UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1583

September Term, 2014

HECTOR JIMENEZ

v.

MARK H. WITTSTADT, *et al.* Substitute Trustees

Zarnoch,
Leahy,
Rodowsky, Lawrence F.
(Retired, Specially Assigned),

JJ.

Opinion by Zarnoch, J.

Filed: July 7, 2015

Appellant Hector Jimenez failed to make payments and defaulted on a Note secured by a Deed of Trust on 7905 Brethren Drive in Gaithersburg. Appellees PNMAC Mortgage Opportunity Fund Investors, LLC (PNMAC) and Mark H. Wittstadt and Gerard W. Wittstadt (collectively, Substitute Trustees) foreclosed on the property and obtained a Final Order of Ratification of Sale on May 15, 2014. Jimenez did not appeal this order. On June 13, 2014, Jimenez filed a "Verified Complaint to Quiet Title for Failure to Comply with UCC Provisions." He alleged that the PNMAC was not the party secured by the Deed of Trust, that he had not been presented with the original Note, and that he was entitled to a declaration that the Deed of Trust was null and void. The Circuit Court for Montgomery County held that Jimenez's claims were barred by *res judicata* and granted appellees' motion to dismiss. We affirm the court's dismissal.

FACTS AND PROCEEDINGS

On August 10, 2004, Jimenez obtained the Brethren Drive property by a deed recorded in the Land Records of Montgomery County. On December 14, 2007, he executed an Adjustable Rate Note in the amount of $731,250 with Lehman Brothers Bank FSB to refinance a prior loan, and signed a Deed of Trust to secure the Note. The parties present varying factual accounts as to what happened thereafter, but it is undisputed that on January 28, 2012, PNMAC appointed the Substitute Trustees, who initiated foreclosure proceedings on February 13, 2012. The property was sold on March 3, 2014, at public auction to PNMAC for $735,000, and the court subsequently entered a Final Order of Ratification of Sale.

On May 29, 2014, Jimenez sent PNMAC a letter (that he describes as a "Qualified Written Request") requesting that PNMAC produce or make available inspection of the original Note. On June 3, 2014, Jimenez filed his "Verified Complaint to Quiet Title for Failure to Comply with UCC Provisions"

The Court held a hearing on September 24, 2014, and stated:

> [W]ith very, very limited exceptions, all alleged defects, problems, irregularities, et cetera, that one could have[,] need to be brought and litigated in the underlying foreclosure action. There is nothing alleged, in my judgment, which even if proven would set aside the sale and would cause this Court to change title. The sale was ratified by the Administrative Judge.

The court dismissed the complaint with prejudice and without leave to amend.

DISCUSSION

A court's ruling on a motion to dismiss under Rule 2-322(b) must be "legally correct" to withstand appellate review. *Norman v. Borison*, 192 Md. App. 405, 419 (2010) (Citation omitted). A court must "presume[ ] the truth of all well-pleaded facts in the [c]omplaint, along with any reasonable inferences derived therefrom in a light most favorable to plaintiffs." *Id.* (Quotation omitted) (Alteration in *Norman*). We will, however, affirm dismissal when the complaint, on its face, fails to establish a legal entitlement to relief. *Id.* (Citation omitted). The complaint may not plead mere "conclusory charges that are not factual allegations." *Morris v. Osmose Wood Preserving*, 340 Md. 519, 53 (1995). We "may affirm the court's decision on any ground adequately shown by the record." *Holden v. Univ. Sys. of Maryland*, 222 Md. App. 360, 366 (2015).

I. Res Judicata

Jimenez claims that the court erred in finding that *res judicata* barred his second complaint. The Court of Appeals has said:

> Res judicata is an affirmative defense that precludes the same parties from relitigating any suit based upon the same cause of action because the second suit involves a judgment that 'is conclusive, not only as to all matters that have been decided in the original suit, but as to all matters which with propriety could have been litigated in the first suit.'
>
> In Maryland, the doctrine of res judicata precludes the relitigation of a suit if (1) the parties in the present litigation are the same or in privity with the parties to the earlier action; (2) the claim in the current action is identical to the one determined in the prior adjudication; and (3) there was a final judgment on the merits in the previous action. The overarching purpose of the res judicata doctrine is judicial economy.

Powell v. Breslin, 430 Md. 52, 63-64 (2013) (Quotations and citations omitted).

Jimenez has not addressed the elements of res judicata, but in any event, we find the court correctly determined that they were satisfied. First, the parties are the same or in privity.[1] "Privity in the res judicata sense generally involves a person so identified in interest with another that he represents the same legal right." *FWB Bank v. Richman*, 354 Md. 472, 498 (1999) (Quotation omitted). Substitute trustees are in privity with the holders of a note, as they are appointed to "exercise the lender's power under the deed of trust to foreclose the [mortgagor's] right of redemption." *Svrcek v. Rosenberg*, 203 Md. App. 705, 729 (2012). The Substitute Trustees were merely exercising PNMAC's legal right under the Deed of Trust, not acting as a separate party.

[1] Jimenez is incorrect in arguing that he did not participate in the foreclosure proceedings; the docket entries indicates that he was represented by counsel during those proceedings, even if he was not physically present.

Second, the causes of action here are "identical." *In Anne Arundel Cnty. Bd. of Educ. v. Norville*, 390 Md. 93, 107 (2005), the Court of Appeals said:

> The plea of [res judicata] applies, except in special cases, not only to the points upon which the court was required by the parties to form an opinion, and pronounce a judgment, but to every point which properly belonged to the subject of litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time.

(Quotation omitted).

Appellees argue that the time to press any challenges to the foreclosure was during the initial foreclosure action. We agree. Litigants must bring all claims based upon the same set of facts and that one would ordinarily "expect . . . to be tried together," lest they face claim preclusion later. *Gonsalves v. Bingel*, 194 Md. App. 695, 711-12 (2010) (Quotation omitted); *see* Restatement (Second) of Judgments § 24 cmt. a. ("The law of res judicata now reflects the expectation that parties who are given the capacity to present their 'entire controversies' shall in fact do so."). The substance of the foreclosure action was Jimenez's failure to pay the Note and the sale of the Property to satisfy the Note. Had he wished to challenge the validity of the Note, his payment obligations, or any aspect of the foreclosure process, he had ample opportunity to do so when he, represented by counsel, appeared before the court in the initial action.

Third, there was a final judgment when the court ratified the sale of property. *See Hohensee v. Minear*, 259 Md. 603, 607 (1970) ("The law is firmly established in Maryland that the final ratification of the sale of property in foreclosure proceedings is *res judicata* as to the validity of such sale").

Jimenez argues, however, that the doctrine of res judicata has a narrow exception with respect to foreclosure sales and that exception applies here. Under Rule 14-305(d), parties may file "exceptions" to the sale, which "shall set forth the *alleged irregularity with particularity*, and shall be filed within 30 days after the date of a notice issued pursuant to section (c) of this Rule or the filing of the report of sale if no notice is issued." (Emphasis added). "Irregularity" here means "procedural irregularities at the sale or . . . the statement of indebtedness. . . ." *Bates v. Cohn*, 417 Md. 309, 326-27 (2010) (quoting *Greenbriar Condo., Phase I Council of Unit Owners, Inc. v. Brooks*, 387 Md. 683, 688 (2005)). The Court of Appeals has made it abundantly clear that "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."

The Court has not explicitly decided, however, whether a homeowner may raise,

> as a post-sale exception, allegations that a deed of trust was the product of fraud, and, therefore, the sale was invalid and *incapable* of passing title. . . . [or] that a foreclosure sale was the product of the lender affirmatively and purposefully misleading the borrower in default that ultimately unsuccessful pre-sale loss mitigation or loan modification efforts would likely be successful (or protracting strategically the denial of those efforts) and therefore dissuading the borrower from seeking to assert pre-sale defenses in a timely manner.

Bates v. Cohn, 417 Md. 309, 328 (2010) (Emphasis added). Regardless, Jimenez did not claim that the deed of trust was the product of fraud; even if we were to interpret his pleadings that way, the Court has indicated that "a general allegation of 'fraud' does not suffice." *Thomas v. Nadel*, 427 Md. 441, 454 (2012).

More damning to Jimenez's claims is the fact that he never filed post-sale exceptions. Rather, he waited until after the sale to raise his claims to quiet title. The Rules do not allow a collateral attack on a foreclosure sale by raising a question of the validity of title after the titled property has been subject to and disposed of in a final order for a foreclosure sale.

Jimenez's additional arguments are similarly barred from litigation. For instance, he argues that he was never presented with the Note. This was certainly a claim encompassed within the circumstances of the foreclosure action and should have been raised then. In our view, the circuit court correctly found Jimenez's claims barred by *res judicata*.

II. Dismissal with Prejudice

Jimenez also argues that the court erred in dismissing his complaint with prejudice and without leave to amend because "it cannot be said that the alleged facts in the Complaint and the permissible inferences (which would include other cause of action) would if proven, nonetheless fail to afford relief." This argument is beside the point.

"A court has discretion to dismiss a claim with prejudice if it fails to state a claim that could afford relief." *Pulte Home Corp. v. Parex, Inc.*, 174 Md. App. 681, 727 (2007). Where a matter has been extensively litigated before a court and disposed of by a final order, there is no abuse of discretion in dismissing a secondary action concerning the same matter with prejudice. *See id.* ("In light of the extensive history of litigation between the parties and, given that the dismissed count was from the Second Amended Complaint in this case and that the complaint that initiated the case was filed nearly five months earlier,

we believe that the court properly exercised its discretion by dismissing the breach of express warranties claim with prejudice."). Accordingly, we see no error in the court's dismissal with prejudice and affirm.

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