UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1854

September Term, 2014

LAURA H.G. O'SULLIVAN, ET AL.
SUBSTITUTE TRUSTEES

v.

JACQUELYN L. McNAIR

Krauser, C.J.,
Hotten,
Berger,

JJ.

Opinion by Berger, J.

Filed: November 12, 2015

This appeal arises from an order declining to ratify an auditor's account following a foreclosure sale, and the denial of a motion filed by appellants, Laura H.G. O'Sullivan, et al. (The "Substitute Trustees") to reconsider the courts refusal to ratify the account. Appellee, Jacquelyn L. McNair ("McNair") has not filed a brief in connection with the Substitute Trustees' appeal.

On appeal, the Substitute Trustees present one issue for our review,[1] which we rephrase as follows:

> Whether the circuit court erred in refusing to ratify the foreclosure sale when it found that the attorney's fees sought by the Substitute Trustees to be unreasonable.

For the reasons set forth below, we shall affirm the judgment of the Circuit Court for Baltimore County.

FACTUAL AND PROCEDURAL BACKGROUND

On May 22, 2006, McNair purchased real property located at 2000 Wintergreen Place, Rosedale, Maryland 21237 ("the property"). McNair purchased the property in exchange for a note for $195,455.00 which was secured by a deed of trust on the property.

Under paragraph 18 of the deed of trust, the parties agreed that the "[t]rustee shall apply the proceeds of the sale in the following order: (a) to all expenses of the sale, including, but not limited to, Trustee's fees of 5.000 % of the gross sale price and reasonable

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[1] The issue, as presented by the Substitute Trustees, is:

> I. Whether the Circuit Court committed reversible error by denying the Appellants' Motion to Alter or Amend Judgment and its refusal to ratify the audit including attorney fees in the amount $1600.00?

attorneys' fees; . . ." Subsequently, McNair fell into default and a foreclosure sale was held on June 21, 2013. The property was sold for $192,808.33, and McNair was credited an additional $66.24 for property taxes she paid on the property. At the time of the foreclosure sale, McNair's outstanding obligation on the note was $192,609.80. Pursuant to paragraph 18 of the deed of trust, the auditor's account awarded the Substitute Trustees a commission in the amount of $9,640.42, and attorney's fees in the amount of $1600.00. Throughout the duration of the foreclosure proceedings, the Substitute Trustees filed numerous documents and affidavits using their individual names often followed by a suffix indicating that they were an attorney. There is no indication in the record that the Substitute Trustees sought the advice or assistance of an attorney that was not also named as a substitute trustee throughout the foreclosure proceeding.

On April 29, 2014, the trial judge refused to ratify the foreclosure sale, finding that "[t]he amount of attorneys' fees is unreasonable under the circumstances." The trial judge further found that "[t]he Trustees' Commissions are sufficient to cover the attorneys' fees the Trustees seek to pay themselves." The Substitute Trustees then filed a motion to alter or amend the judgment pursuant to Md. Rule 2-534. On October 21, 2014, the circuit court denied the Substitute Trustees' motion to alter or amend the circuit court's refusal to ratify the foreclosure sale. In the court's order, the court reasoned that because the substitute trustees were *pro se* litigants, they were not entitled to attorney's fees. This timely appeal followed. Additional facts will be discussed as necessitated by the issues presented.

DISCUSSION

In the present action, the Substitute Trustees argue that the circuit court erred by disregarding the terms of the deed of trust which entitled the Substitute Trustees to attorney's fees. Further, the Substitute Trustees maintain that the circuit court erred in finding that the Substitute Trustees had not incurred any attorney's fees.

I. Standard of Review

A foreclosure may generally be challenged by "obtaining a pre-sale injunction pursuant to Maryland Rule [14-211], filing post-sale exceptions to the ratification of the sale under Maryland Rule 14-305(d), and [by filing] post-sale ratification exceptions to the auditor's statement of account pursuant to Maryland Rule 2-543(g), (h)." *Well Fargo Home Mortg., Inc. v. Neal*, 398 Md. 705, 726 (2007). In the present action, the trial judge, *sua sponte,* declined to ratify the auditor's statement of account.[2]

Generally, with respect to foreclosure proceedings, "[w]e will review the trial court's legal conclusions . . . *de novo*." *Wincopia Farm, LP v. Goozman*, 188 Md. App. 519, 528

[2] Maryland Rule 2-543 governs court appointed auditors, and the means by which exceptions may be taken to an auditor's account. We observe that there does not appear to be a provision which expressly grants the circuit court authority to refuse to ratify an account when no party has taken exceptions to the account. We further observe, however, that after the time for filing exceptions has expired "the court *may* enter an order ratifying the report or account." Md. Rule 2-543(f) (emphasis added). The permissive "may" language employed in Md. Rule 2-543(f) authorizes the court with the discretion to decline to ratify an account when neither party files exceptions to the account. Appellants do not allege it was error for the court to refuse to ratify the account *sua sponte*. We, therefore, do not address that issue on this appeal. For the purposes of this appeal we assume, without deciding, that the circuit court had discretion to decline to ratify an auditor's account *sua sponte*.

(2009). On the other hand, "[w]hen attorney's fees are permitted, the award is 'a factual matter which lies within the sound discretion of the trial judge and will not be overturned unless clearly erroneous.'" *Holzman v. Fiola Blum, Inc.*, 125 Md. App. 602, 637 (1999) (quoting *Reisterstown Plaza Assoc. v. Gen. Nutrition Ctr., Inc.*, 89 Md. App. 232, 248 (1991)). The circuit court abuses its discretion and is clearly erroneous "where the trial court ruling was 'clearly against the logic and effect of facts and inferences before the court[] . . . or when the ruling is violative of fact and logic.'" *Fishman v. Murphy ex rel. Estate of Urban*, 433 Md. 534, 546 (2013) (quoting *Aventis Pasteur, Inc. v. Skevofilax*, 396 Md. 405, 419 (2007)).

II. The Circuit Court Observed the Terms of the Deed of Trust

The Substitute Trustees first maintain that it was error for the court to refuse to enforce the provision of the deed of trust granting them attorney's fees. Generally, "in the absence of specific authority in the contract of indebtedness or contained in statute or court rule, it is an impermissible abuse of discretion for trustees . . . to include the demand for additional legal fees . . . ." *Maddox v. Cohn*, 424 Md. 379, 399-400 (2013). Where there is either a "specific authority in the contract of indebtedness or contained in statute or court rule," *Id*., however, it may be permissible for Substitute Trustees to enforce their agreement awarding themselves attorney's fees. *See 101 Geneva LLC v. Wynn*, 435 Md. 233, 253 (2013) (Permitting Substitute Trustees to seek attorney's fees where they were "contemplated by a court rule.").

In the present action, the parties agreed that McNair would be responsible for attorney's fees arising from the foreclosure of the property. We agree with the Substitute Trustees and see no reasons why the Substitute Trustees would not be entitled to have the deed of trust enforced here. In denying the ratification of the auditor's account, however, the circuit court did not refuse to enforce section 18 of the deed of trust. Rather, the circuit court observed section 18 and found that there was no cognizable claim for attorney's fees. Accordingly, we agree with the Substitute Trustees, that generally--limited, of course, by principles of contract--they are entitled to enforce the deed of trust. The circuit court here, however, did not alter that agreement. It merely found that there were no attorney's fees to be awarded under the deed of trust. Accordingly, the circuit court did not err by refusing to enforce the deed of trust.

III. The Circuit Court Did Not Err in Refusing to Award Attorney's Fees

Although we hold that the Substitute Trustees are entitled to enforce paragraph 18 of the deed of trust and is entitled to recover attorney's fees, the question remains as to whether the Substitute Trustees actually incurred attorney's fees recoverable under the deed of trust. In the present action, the parties named as substitute trustees are listed as follows: Laura H.G. O'Sullivan, Erin M. Brady, Diana C. Theologou, Laura L. Latta, Jonathan Elefant, Chasity Brown, and Laura T. Curry. Notwithstanding the fact that these parties are named as substitute trustees, they claim that they are also entitled to attorney's fees because their roles as attorneys are distinguishable from their roles as trustees, and that the attorney's fees represent distinguishable costs actually incurred. We disagree.

In the present case, the trial court cited *Frison v. Mathis*, 188 Md. App. 97 (2009), for the proposition that "a litigant who chooses to represent himself or herself is not entitled to attorneys' fees, even when a contract would provide for such fees for a non-self-represented litigant." *See Frison*, *supra*, 188 Md. App. at 102-106. The Substitute Trustees seek to distinguish *Frison*, *supra*, because in that case, Frison was attempting to collect unpaid bills owed to him, whereas here the Substitute Trustees were acting in connection with their appointment as trustees. The reason that a *pro se* litigant is generally prohibited from collecting attorney's fees, however, has nothing to do with the parties' relationship with each other. Rather, the prohibition on attorney's fees for *pro se* litigants stems from the relationship--or more accurately, the absence of a relationship--between an attorney and client. Accordingly, while *Frison*, *supra*, may be factually distinguishable, the principle that an attorney-client relationship is a condition precedent to the recovery or attorney's fees is equally applicable here.

We begin our analysis by observing that an individual may "enter an appearance by an attorney **or** in proper person." Md. 2-131(a) (emphasis added). A textual analysis of Rule 2-131 indicates that one may enter their appearance as a party or as an attorney but not as both. In the present action, the parties named as Substitute Trustees are named individually as plaintiffs in the foreclosure action. Pursuant to Md. Rule 2-131(a), the Substitute Trustees' status as a party would necessarily preclude their ability to enter their appearance as an attorney and be entitled to the recovery of attorney's fees.

Consistent with the text of Md. Rule 2-131(a), the Court of Appeals' holding in *Frison*, *supra*, stands for the proposition that in order for an attorney to receive attorney's fees, there must be a client from whom to receive attorney's fees. *Frison*, *supra*, 188 Md. App. 97, 102 (2009) ("[T]here are policy reasons for requiring the existence of an attorney-client relationship before attorney's fees may be recovered.").

> 'An attorney-client relationship is formed when: 1) a person manifests to a lawyer the person's intent that the lawyer provide legal services for the person; and . . . (b) the lawyer fails to manifest lack of consent to do so, and the lawyer knows or reasonably should know that the person reasonably relies on the lawyer to provide the services.'

Attorney Grievance Comm'n v. Kreamer, 404 Md. 282, 318 (2008) (quoting *Attorney Grievance Comm'n v. Brooke*, 374 Md. 155, 174 (2003) (quoting Restatement (Third) of the Law Governing Lawyers § 14 (2000))). The requisite conditions necessary to form an attorney-client relationship are premised on the participation of "a lawyer" and a separate and distinct "person." *Kreamer*, 404 Md. at 318.

Moreover, "[t]he attorney-client relationship is an agency relationship, governed by agency law." *Seney v. Seney*, 97 Md. App. 544, 552 n.5 (1993). "'An agency relationship is one that arises from the manifestation of the principal to the agent that the agent will act on the principal's behalf.'" *Anderson v. Gen. Cas. Ins. Co.*, 402 Md. 236, 247 (2007). Indeed, "[a]n agency is 'the fiduciary relation which results from the manifestation of consent by **one person** [the principal] **to another** [the agent] that **the other** shall act on his behalf and subject to his control and consent by **the other** so to act.'" *Schinnerer v. Md. Ins.*

Admin., 147 Md. App. 474, 486 (2002) (emphases added) (quoting *Ins. Co. of N. Am. v. Miller*, 362 Md. 361, 373 (2001)).

In order to hold that the Substitute Trustees are entitled to attorney's fees for their own work on the foreclosure (in addition to the 5 percent they took from the proceeds of the sale), there must be an attorney-client relationship between the Substitute Trustees--as attorneys, and the Substitute Trustees--as clients. The idea that the Substitute Trustees can act both as principals and as agents for themselves is inconsistent with the foundation principle of agency which requires one person to act for the benefit of another. Furthermore, to hold that the Substitute Trustees can act as both attorney and client is inconsistent with the rights and responsibilities that arise from the attorney-client relationship. Indeed, if an attorney and client could be one in the same, he could not be expected to comply with the contingent fee disclosure provisions of Maryland Rule of Professional Conduct ("MRPC") 1.5(c).[3] Further, if an attorney and client were the same, the attorney could not refrain from "providing financial assistance to a client in connection with pending or contemplated litigation" (MRPC 1.8(e)), refrain from acting as "advocate at a trial in which the lawyer is

[3] MRPC 1.5(c) (permitting contingent fees upon the satisfaction of certain conditions) is related to MRPC 1.8(a) (generally prohibiting business transactions with clients), and MRPC 5.4 (promoting professional independence of a lawyer), because the rules of professional conduct seek, in part, to preserve a lawyers independent judgment and reduce the extent to which their judgment is influenced by a vested interest in the outcome of the litigation, a shared business venture, or other non-lawyer individuals who do not share the distinguished status of being an officer of the court. The necessary entanglement that would ensue between the Substitute Trustees divided interests in the subject of the litigation and their professional responsibilities as attorneys strengthens our resolve that they may not create ambiguity as to whether they are acting as an attorney or client.

likely to be a necessary witness" (MRPC 3.7), or comply with a number of other obligations that attach when an attorney takes on the representation of a client.

Our rules governing the practice of law are designed around a two-party attorney-client relationship. Similarly, the right to compensation that arises from incurring the risks and liabilities attendant to representing another as an attorney are also premised on a two-party attorney-client relationship. For that reason, the Substitute Trustees cannot maintain an attorney-client relationship with themselves. Accordingly, because an attorney-client relationship is a condition precedent to the entitlement to attorney's fees, *Frison*, *supra*, 188 Md. App. at 102, the Substitute Trustees are not entitled to attorney's fees. We, therefore, hold that the circuit court did not err in declining to ratify the auditor's account because the Substitute Trustees' failed to show that they were entitled to recover $1,600.00 in attorney's fees under that account.

JUDGMENT OF THE CIRCUIT COURT FOR BALTIMORE COUNTY AFFIRMED. APPELLANTS TO PAY COSTS.