UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 0059

September Term, 2015

MAXIMILIANO CASTILLO, JR.

v.

THOMAS P. DORE, ET AL.
SUBSTITUTE TRUSTEES

Meredith,
Nazarian,
Salmon, James P.
(Retired, Specially Assigned),

JJ.

Opinion by Salmon, J.

Filed: March 24, 2016

This appeal arises out of an order of the Circuit Court for Montgomery County denying Maximiliano Castillo, Jr.'s motion for stay of sale and dismissal of the foreclosure action initiated by Thomas P. Dore, et al.,[1] Substitute Trustees. Castillo, proceeding *pro se*, presents eight questions for our review, which we have rephrased and consolidated into one: Did the circuit court err in denying Castillo's motion for stay of sale and dismissal of the foreclosure action?[2]

[1]The Substitute Trustees are Thomas P. Dore, Mark S. Devan, Gerard F. Miles, Jr., Shannon Menapace, Erin Gloth and Christine Drexel.

[2]Castillo phrased the questions as:

1. Do the Appellees, namely Thomas P. Dore, et al. Substitute Trustees, have standing to institute the Foreclosure action as Substitute Trustees of HBSC Bank USA National Association as Trustee for Wells Fargo Asset Securities Corporation, Mortgage Pass through Certificates, Series 2007-AR4 as The Annotated Code of Maryland Real Property Article Section 5-105 requires that every Declaration of Trust, or amendment to it, respecting land shall be manifested and proved by a writing signed by the party who by law is enabled to declare the Trust?

2. Was the attempted assignment by HSBC Bank USA of a beneficial interest in the Trust, the assets of which wholly or partially consisted of land, void as the assignor was not lawfully authorized as stated in Ann Code of MD Real Property Article Sec 5-106 as the Appellees are not within the chain of assignments from Andrew Valentine the original Trustee or Wells Fargo Asset Securities Corporation, mortgage Pass through Certificates Series 2007-AR4?

3. Did the fact that Andrew Valentine did not transfer the interest in the Real Property which transfer would have been required to be recorded in the Land records of Montgomery County, Maryland pursuant to Ann

(continued...)

For the reasons set forth below, we shall affirm.

[2](...continued)

Code of MD. Real Property Article 3-501 and the failure to record the said failed assignment make the claim of the Appellees invalid?

4. Did the discharge of the Note in the Chapter 7 Bankruptcy result in the Appellee's loss of standing to proceed with a foreclosure action due to a lack of standing?

5. Are the Appellees "holders of the Note or Deed of Trust by way of assignment or otherwise? The Note has been discharged and the alleged assignment is violative of Maryland, New York and Federal law.

6. The Appellees hold themselves out as Trustees for Wells Fargo Securities Mortgage Pass through Trust Certificates Series 2007-AR4. Is that entity which in actuality is a Mortgage Backed Security (MBS) and not registered as a Business Trust required to be registered with the State of Maryland? If not does it legally exist in Maryland?

7. Was the Circuit Court's denial of the Appellant's Motion and refusal to permit his expert to testify, legally correct when Maryland Rule 2-311(f) requires the trial court to "hold a hearing before rendering a decision disposing of a claim or defense.["]

8. Was the Court's determination that the Appellant had not pled sufficient cause of action incorrect in light of the court's duty to assume the truth of all relevant and material facts?

I.
BACKGROUND

On February 28, 2007, Castillo and his former wife, Adriana L. Ferrante[3], executed an adjustable rate note in the amount of $776,000.00 for the purchase of residential property located at 9113 Fall River Lane, Potomac, Maryland (the "Property"). The lien on the Property was secured by a deed of trust, executed on the same date, which identified American Brokers Conduit as the lender, Andrew Valentine as the trustee, and Mortgage Electronic Registration Systems, Inc. (MERS) as the beneficiary of the trust.

On August 7, 2012, Castillo defaulted on his mortgage, and shortly thereafter, the Substitute Trustees filed an Order to Docket foreclosure action. Castillo filed a motion for stay of the sale and dismissal of the foreclosure action. During the hearing on the motion, Castillo sought to introduce expert testimony to explain "why the [a]ppellees were not true holders of the Note and Deed of Trust in question." The court refused Castillo's request to introduce expert testimony, and denied Castillo's motion for stay of sale and motion to dismiss the foreclosure action. The denial of his motion was conditional, however, because

[3]Adriana L. Ferrante is not a party to this action. Castillo indicates in one sentence in the "standard of review" section of his brief that the circuit court's finding that his ex-wife was a necessary party was also error. He includes no further argument on the issue and no citation to the record. Additionally, the issue is not addressed in the appellees' brief. We therefore deem it waived and decline to review it. *See Health Svcs. Cost Review Comm'n v. Lutheran Hosp. of Md., Inc.*, 298 Md. 651, 664 (1984)("This Court has consistently held that a question not presented or argued in an appellant's brief is waived or abandoned and is, therefore, not properly preserved for review.")

Castillo was given the right of posting a corporate bond in the amount of $50,000 and an affidavit demonstrating that the mortgage was current or otherwise fully satisfied. Castillo did not post bond or file an affidavit. Instead, he filed a motion for reconsideration, which the court denied. This appeal followed.

II.
DISCUSSION

We review the circuit court's denial of a motion to stay a foreclosure sale or to dismiss a foreclosure action for an abuse of discretion. *Burson v. Capps*, 440 Md. 328, 342 (2014). "We will reverse under this standard if we determine that 'no reasonable person would take the view adopted by the [trial] court[.]'" *Fishman v. Murphy ex rel. Estate of Urban*, 433 Md. 534, 546 (2013)(quoting *Aventis Pasteur, Inc. v. Skevofilax*, 396 Md. 405, 419 (2007)). We review the trial court's legal conclusions *de novo*. *Wincopia Farm, LP v.Goozman*, 188 Md. App. 519, 528 (2009).

Standing of the Substitute Trustees and HSBC Bank to enforce the note and the security provided by the deed of trust

According to the Affidavit Certifying Ownership of the Debt Instrument and Accuracy of Note submitted by the Substitute Trustees with the Order to Docket the foreclosure suit, "HSBC Bank USA, National Association as Trustee for Wells Fargo Asset Securities Corporation, Mortgage Pass-Through Certificates, Series 2007-AR4 is the owner and holder

of the loan evidenced by the Note." Castillo contends that "HSBC has no interest in the obligation and has no legal authority or right to appoint a Trustee."

The parties acknowledge, without citation to the record, that Wells Fargo Asset Securities Corporation became the owner of the note as a result of the securitization of the note into the Mortgage Pass-through Certificates, Series 2007-AR4 9 (the "Trust").[4] HSBC became the Trustee for the Trust, which included Castillo's note, and Wells Fargo Bank, N.A. became the servicing agent.

The Substitute Trustees maintain that, as the holder in possession of the note, HSBC has the right to enforce the note pursuant to the following indorsements on the allonge[5] of the note:

> PAY TO THE ORDER OF
> Wells Fargo Bank, N.A
> WITHOUT RECOURSE,

[4]"[S]ecuritization starts when a mortgage originator sells a mortgage and its note to a buyer, who is typically a subsidiary of an investment bank. The investment bank bundles together the multitude of mortgages it purchased into a 'special purpose vehicle,' usually in the form of a trust, and sells the income rights to other investors. A pooling and servicing agreement establishes two entities that maintain the trust: a trustee, who manages the loan assets, and a servicer, who communicates with and collects monthly payments from the mortgagors." *Deutsche Bank Nat. Trust Co., v. Brock*, 430 Md. 714, 718 (2013)(quoting *Anderson v. Burson*, 424 Md. 232, 237 (2011)).

[5]An allonge is a "slip of paper sometimes attached to a negotiable instrument for the purpose of receiving further indorsements when the original paper is filled with indorsements." *Deutsche Bank*, 430 Md. at 719 n.3 (quoting *Anderson*, 424 Md. at 240 n.10 (further citation omitted). Pursuant to § 3-204(a) of the Commercial Law Article of the Md. Code (1975, 2002 Repl. Vol.), an allonge is considered to be part of the Note. *Id.*

By: American Brokers Conduit
WITHOUT RECOURSE
PAY TO THE ORDER OF
WELLS FARGO BANK, N.A.

The issue of enforceability of a note by the party in possession was squarely addressed in *Deutsche Bank National Trust Co., v. Brock*, 430 Md. 714 (2013). There, the mortgagor challenged the enforceability of the note, claiming that regardless of which entity is the holder of the note, only the owner of the note could enforce it. *Id*. at 730. In resolving the issue, the Court of Appeals examined Md. Code, Commercial Law Article ("Com. Law") § 3-301 (1975, 2002 Repl. Vol), which provides that a promissory note may be enforced by:

> (i) the holder of the instrument, (ii) a nonholder in possession of the instrument who has the rights of a holder, or (iii) a person not in possession of the instrument who is entitled to enforce the instrument pursuant to § 3-309 or § 3-418(d). A person may be a person entitled to enforce the instrument even though the person is not the owner of the instrument or is in wrongful possession of the instrument.

Id. at 729. As the Court noted, in this context, a "holder" is "[t]he person in possession of a negotiable instrument that is payable either to bearer or to an identified person that is the person in possession." *Id*. (citing Com. Law § 1-201(b)(21)(i)). "A promise or order is payable to bearer if it states that: (a) it is payable to bearer or to cash; (b) indicates that an individual or entity in possession of the promise or order is entitled to payment; (c) does not state a payee; or, (d) otherwise indicates that it is not payable to an identified person." *Id*. (citing Com. Law § 3-109(a)). The court held that the entity in possession of the note that

was indorsed in blank is the holder of the note, and as the holder, is the entity entitled to enforce it. *Id*. at 732.

We reach the same result in this case. Here, the note is indorsed by American Brokers Conduit to Wells Fargo Bank, N.A. and then indorsed by Wells Fargo Bank, N.A. in blank. There is no gap in title. As the entity in possession of the note, HSBC is the holder of the note. Accordingly, Wells Fargo Bank, N.A., as servicing agent for HSBC, is entitled to enforce the note as a matter of law.

Contrary to Castillo's assertions, Wells Fargo Bank, N.A., as servicing agent and attorney-in-fact for HSBC, also had authority to appoint Dore et al. as Substitute Trustees. Castillo contends that HSBC "has no legal authority or right to appoint a Trustee" because there is no evidence of an assignment from Andrew Valentine, the original trustee, to HSBC. We disagree with that contention.

In support of the Order to Docket, the Substitute Trustees submitted an "Affidavit Pursuant to [Rule] 14-207(b)(4), and Declaration of Substitution of Trustees[.]" According to the Declaration, Wells Fargo Bank, N.A., acting as attorney-in-fact for HSBC, as Trustee for Wells Fargo Asset Securities Corporation, Mortgage Pass-Through Certificates, Series N2007-AR4, named Dore et al. as Substitute Trustees.

The appointment of trustees to enforce the lien on the property originates in the deed of trust. Castillo's deed of trust provides that American Brokers Conduit is the lender and

MERS is the beneficiary "solely as nominee for Lender" and that "[t]his Security Instrument secures to Lender ... (ii) the performance of Borrower's covenants and agreements under this Security Instrument and the Note," including the provisions pertaining to the foreclosure procedure in paragraph 22 and the substitute trustee provision in paragraph 24. The note, which also identifies American Brokers Conduit as the "lender," directly links ownership of the note to the allonge and the terms and agreements of the deed of trust. *See Anderson v. O'Sullivan*, 224 Md.App. 501, 513 (2015)(finding that the appointment of substitute trustees was appropriate where the deed of trust specifically incorporated the covenants and provisions of the note (and allonge)).

"The deed of trust cannot be transferred like a mortgage; rather, the corresponding note may be transferred, and carries with it the security provided by the deed of trust." *Svrcek v. Rosenberg*, 203 Md. App. 705, 723 (2012). Once the note was transferred to HSBC, the deed of trust that secured the Property was also transferred. *See Deutsche Bank*, 430 Md. at 728 ("[O]nce the note is transferred, 'the right to enforce the deed of trust follow[s].'" (citation omitted)) Accordingly, HSBC, through its servicing agent and attorney-in-fact, Wells Fargo Bank, N.A., had authority to appoint Dore et al. as substitute trustees to enforce the deed of trust and institute the foreclosure action.

Although Castillo argues that the Trust, does not "legally exist" because it is not registered as a Business Trust in the State of Maryland, he provides no citation to the record

or other support for this allegation. Whether HSBC (through Wells Fargo Bank, its attorney-in-fact) executed the Declaration of Substitution of Trustees on its own authority or as an agent for the trust "is a distinction without a difference." *See Deutsche Bank*, 430 Md. at 733(rejecting a similar claim that existence of trust was an issue of material fact, and finding that holder of the note, which was also trustee for the trust that owned the note, could appoint substitute trustees in either capacity).

Hearing on the motion for stay of sale

The circuit court held a hearing on Castillo's motion to stay, but Castillo nevertheless claims that he was denied a "true hearing." He also claims that the court's "failure to follow the requirement of MD Rule 2-311(f) in its decision not to permit the expert to testify was not legally correct."

Maryland Rule 2-311(f) provides that "the court may not render a decision that is dispositive of a claim or defense without a hearing if one was requested as provided in this section." Castillo's reliance on Rule 2-311(f), which governs hearings on motions generally, is misplaced. And in any event, Castillo received a hearing on the motion to stay. Therefore, appellant has shown no failure to abide by Rule 2-311(f).

Motions to stay foreclosure are governed specifically by Rule 14-211, which sets forth the required contents of the motion and the procedure for determining whether to grant or deny the motion. Rule 14-211 provides in pertinent part:

(3) Contents. A motion to stay and dismiss shall:

(A) be under oath or supported by affidavit;

(B) 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 plaintiff to foreclose in the pending action;

(C) be accompanied by any supporting documents or other material in the possession or control of the moving party and any request for the discovery of any specific supporting documents in the possession or control of the plaintiff or the secured party;

(D) state whether there are any collateral actions involving the property and, to the extent known, the nature of each action, the name of the court in which it is pending, and the caption and docket number of the case;

(E) state the date the moving party was served or, if not served, when and how the moving party first became aware of the action; and

(F) if the motion was not filed within the time set forth in subsection (a)(2) of this Rule, state with particularity the reasons why the motion was not filed timely.

* * *

(b) Initial determination by court. (1) Denial of motion. The court shall deny the motion, with or without a hearing, if the court concludes from the record before it that the motion:

(A) was not timely filed and does not show good cause for excusing non-compliance with subsection (a)(2) of this Rule;

(B) does not substantially comply with the requirements of this Rule; or

> (C) does not on its face state a valid defense to the validity of the lien or the lien instrument or to the right of the plaintiff to foreclose in the pending action.

The Rule provides the circuit court with discretion to deny the motion based on the record without first holding an initial hearing if the court concludes that the motion does not present a facially valid defense to the foreclosure action. Here, the court opted to conduct an initial hearing before denying Castillo's motion.

Castillo complains that the court should have permitted him to introduce expert testimony at the initial hearing in support of his motion. He proffered the following to the hearing judge regarding the expert at the hearing:

> MR. CASTILLO: Your Honor, I have a forensic expert that has audited the loan, and he is advising me that the loan, based on his examination has been satisfied. He's here today. I'd be happy to --
>
> THE COURT: The entire loan, the $700,000 has been satisfied? Is that – no, I'm asking you, Mr. Castillo.
>
> MR. CASTILLO: Yes.
>
> THE COURT: You're saying that you have paid $700,000 something on this debt?
>
> MR. CASTILLO: No, I'm not saying that. I'm saying that he --
>
> THE COURT: Well, then how have you satisfied a $700,000 mortgage if you haven't paid it? It was $776,000 when you took it out in 2007, right? When you and your then spouse took it out?

> MR. CASTILLO: Your Honor, with all due respect, I am suggesting that the forensic expert has looked into the archives of these mortgage backed securities, and the criteria [and] he has concluded is that the loan is satisfied.
>
> THE COURT: Okay.
>
> MR. CASTILLO: I never said that the loan was satisfied.
>
> * * *
>
> THE COURT: But ... in an effort to give the defendant every opportunity to present what he has not yet presented in his pleadings, namely, a contention that the mortgage obligation at the very least is current, if not fully satisfied as I have just now heard, none of which is reflected in the pleadings in this case.
>
> I will issue an order staying foreclosure, and particularly of the February 8th proceeding, upon posting of a $50,000 corporate bond. And then upon that posting, upon further condition to prevent any resumption of the proceedings, within 15 days the defendant will provide an affidavit with any supporting documents to indicate his claim of mortgage either payment as currently would be due, or full satisfaction, whichever the case may be.
>
> So you'll have the opportunity, sir, to present whatever it might be that your expert might wish to put together in a written form by your affidavit, accompanied by your affidavit as to your claims.

The court conditionally denied Castillo's motion to stay and/or dismiss, but permitted him to supplement his pleading with an affidavit that complied with the requirements of the Rule, namely, setting forth the factual and legal basis of his defense, by his own affidavit or that of an expert, that the mortgage was current or otherwise satisfied. Castillo declined to do so. Based on the foregoing, the court did not abuse its discretion in declining to permit

expert testimony at the initial hearing where the court correctly found that Castillo's pleading failed to establish a valid defense to the foreclosure.

Castillo's Chapter 7 bankruptcy

Castillo contends that his obligations pursuant to the terms of the note were discharged in his Chapter 7 bankruptcy case, and therefore, the appellees have no standing to proceed with the foreclosure action. Appellees point out that Castillo did not raise this issue in the circuit court, and therefore the issue is unpreserved. *See* Md. Rule 8-131(a) (Ordinarily, except for certain jurisdictional issues, "the appellate court will not decide any other issue unless it plainly appears by the record to have been raised in or decided by the trial court. . . ."); *accord Robinson v. State*, 404 Md. 208, 216 (2008). We agree that the issue is unpreserved as there is no indication that the bankruptcy issue was raised in the circuit court.

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