

UNREPORTED
IN THE COURT OF SPECIAL APPEALS
OF MARYLAND

No. 0073

September Term, 2015

NEW DEAL DEVELOPMENT, LLC

v.

BARBARA ZABEL, SURVIVING
MEMBER OF EAGLE WING PROPERTY
SOLUTIONS, LLC, ET AL.

Woodward,
Arthur,
Thieme, Raymond G., Jr.
(Retired, Specially Assigned),

JJ.

Opinion by Woodward, J.

Filed: February 1, 2016

*This is an unreported opinion, and it may not be cited in any paper, brief, motion, or other document filed in this Court or any other Maryland Court as either precedent within the rule of stare decisis or as persuasive authority. Md. Rule 1-104.

New Deal Development, LLC (“New Deal”) appeals from an order by the Circuit Court for Baltimore City denying its Motion to Vacate Judgment Foreclosing Rights of Redemption and Reopen Case to Include Additional Required Parties (“Motion to Vacate”) as to an April 2011 judgment in its favor foreclosing the right of redemption regarding certain property acquired by New Deal at a tax sale. New Deal presents one question for our review:

Did the circuit court err in denying [New Deal]’s Motion to Vacate Judgment Foreclosing Rights of Redemption and Reopen Case to Include Additional Required Parties?

For the reasons stated below, we answer this question in the negative and affirm the judgment of the circuit court.

FACTS AND PROCEDURAL HISTORY

In May 2009, the City of Baltimore sold property known as 2788 1/2 The Alameda, Baltimore, Maryland (“the property”) at a tax sale to New Deal.¹ New Deal subsequently filed a Complaint to Foreclose Rights of Redemption pursuant to Maryland Code (1986, 2012 Repl. Vol.), Tax-Property Article (“T.P.”), § 14-833. With its complaint, New Deal filed an affidavit of compliance, certifying that it had served all defendants in accordance with T.P. §§ 14-836 & 14-839. On April 4, 2011, the circuit court entered a judgment foreclosing the right of redemption, granting New Deal an absolute and indefeasible leasehold title in the property.

¹ For a discussion of the tax sale process, see *PNC Bank, N.A. v. Braddock Properties*, 215 Md. App. 315, 322-25 (2013).

The title search relied on by New Deal, however, failed to disclose that Talbot Consulting, LLC, and Lehman Brothers Bank, FSB (collectively, “the mortgagees”) had outstanding mortgages on the property at the time of the filing of New Deal’s complaint to foreclose the right of redemption. As a result, New Deal did not serve the mortgagees with its complaint. New Deal learned of the existence of the mortgages when one or both of the mortgagees filed a notice of foreclosure.

On December 18, 2014, New Deal filed its Motion to Vacate, requesting that the April 2011 judgment be vacated to permit New Deal to serve the mortgagees in the tax sale proceeding. New Deal attached to its motion an amended affidavit and title report. On February 17, 2015, citing T.P. § 14-845(a), the circuit court denied New Deal’s motion, stating: “[A] judgment rendered in a tax sale foreclosure proceeding shall not be reopened except on the ground of lack of jurisdiction or fraud in the conduct of the foreclosure proceeding.” This timely appeal followed.

STANDARD OF REVIEW

T.P. § 14-845(a) provides, in pertinent part: “A court in the State may not reopen a judgment rendered in a tax sale foreclosure proceeding except on the ground of lack of jurisdiction or fraud in the conduct of the proceedings to foreclose.” The Court of Appeals has remarked that appellate courts should apply the same standard of review for this statute as for Rule 2-535(b) and Maryland Code (1974, 2013 Repl. Vol.), Courts & Judicial Proceedings Article (“CJP”), § 6-408. *Canaj, Inc. v. Baker & Div. Phase III, LLC*, 391 Md.

374, 401 (2006). Accordingly, “the only issue before the appellate court is whether the trial court erred as a matter of law or abused its discretion in denying the motion.” *Id.* at 400-01 (quoting *In re Adoption/Guardianship No. 93321055/CAD*, 344 Md. 458, 475 (1997)).

DISCUSSION

New Deal contends that the mortgagees are necessary parties to its original complaint, and, therefore, the circuit court entered the April 2011 judgment with a jurisdictional defect. New Deal also asserts that the circuit court’s order denying its Motion to Vacate violates the public policy goal of providing marketable title to purchasers of property sold at tax sales.

New Deal is correct that the mortgagees are statutorily defined as “necessary parties” to the foreclosure of the right of redemption. T.P. § 14-836(b)(1)(iii) provides: “Except as otherwise provided in this subsection, the defendants in any action to foreclose the right of redemption shall be: any mortgagee of the property or any assignee of the mortgage of record, named as such in any unreleased mortgage recorded in the land records of the county.” In *PNC Bank, N.A. v. Braddock Properties*, we defined the parties listed in T.P. § 14-836(b)(1) as “necessary.” 215 Md. App. 315, 324 (2013). New Deal is incorrect, however, in its assertion that the failure to include the mortgagees as defendants constitutes a jurisdictional defect sufficient for the trial court to vacate the April 2011 judgment foreclosing the right of redemption.

Smith v. Lawler, 93 Md. App. 540 (1992), is directly on point and controls this case. In *Smith*, Frank Lawler purchased property at a tax sale, and the purchase price included

unpaid taxes not paid as a result of a previous tax sale. *Id.* at 542-43. Subsequently, Lawler filed a complaint to foreclose the right of redemption, which the court granted, and the property was conveyed to Lawler and his wife, as tenants by the entirety. *Id.* at 543. Lawler failed to discover, however, the existence of a lien on the property resulting from a deed of trust securing a promissory note from a prior owner, which note was eventually assigned to the Cadle Company – a necessary party pursuant to T.P. § 14-836(b)(1). *Smith*, 93 Md. App. at 543, 552. Approximately two years later, Amanda Smith, the substitute trustee for the Cadle Company, initiated foreclosure proceedings. *Id.* at 543. The Cadle Company then purchased the property at the foreclosure sale. *Id.*

The Lawlers moved to reopen both of the tax foreclosure proceedings. *Id.* The circuit court granted the Lawlers’ motion, ordering that the tax foreclosure and foreclosure proceedings be consolidated, that the tax sale orders and deed be vacated and voided, and that Smith and the Cadle Company be added as defendants in the tax foreclosure proceedings. *Id.* Smith and the Cadle Company appealed, contending, *inter alia*, that the circuit court erred in ordering that the tax sale orders and the deed be set aside and voided. *Id.* at 543-44.

This Court agreed and reversed the judgment of the circuit court, noting:

[T.P. § 14-845(a)] provides that a court may not reopen a judgment rendered in a tax foreclosure sale proceeding except on the ground of lack of jurisdiction or fraud in the conduct of the proceedings to foreclose. That section further provides that reopening of the judgment on the grounds of constructive fraud is not permitted unless

the application to reopen is filed within one year of the date of the judgment.

In the instant case, a final judgment was entered in the second tax foreclosure sale on March 21, 1989. The court had general revisory power for thirty days. Thereafter, for a period of one year, the judgment could have been reopened for fraud (including constructive fraud) or lack of jurisdiction. After one year, the judgment could have been reopened only for actual fraud or lack of jurisdiction.

Id. at 550-51 (internal citations omitted).

Applying the above law to the facts of *Smith*, we stated:

The trial court set aside and voided the prior tax sale orders and the deed to the appellees more than two and one-half years after the entry of the final judgment without any showing of actual fraud or lack of jurisdiction. It is clear that no actual fraud has occurred, nor do [the Lawlers] allege that fraud occurred. As we have stated, there was no jurisdictional defect as to the [Lawlers]. Thus, the trial court erred in setting aside and voiding the prior tax sale orders and deed to [the Lawlers].

Id. at 551.

We further explained:

When [the Lawlers] purchased the [p]roperty at the tax sale and subsequently failed to notify [Smith and the Cadle Company] and identify them as defendants when they attempted to foreclose the right of redemption, [the Lawlers] created a situation where they obtained the [p]roperty *subject to the rights of [Smith and the Cadle Company]*.

Id. (emphasis in original).

We observed that T.P. § 14-836(b)(2) permitted the plaintiff “not to include as a defendant any of the persons enumerated in paragraph (1) of this subsection. However, the

rights of any person not included as a defendant are not affected by the proceedings.” *Smith*, 93 Md. App. at 551-52 (quoting T.P. § 14-836(b)(2)). Accordingly, the Cadle Company retained its rights pursuant to the deed of trust – which included the right to foreclose in case of non-payment – when the Lawlers took the property without including the Cadle Company as a defendant in the tax foreclosure proceeding. *Id.* at 552. *See also PNC Bank*, 215 Md. App. at 328 (noting that if a plaintiff fails to serve a necessary defendant in a tax foreclosure proceeding, “any tax sale judgment does not affect [that defendant’s] property interest”).

In this case, New Deal failed to serve the mortgagees in the tax foreclosure proceeding. Accordingly, New Deal took title to the property subject to the rights of the mortgagees. *See* T.P. § 14-836(b)(2). There was no jurisdictional defect sufficient to reopen the proceedings pursuant to T.P. § 14-845(a).

We note that New Deal appears to have confused *in rem* jurisdiction and *in personam* jurisdiction. A tax foreclosure proceeding is an *in rem* proceeding, meaning that the court must have jurisdiction over the *res* – the thing – in question. *See PNC Bank*, 215 Md. App. at 328 (noting that “redemption foreclosure actions are *in rem*”). The “lack of jurisdiction” ground stated in T.P. § 14-845(a), which would be sufficient to reopen a tax sale proceeding, is the *in rem* jurisdiction over the property, not the *in personam* jurisdiction of a party. *See Bonds v. Royal Plaza Cmty. Assocs., Inc.*, 160 Md. App. 445, 455-56 (2004), *aff’d*, 389 Md. 187 (2005). New Deal does not contest the circuit court’s exercise of *in rem* jurisdiction over the property.

Furthermore, *New Deal* cites to cases in support of its argument that interpreted a previous version of the statutes governing tax foreclosure proceedings that did not include T.P. § 14-836(b)(2). *See PNC Bank*, 215 Md. App. at 337 n.11. Accordingly, these cases now stand for the proposition that, “when notice is not properly sent to a necessary party defendant, the court lacks personal jurisdiction to proceed against the defendant’s interest in the subject property.” *Bonds*, 160 Md. App. at 455 (emphasis omitted). In this case, the circuit court had *in rem* jurisdiction over the property, but it lacked *in personam* jurisdiction over the mortgagees, such that it could not determine the rights of the mortgagees as to the property in the tax foreclosure proceeding.

Finally, *New Deal* asserts that under T.P. § 14-832(2), there is a public policy of providing marketable title to tax sale purchasers. Indeed, T.P. § 14-832(2) expressly states this public policy goal. The statute, however, does not define “marketable title.” Given the presence of subsection 14-836(b)(2) in the statute, it appears that the legislature intended the concept of “marketable title” to include, among other things, title to property that is subject to the interest of any mortgagee under a prior mortgage of record or of any trustee under a prior recorded deed of trust. Indeed, in *Smith*, we impliedly recognized such title as marketable when we stated that “[i]n certain instances, tax sale purchasers may choose to have the property remain under instruments of indebtedness to avail themselves of lower interest rates, etc., so long as the instruments permit alienation.” 93 Md. App. at 552 n.7. Therefore, we conclude that by upholding the tax foreclosure judgment in the instant case,

which vested title to the property in New Deal subject to the interest of the mortgagees, neither this Court nor the circuit court contravened the statutory public policy of providing “marketable title” to the tax sale purchasers.

**JUDGMENT OF THE CIRCUIT COURT
FOR BALTIMORE CITY AFFIRMED.
COSTS TO BE PAID BY APPELLANT.**