the facts

> upon which the individual making service concluded that the individual served is of suitable age and discretion.

(Emphasis added.)

Here, the substitute trustees complied with Maryland Rule 14-209(a) by serving appellant's daughter on August 6, 2013, with the Order to Docket and accompanying papers at 5540 Thurso Court. The affidavit included in the record attests that Cheryl Harris acknowledged that: (1) she was a resident of the subject property; (2) she was the defendant's daughter; and (3) the address listed on the affidavit was the residence, dwelling house, or usual place of abode. Appellant has never contested the fact that the process server left the papers with her daughter.

In addition, appellees filed an affidavit of notice, certifying that notice of the time, place, and terms of the foreclosure sale were mailed by certified and regular mail to "All Occupants" of the property in accordance with Maryland Rule 14-209(b). The appropriate affidavit was then filed pursuant to Maryland Rule 14-209(e)(5). Appellees also published notice of the sale and ratification in The Washington Post and the Howard County Times, respectively. Finally, we note that the Order to Docket was filed on August 6, 2013, and appellant filed a "response" with the court on August 14, 2013. The court file, therefore, contains evidence that appellant was on notice of the foreclosure action almost immediately after it commenced.

Accordingly, the circuit court did not abuse its discretion in denying relief pursuant to Rule 2-535(b).

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