Circuit Court for Howard County
Case No. C-13-CV-23-000346

UNREPORTED

IN THE APPELLATE COURT

OF MARYLAND*

No. 2384

September Term, 2023

LESLIE D. GROSS, *et al.*,

v.

JAMES E. CLARKE, *et al.*

Wells,
Reed,
Sharer, J. Frederick,
(Senior Judge, Specially Assigned),

JJ.

Opinion by Reed, J.

Filed: January 23, 2025

* This is an unreported opinion. This opinion may not be cited as precedent within the rule of stare decisis. It may be cited for its persuasive value only if the citation conforms to Rule 1-104(a)(2)(B).

Leslie Gross and Terry Gross, the Appellants, signed a deed of trust for the property located at 8790 Sage Brush Way, Columbia, Maryland 21045. In 2021, the Appellants began to fall behind on their mortgage payments. On April 25, 2023, a foreclosure action on the property was filed in the Circuit Court for Howard County. The action was filed by James Clarke, Christine Drexel, and Joanna Foronda, the Appellees, who became the substitute trustees on the deed of trust on the property. The Appellants then applied for assistance from the Maryland Homeowner Assistance Fund. Appellants claimed they received notice of approval for funding shortly before the foreclosure sale on September 5, 2023. Despite this, the foreclosure sale proceeded on September 5, 2023. The Appellants then filed exceptions to the sale on October 16, 2023. After a hearing in the Circuit Court for Howard County, the court denied the Appellants' exceptions and denied a later motion for reconsideration, resulting in this timely appeal.

In bringing their appeal, Appellants presents two questions for appellate review:

I. Whether the Circuit Court for Howard County erred when it overruled Appellants' exceptions to the foreclosure sale when the exceptions were brought after the sale had proceeded?

II. Whether the Circuit Court for Howard County erred when it held that the issue of the Appellees' standing had not been timely raised?[1]

[1] We rephrase the Appellants' original questions presented, which were as follows:

I. Whether the Circuit Court for Howard County erred when it overruled Appellant's exceptions to the foreclosure sale as the sale should be set aside because the trustees and the loan servicer did not conduct themselves in accordance with the required duty of care?

II. Whether the Circuit Court for Howard County erred when it held that the issue related to whether Appellees had standing to maintain this action

For the following reasons, we answer the questions in the negative and affirm the decision of the Circuit Court for Howard County.

FACTUAL & PROCEDURAL BACKGROUND

On June 15, 2007, the Appellants signed a purchase money deed of trust ("Deed of Trust") with Countrywide Home Loans, Inc., doing business as America's Wholesale Lender, for 8790 Sage Brush Way in Columbia, Maryland (the "Property"). The original named trustee in the agreement was North American Title Company. Included in this Deed of Trust was a provision allowing for the appointment of substitute trustees.[2] The Appellants later signed a modification agreement for the Property with Shellpoint Mortgage Servicing ("Shellpoint") in November 2018.

In late 2021, the Appellants began to fall behind on their payments on their mortgage loan as a result of the COVID-19 pandemic. Consequently, the Appellants applied for and received a loan modification agreement for the mortgage with Shellpoint. On November 18, 2022, Shellpoint sent a letter to the Appellants with a Notice of Intent to Foreclose

> because the power of sale in the deed of trust is void because it names a corporate entity as trustee had not been timely raised?

[2] The section of the Deed of Trust stated:

> **24. Substitute Trustee.** Lender, at its option, may from time to time remove Trustee and appoint a successor trustee to any Trustee appointed hereunder by an instrument recorded in the city or county in which this Security instrument is recorded. Without conveyance of the Property, the successor trustee shall succeed to all title, power and duties conferred upon Trustee herein and by Applicable Law.

because the Appellants again defaulted on their payments. The Notice gave a right to cure the default by January 7, 2023, for the owed amount of $31,673.77.

The Appellees filed a foreclosure action for the Property against the Appellants on April 25, 2023. Included with this foreclosure action were materials appointing the Appellees as substitute trustees for the Deed of Trust. The Final Loss Mitigation Affidavit was filed on June 23, 2023. The foreclosure sale was scheduled to take place on September 5, 2023. On July 28, 2023, the Appellants applied for assistance from the Maryland Homeowner Assistance Fund ("HAF"). The Appellants met with an HAF coordinator on August 5, 2023. Two days later, the Appellants contacted Shellpoint to inform them about the HAF application. The HAF application was expedited due to the pending foreclosure sale. The Appellants called Shellpoint throughout August 2023 to keep them updated on the HAF process.

Then on August 31, the Appellants received a qualification letter from HAF for $40,000 for the mortgage loan. By this time, the amount owed on the mortgage had risen to $59,450.66, with an additional $2,756.41 owed if the payment came after September 1, 2023. On September 1, a Friday, the Appellants contacted the Appellees to inform them of the grant. The Appellants called again on the next Monday, September 4, which was Labor Day. The Appellants claimed that HAF reached out to Shellpoint to say the grant was awarded. After these calls and attempts to halt the sale, the Property was sold at a foreclosure sale on September 5, 2023. The property was sold for $568,000 to The Bank of New York Mellon.

On October 16, 2023, the Appellants filed exceptions to the foreclosure sale. The

Appellants argued that the Appellees did not follow the duty of care required for those servicing mortgage loans. They also asserted that the power of sale clause in the Deed of Trust was unenforceable because the trustee was a corporate entity, which was not allowed in Maryland when the Deed was originally signed. The Appellees filed an opposition to the exceptions on November 30, 2023. The Appellees focused on the lack of objections prior to the sale and the inability to bring certain claims as objections after the sale had occurred.

A hearing on the Appellants' exceptions was held in the Circuit Court for Howard County on January 18, 2024, before the Honorable Mary M. Kramer. At the hearing, the Appellant argued the sale should be set aside because the Appellees should not have held the sale after learning the Appellants had the funds available. Regarding the HAF application, the Appellees argued that they never received notice of the application from the bank or lender and even if they had received notice, the arrears were greater than the HAF's proposed loan. Judge Kramer found that the Appellants did not meet their burden of proof for showing that the money was available to pay back the amount due on the mortgage loan prior to the sale. She found that there was no constitutional violation in substituting the trustees and that the exceptions were not properly asserted after the sale. As a result, she denied the Appellant's motion for the exceptions.

The Appellants filed a motion for reconsideration on February 12, 2024. The motion included emails from HAF employees that they argued showed that Shellpoint was on notice that the funds were available. The Appellees filed an opposition to that motion on February 27, 2024, arguing the motion presented no new information and the Appellants

still did not provide proof of the funds needed to pay off the debt. The motion for reconsideration was denied on February 29, 2024. The Appellants had already filed an appeal prior to the denial of the motion for reconsideration.

DISCUSSION

A. Parties' Contentions

The Appellants argue that the Appellees breached their duty of care owed to a borrower for those servicing mortgage loans. The breach of duty was in continuing to move forward with the foreclosure sale despite being on notice from the Appellants that they had funds available to pay off the debt. The Appellants claim that they provided evidence prior to the foreclosure sale that showed an ability to pay and by ignoring that evidence, the Appellees created a clear irregularity in the sale that this court should overturn.

As to the second exception raising the issue of standing, the Appellants argue that the trustee was a corporate entity in the original Deed of Trust. As a result, under Maryland law when the Deed of Trust was signed in 2007, the power of sale clause should be void because it was given to a corporate entity. The Appellants dispute a retroactive legislative amendment that permitted a substitute trustee to exercise the power of sale even if it was originally void and argue that the law violated the Contracts Clause of the U.S. Constitution. Additionally, the Appellants argue that since this issue relates to standing it was timely raised.

The Appellees argue that the lower court properly denied the Appellants' exceptions to the sale. They argue that the Appellants' complaints should have been asserted prior to sale, rather than as post-sale exceptions. The Appellees claim that they complied with the

regulations and that the Appellants failed to provide evidence that they could pay off the amount due on the loan before the sale. The Appellees also deny that they ever refused to accept funds from HAF because the evidence was disputed over whether the funds were truly available.

On the standing issue, the Appellees respond that the issue should have also been a pre-sale objection, especially when the parties were aware of the language in the Deed of Trust allowing for the substitution of trustees when they signed the contract. The Appellees assert that this claim was not properly brought before the trial court, and the Appellants asserted this claim too late.

B. Standard of Review

The Supreme Court of Maryland set out the standard of review for rulings on exceptions to a foreclosure sale:

> [T]rial courts may consider both questions of fact and law. In reviewing a trial court's finding of fact, we do "not substitute our judgment for that of the lower court unless it was clearly erroneous" and give due consideration to the trial court's "opportunity to observe the demeanor of the witnesses, to judge their credibility and to pass upon the weight to be given their testimony." Young v. Young, 37 Md. App. 211, 220 (1977). Questions of law decided by the trial court are subject to a *de novo* standard of review.

Burson v. Capps, 440 Md. 328, 342 (2014) (quoting *Jones v. Rosenberg*, 178 Md. App. 54, 68 (2008)).

C. Analysis

A borrower's ability to challenge a foreclosure sale changes based on whether relief is requested before or after the foreclosure sale. *Thomas v. Nadel*, 427 Md. 441, 443 (2012). Prior to a foreclosure sale, a borrower or owner may file a motion to stay the sale of

property and dismiss the foreclosure action. Md. Rule 14-211(a)(1). The motion needs to state the basis of the defense, relating to "the validity of the lien" or "the right of the plaintiff to foreclose in the pending action." Md. Rule 14-211(a)(3)(B). This allows a court to hold a hearing on the merits of the motion and dismiss the foreclosure action if the lien was invalid or there was no right of foreclosure. *Thomas*, 427 Md. at 443 (quoting Md. Rule 14-211(e)). "It was intended that knowable challenges to the legitimacy of a foreclosure action be raised in such a motion to dismiss and, if possible, be litigated before any foreclosure sale is authorized." *Devan v. Bomar*, 225 Md. App. 258, 265 (2015); *see also Bates v. Cohn*, 417 Md. 309, 328 (2010) ("[A] homeowner/borrower ordinarily must assert known and ripe defenses to the conduct of a foreclosure sale prior to the sale, rather than in post-sale exceptions.").

After a foreclosure sale is conducted, the Maryland Rules set out the procedure for filing an exception to the sale. Md. Rule 14-305(e). "A party . . . may file exceptions to the sale. Exceptions shall be in writing, shall set forth the alleged irregularity with particularity, and shall be filed within 30 days" of the required notice of the sale. Md. Rule 14-305(e)(1). This process is more limited:

> A post-sale exception to a foreclosure sale is not an appropriate vehicle to challenge the broad equities of the entire foreclosure proceeding itself. It is, rather, a narrow challenge to the procedures employed in the execution of the sale process itself. . . . [E]ven an unconscionable foreclosure proceeding, if foreclosure should be erroneously ordered, might be implemented by a sale that is itself procedurally impeccable. In such a case, Rule 14-305 exceptions would be the wrong weapon aimed at the wrong target.

Devan, 225 Md. App. at 267; *see also Bates*, 417 Md. at 327 ("Rule 14-305 is not an open portal through which any and all pre-sale objections may be filed as exceptions, without

regard to the nature of the objection or when the operative basis underlying the objection arose and was known to the borrower."). These procedural allegations can include issues like "the advertisement of sale was insufficient or misdescribed the property, the creditor committed a fraud by preventing someone from bidding or by chilling the bidding, [or] challenging the price as unconscionable . . . ." *Devan*, 225 Md. App. at 268 (quoting *Bates*, 417 Md. at 327). When the lower court finds that the irregularities could have been properly raised prior to the sale, then the claim was waived when the sale occurred. *Id.* at 268–69 (citing *Thomas*, 427 Md. at 499; *Bates*, 417 Md. at 311). "The focus of the [post-sale] exceptions is on the conduct of the sale, not whether the trustee had a right to have the property sold." *Hood v. Driscoll*, 227 Md. App. 689, 695 (2016).

Here, the Appellants' exceptions were raised post-sale pursuant to Rule 14-305(e). The exceptions to sale were filed on October 16, 2023, after the sale proceeded on September 5, 2023.[3] The Appellants made two exceptions: first, that the Appellees breached their duty as mortgage lenders by not halting the sale after funding was available and, second, that the power of sale was void because the original holder of that power was a corporation.

Duty of Care

A mortgage lender owes a duty of care to the borrower, including a duty of good faith and fair dealing. COMAR § 09.03.06.20(A). A lender has a duty to "[p]rovide trained

[3] The exceptions were timely filed on October 16 within the thirty-day window because the Report of Sale that triggers the thirty-day time was not filed until September 16, 2023.

personnel and telephone facilities sufficient to promptly answer and respond to borrower inquiries regarding their mortgage loans" and a duty to "[p]ursue loss mitigation when possible." COMAR § 09.03.06.20(A)(3)(c)–(d).

In the aftermath of the COVID-19 Pandemic, the Maryland Department of Housing and Community Development launched the Maryland Homeowner Assistance Fund (HAF). The Maryland Commissioner of Financial Regulation distributed regulatory guidance about the HAF program to help inform mortgage servicers about the process. Industry Advisory Regulatory Guidance: Notice to Servicers: Maryland Homeowner Assistance Fund Now Open, *Maryland Commissioner of Financial Regulation* (Dec. 17, 2021) ("Regulatory Guidance"). The Regulatory Guidance outlined the expectations for lenders and servicers, which included an expectation that they will "[t]o the greatest extent possible, delay the filing of foreclosure actions against Maryland homeowners, or the scheduling of foreclosure sales, so that borrowers have reasonable time to apply and be evaluated for assistance under the HAF program." *Id.* at 2. It also outlined conduct that the Commissioner "deemed to violate relevant Maryland laws and regulations." *Id.* This conduct included "[r]efusing to accept HAF funds on behalf of a borrower if the servicer would otherwise accept such funds directly from the borrower." *Id.*[4]

[4] This same section includes other actions like failing to cooperate in the HAF application unless the notice came "37 days or less before a scheduled foreclosure sale" or proceeding with a foreclosure sale if the servicer has been notified more than 37 days before the sale that the borrower applied for assistance. Regulatory Guidance at 2. The Appellees claim they were only notified by HAF that there was a request for assistance on August 31, 2023, only five days before the sale, and therefore there was no violation. The timeline of the case suggests these actions were not violative of the Regulatory Guidance.

The Appellants argue that the Appellees violated the duties outlined in COMAR and the Regulatory Guidance by their decision to move forward with the sale despite being informed of their HAF approval. However, by the time of the sale when the Appellants claim HAF approval came in, the amount owed on the mortgage was around $60,000, which was more than the $40,000 grant the Appellants claimed the HAF would provide them.[5] As a result, the Appellants needed to show certified funds to cover the rest of the money to pay off the total amount before the foreclosure sale. At the hearing, Judge Kramer found that she had "no proof that the [Appellant] had about $25,000.00 in cash available to stop the sale." Without the proof of approval from the HAF and funds to cover the rest of the owed amount, the Appellees did not have a duty to stop the sale.

Additionally, the Appellants' concerns all complain of the Appellees' conduct *prior to* the sale. As a result, the Appellants were required to file a motion to stay or dismiss under Maryland Rule 14-211 before the sale. Judge Kramer noted the same in the motions hearing, describing that "what should have happened" after the Appellants believed they had the funds available to halt the sale was to "file[] a stay saying here is my HAF approval.

[5] Further, by the time of the foreclosure sale, the evidence only showed that the Appellants were *eligible* for the HAF loan, not that they had been approved. Emails with the Department of Housing and Community Development showed that the Appellants were eligible for a $40,000 loan, but they had only sent in an information request to Shellpoint on August 31, 2023. The email specifically states that "MDHAF was unable to proceed with a final approval without a response from the servicer." Therefore, the Appellants were not approved for a loan on September 5, 2023.

Here is my bank statement or my cashier's check. Stop the sale, Judge."[6] That did not occur in this case and instead the Appellants allowed the sale to proceed and then later asserted issues that went to the Appellees' "right to foreclose, rather than its procedural handling of the sale." *Bates*, 417 Md. at 329. Although we are sympathetic to the difficulties the Appellants faced in getting ahold of the Appellees in the days leading up to the sale, we must apply the law governing foreclosure actions. As a result, the circuit court did not err in overruling the exception to the sale based on the breach of duty.

Standing of Appellees

The second issue is whether the lower court properly held that the standing issue was not timely raised.[7] The Appellants' claim arises out of a 2010 amendment to Maryland's real property law. Prior to 2010, Maryland law stated that:

> A provision may be inserted in a mortgage or deed of trust *authorizing any natural person* named in the instrument, including the secured party, to sell the property or declaring the borrower's assent to the passing of a decree for

[6] At the hearing the Appellants' argued that this claim could not have been asserted before the sale because the Appellants could not have known that the Appellees "would disregard information that the money was available and would be paid." However, that does not mean the Appellants could just sit and wait for the sale to go forward instead of proactively asserting their claims that the money was available for the sale.

[7] The standing issue was also not properly asserted in the post-sale exception. As described above, post-sale exceptions are limited to procedural issues. By contrast, this issue of standing was a "known and ripe defense[]" since the substitute of trustee occurred when the foreclosure action began. *Bates*, 417 Md. at 328. This is unlike the hypothetical cases described in *Bates* when a "lender affirmatively and purposefully mislead[s] the borrower" to dissuade them from taking pre-sale defenses. *Id.* Instead, it is a case where the defense of standing related to the Contracts Clause could have been asserted any time prior to the sale because nothing about the issue changed since the substitution of trustees at the start of foreclosure proceedings. Therefore, this issue of the power of sale being void should have been brought by motion prior to the sale occurring pursuant to Maryland Rule 14-211.

> the sale of the property, on default in a condition on which the mortgage or deed of trust provides that a sale may be made.

Md. Code, Real Prop § 7-105(a) (eff. April 3, 2008 – May 31, 2010) (emphasis added). Under this version of the law, only a natural person could be authorized to sell the property. If the power to sell was assigned to a corporation and no natural person, then the right would be void. *Whitworth v. Algonquin Assocs., Inc.*, 75 Md. App. 479, 483 (1988).

Then in 2010, the Maryland legislature amended the statute and added language allowing for any errors in not naming a natural person to later be amended. 2010 Md. Laws Ch. 322 (S.B. 562). The revised statute now states that:

> "[a]n error or omission in a mortgage or deed of trust concerning the designation of the trustee or the individual authorized to exercise a power of sale does not invalidate the instrument or the ability of the mortgagee or beneficiary of the deed of trust to appoint an individual to exercise the power of sale.
>
> Md. Real Prop. § 7-105(b)(4).[8]

[8] The statute reads:

> (a) In this section, "individual" means a natural person.
>
> (b)(1) A mortgage or deed of trust may authorize the sale of the property or declare the borrower's assent to the passing of a decree for the sale of the property, on default in a condition on which the mortgage or deed of trust provides that a sale may be made.
>
> (2) A power of sale or assent to decree authorized in a mortgage or deed of trust may be exercised only by an individual.
>
> (3) The individual selling the property under a power of sale need not be named in the mortgage or deed of trust.
>
> (4) An error or omission in a mortgage or deed of trust concerning the designation of the trustee or the individual authorized to exercise a power of

The legislation stated that the act shall apply retroactively to any mortgage or deed of trust that was on record on June 1, 2010. 2010 Md. Laws Ch. 322 § 2.

When the Deed of Trust in this case was signed in 2007, the power of trust was assigned to North American Title Company. Because the power of trust was held by a corporation and not an individual when the contract was signed, the Appellants argue that the Deed of Trust was void when it was made and unenforceable now.

"[L]aws subsisting at the time of the making of a contract enter into and form a part thereof as if expressly referred to or incorporated in its terms[.]" *John Deere Const. & Forestry Co. v. Reliable Tractor, Inc.*, 406 Md. 139, 146 (2008) (citation omitted). However, the legislature has the power to pass retroactive curative acts "so long as there is no interference with vested rights or contractual obligations." *Svrcek v. Rosenberg*, 203 Md. App. 705, 734 (2012) (quoting *Dryfoos v. Hostetter*, 268 Md. 396, 404 (1973)). Appellants contend the act passed here interferes with their contractual obligations, arguing that the amendment to the Maryland law violates the Contracts Clause because it interferes

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> sale does not invalidate the instrument or the ability of the mortgagee or beneficiary of the deed of trust to appoint an individual to exercise the power of sale.
>
> (5) If a mortgage or deed of trust allows for the appointment or substitution of a trustee or an individual authorized to exercise a power of sale, the holder of the mortgage or deed of trust may make the appointments or substitutions from time to time.

Md. Real Prop. § 7-105(a)–(b).

with existing private contracts. The Contracts Clause of the United States Constitution states that "No State shall . . . pass any . . . Law impairing the Obligation of Contracts . . . ." U.S. Const. Art. I § 10. The key issue in whether a law violates the contracts clause is whether the state law actually "operate[s] as a substantial impairment of a contractual relationship." *Allied Structural Steel Co. v. Spannaus*, 438 U.S. 234, 245 (1978).

A similar argument regarding the change to Real Property § 7-105 was presented to this court soon after the law was passed in *Svrcek v. Rosenberg*. 203 Md. App. 705 (2012). The initial trustees in that case were a law office; and eventually deeds of appointment named individual appellees as substitute trustees. *Id.* at 730. The appellant in *Svrcek* argued that the General Assembly could not enact laws with retroactive applications that impaired vested property rights. *Id.* at 733. This Court disagreed and held that because the appellant agreed to a potential substitution of trustees and the grant of the power of sale to a trustee, the legislation allowing for that substitution upon the mortgagor's default does not infringe upon a vested property right. *Id.* at 737.

Similarly, in Appellants' contract, there was a section for a substitute trustee. The contract gave the lender power to "remove Trustee and appoint a successor trustee to any Trustee appointed hereunder . . . . [T]he successor trustee shall succeed to all title, power and duties conferred upon Trustee herein and by Applicable Law." Therefore, similar to *Svrcek*, no vested property right was infringed upon. The power of sale was never void under the contract because the Deed of Trust allowed for substitute trustees that could cure the defect if and when they wished to exercise the power of sale. While no individual was assigned the power of sale when the contract was initially signed in 2007, that problem was

cured on April 25, 2023, when the Appellees were appointed as substitute trustees on the Deed of Trust. As a result, when foreclosure proceedings began, the Deed of Trust was enforceable against Appellants.

The contractual relationship was not substantially impaired because the power of sale was never truly void. The Appellants agreed to the lender's ability to name substitute trustees in the Deed of Trust, which is exactly what the lender did here. When the Deed of Trust was originally signed in 2007, it could not be immediately enforced because only a corporate entity was named. However, at any time under the original contract, an individual could be substituted for the corporate trustee under both the original statute and the 2010 revision. The revision did not impair the contractual relationship under the Deed of Trust in this case. As a result, we hold that there was no substantial impairment of a contractual relationship, and therefore, there was no violation of the Contracts Clause. The Appellees were permitted to substitute natural persons as trustees for the foreclosure proceedings.

The Circuit Court did not err in denying either of the Appellants' exceptions to the foreclosure sale.

CONCLUSION

Accordingly, we affirm the judgment of the Circuit Court for Howard County.

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