UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 2325

September Term, 2014

ELIZABETH HARRIS

v.

CARRIE M. WARD, *et al.,*
SUBSTITUTE TRUSTEES

Eyler, Deborah S.,
Nazarian,
Wilner, Alan M.
(Retired, Specially Assigned),

JJ.

Opinion by Wilner, J.

Filed: December 10, 2015

Appellant complains that the proceeding leading to the foreclosure of a deed of trust on her home was laced with fraud, the fraud arising from allegedly inconsistent averments of who owned the note secured by the deed of trust. She chose to raise this defense, not by a motion to enjoin the sale or dismiss the foreclosure proceeding, or by filing an objection to ratification of the sale, but rather by a motion for reconsideration under Rule 2-535(b) filed more than 30 days after the sale had been ratified. She was seeking to set aside an enrolled judgment. The Circuit Court for Calvert County denied the motion; hence, this appeal.

The procedural facts are not in dispute. On April 12, 2013, Howard N. Bierman, one of three substituted trustees under the deed of trust, filed an Order to Docket the foreclosure action.[1] Attached to the Order were the exhibits required by Rule 14-207(b). Among them were:

(1) A copy of the original deed of trust, entered into by appellant on October 25, 2005. It showed the lender to be Wilmington Finance, a division of AIG Federal Savings Bank (Wilmington), the trustee to be First Equity Title Corporation, and the beneficiary under the deed of trust to be Mortgage Electronics Registration System (MERS), as nominee for the lender and the lender's assigns;

[1] In their brief, appellees state that the Order to Docket was filed August 8, 2013. That is an obvious mistake [acknowledged by appellees at oral argument]. The docket shows that the Order was filed on April 12, 2013.

(2) The note, in the amount of $288,000, payable to Wilmington in monthly installments for 30 years, subject to the right of Wilmington to transfer the note;

(3) Two allonges to the note, both dated October 25, 2005 – the date the note and deed of trust were executed -- one showing an assignment from Wilmington to CitiFinancial Mortgage Company (CitiFinancial), and the other showing an assignment by CitiMortgage, Inc. (CitiMortgage), a successor by reason of merger with CitiFinancial), *in blank*;[2]

(4) A loan modification agreement dated November 4, 2011, that increased the principal balance of the loan, extended the maturity date of the note, and showed the lender to be Selene Finance, LP (Selene) and the beneficiary to be MERS;

(5) A copy of a Notice of Intent to Foreclose sent to appellant on February 3, 2012, showing Ranieri Fund II as the secured party and Selene as the loan servicer;

(6) A copy of a Notice of Intent to Foreclose sent to appellant on November 19, 2012, showing the secured party as Wells Fargo Bank (Wells Fargo), as trustee for SRMOF II 2011-1 Trust (SRMOF), with the same telephone number as given for Ranieri in the February Notice of Intent, and Selene as the loan servicer;

[2] An allonge is a separate paper attached to a negotiable instrument for the purpose of receiving indorsements. *See Black's Law Dictionary* 10th ed.(2014) at 83. Initially, the Uniform Commercial Code allowed allonges only when there was no room on the note itself for further endorsements. That is no longer the case. *See* Comment 2 to § 3-204 of the Uniform Commercial Code (Md. Code, § 3-204 of the Commercial Law Article).

(7) A December 20, 2012 appointment by Selene, claiming to be the "present holder or agent of the holder of the note secured by the deed of trust," of Carrie M. Ward, Howard N. Bierman, and Jacob Geesing as substitute trustees;

(8) An Affidavit of Default dated January 17, 2013, signed on behalf of Selene, as servicer for Wells Fargo in its capacity as trustee for SRMOF;

(9) A February 4, 2013 affidavit on behalf of Selene, as servicer for Wells Fargo in its capacity as trustee for SRMOF, that Wells Fargo, as trustee for SRMOF is the owner of the note, that Selene is the servicer for Wells Fargo, and that the note attached to the Order to Docket is a true and accurate copy of the original debt instrument; and

(10) An affidavit by Bierman that appellant was in default, that notice was given, and that the holder of the beneficial interest under the deed of trust has the right to foreclose.

In addition to those documents that were attached to the Order to Docket, four other documents bear on the issue raised by appellant. Three of them were assignments of the deed of trust dated January 2, 2013 and recorded January 14. The first assignment was by MERS, as nominee for Wilmington, to Selene Financial; the second, was an assignment by Selene Financial to SRMOF II 2011-1 Trust; and the third was an assignment by SRMOF II 2011-1 Trust to Selene RMOF II REO Acquisition LLC. All three assignments were acknowledged by Gina Gray, a vice-president of Selene Financial, in various capacities. She acknowledged the first assignment as vice-president of MERS, as nominee for Wilmington. The second she acknowledged as vice-president of Selene Financial LP; and

the third she acknowledged as vice-president of Selene RMOF II LLC, sole certificate holder for SRMOF II 2011-1 Trust. The fourth document relied on by appellant in her Rule 2-535(b) motion was a copy of the note sent by Selene to appellant's attorney on July 17, 2014, in response to the attorney's request.

Pursuant to appellant's request, post-filing mediation occurred in August 2013, but no agreement was reached. On August 22, 2013, the court entered an order permitting the secured party to schedule the foreclosure sale, subject to the right of appellant to file a motion pursuant to Rule 14-211 to stay the sale and dismiss the action. In lieu of that, on September 30, 2013, appellant filed a Chapter 13 petition in the U.S. Bankruptcy Court, which again put the foreclosure sale temporarily on hold.

In December 2013, Wells Fargo, as trustee for SRMOF, filed a motion in the Bankruptcy Court to lift the automatic stay so that the trustee may continue with the foreclosure. In its motion, it alleged that SRMOF was the holder by assignment of the note. Attached to the motion were copies of three allonges – a January 2, 2013 assignment from Selene Financial LP to SRMOF II-1 2011-1 Trust, an assignment dated the same day on behalf of SMOF II-2011-1 Trust, by Selene RMOF II LLC to what appears to be Selene RMOF II REO Acquisition LLC, and a January 10, 2013 assignment to Wells Fargo, as trustee for SRMOF II 2011-1 Trust by Selene RMOF II REO Acquisition LLC. All three assignments were signed, on behalf of the assignor, by Gina Gray, a vice-president of Selene.

The Bankruptcy Court lifted the automatic stay with respect to the foreclosure proceeding on January 27, 2014. The substituted trustees thereupon advertised the sale, which was conducted on April 1, 2014. The property was sold to Wells Fargo, as trustee for SRMOF II 2011-1 Trust, care of Selene Finance LP, for $195,000, and, on April 23, 2014, a Report of Sale was filed, along with an auctioneer's affidavit, the purchaser's affidavit, and the trustee's affidavit of fairness. No exceptions to the sale were filed, and, on June 4, 2014, the court, finding that the sale was fairly and properly made, ratified and confirmed it, and referred the matter to the court auditor to state an account. The order of ratification became an enrolled judgment on July 5, 2014.

On August 25, 2014, appellant filed a Motion to Dismiss the Foreclosure Proceeding Pursuant to Md. Rule 2-535(b). In the motion, appellant pointed out what she regarded as various discrepancies in the assignments, notices, and other documents regarding the actual owner of the note. She focused, in particular, on:

(1) the affidavit by Selene attached to the Order to Docket that Wells Fargo, as trustee for SRMOF II 2011-1 was the owner of the note and that the copy of the note attached to the Order to Docket was a true and accurate copy of the original debt instrument (*see* ¶ (9) above),

(2) the note attached to the Order to Docket, which identified Wilmington as the lender and contained no indorsements;

(3) the three assignments of record and the various allonges, which, according to her, showed that Wilmington was not, in fact, the current owner of the note;

(4) the copy of the note and the allonges attached to the motion to lift the Bankruptcy stay; and

(5) the copy of the note sent to appellant's attorney on July 27, 2014.

Appellant drew from those documents that the copies of the note filed with the motion to lift the bankruptcy stay and a copy of the note sent to appellant's attorney in response to a request made by him did not have the same allonges attached, making those two notes different from the one attached to the Order to Docket. She concluded that there were at least three different versions of the note in existence and averred that the trustees must have been aware of those discrepancies but nonetheless accepted Selene's certification that the note attached to the Order to Docket was genuine. She regarded the pursuit of the foreclosure as based on defective affidavits and fraud and urged that, if that one assertion was false, none of the assertions made by the substituted trustee should be credited. Her ultimate conclusion was that, if the note cannot be authenticated, the foreclosure sale must be vacated and the action dismissed.

The court denied the motion on three grounds – that appellant had failed to prove fraud by clear and convincing evidence, that if any fraud was proven, it was not extrinsic fraud, which is required for relief under Rule 2-535(b), and that she also had failed to show a meritorious defense to the foreclosure action.

DISCUSSION

Unquestionably, the trail of indorsements and assignments in this case is confusing – confusing even to lawyers and judges, and hopelessly confusing to laypersons. It is likely a byproduct of the awful Wall Street misadventure that wreaked such hardship and devastation to so many homeowners (and their families) in this country and that ultimately led the Maryland General Assembly and the Court of Appeals to impose greater regulation over, and transparency in, the foreclosure of residential mortgages and deeds of trust. The question here, though, is not whether mortgage lenders, servicers, and financiers should be punished for what they did, but whether cognizable fraud was committed in this case.

In recognition that "[f]or years Maryland courts have distinguished between extrinsic fraud and intrinsic fraud, finding the latter to be insufficient to find fraud under 2-535(b)," and in at least tacit recognition that the fraud alleged by her in this case was intrinsic in nature, appellant asks this Court to eliminate that distinction.[3] That, we are unable to do. The distinction, and the conclusion that only extrinsic fraud warrants consideration under Rule 2-535(b), was determined by the Court of Appeals, initially as a matter of common law and more recently as an interpretation of its own Rule, and only that Court is competent to alter those holdings. *See Schwartz v. Merchants Mort. Co.*, 272 Md. 305, 308-11 (1974); *Maryland Steel Co. v. Marney*, 91 Md. 360, 376 (1900).

[3] *See* appellant's brief, at 7.

The distinction, as articulated in *Schwartz,* is that "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 that truth was distorted by the complained of fraud." *Schwartz*, at 309. Unquestionably, the fraud alleged by appellant, if fraud at all, was intrinsic in nature.[4]

Apart from that, all of the relevant assignments and allonges alleged by appellant to be inconsistent were of record before the sale was conducted. Some were in the county land records; some were attached to the Order to Docket; some were in her own bankruptcy case; none were hidden from her. In several recent cases, the Court of Appeals has confirmed the requirement that "a homeowner/borrower ordinarily must assert known and ripe defenses to the conduct of a foreclosure sale prior to the sale, rather than post-sale exceptions." *Bates v. Cohn*, 417 Md. 309, 328 (2010); *Greenbriar Condo. v. Brooks*, 387 Md. 683, 740-41 (2005); *Thomas v. Nadel*, 427 Md. 441, 445 (2012); *101 Geneva LLC v.*

[4] The distinction is by no means an artificial one. Attempts have been made to upset enrolled judgments on the basis of perjured testimony, forged documents, and the like – matters that were intrinsic to the trial, that go generally to the credibility of witnesses, and that are typically weighed by the finder of fact in the trial. As the Supreme Court noted in *United States v. Throckmorton*, 98 U.S. 61, 68-69 (1878), as quoted by the Court of Appeals in *Schwartz*, "the mischief of retrying every case in which the judgment or decree rendered on false testimony, given by perjured witnesses . . . was in issue . . . would be greater, by reason of the endless nature of the strife, than any compensation arising from doing justice in individual cases." The kind of fraud that both the *Throckmorton* Court and the *Schwartz* Court regarded as sufficient ground to upset an enrolled judgment was preventing the unsuccessful party from exhibiting fully his case by fraud or deception on the part of the opponent, "as by keeping him away from court, a false promise of a compromise; or where the defendant never had knowledge of the suit, being kept in ignorance by the acts of the plaintiff . . . ." *See Schwartz*, 272 Md. at 308, 309.

Wynn, 435 Md. 233, 247, n.12 (2013). Although in *Thomas*, the Court left open the question of whether fraud in the deed of trust itself could be raised through exceptions to a sale, here, appellant never contended that she did not owe the debt or that the deed of trust was fraudulent in any way; nor did she raise her fraud defense either pre-sale *or* through exceptions to the sale. She acquiesced in the sale taking place; she acquiesced in the sale being ratified; and then, 81 days after the sale was ratified, sought to undo it all and go back to square one. That, the law does not allow.

JUDGMENT AFFIRMED; APPELLANT TO PAY THE COSTS.