UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 0770

September Term, 2015

ABDELHALIM ELGALLI

v.

JEFFREY B. FISHER, et al.
SUBSTITUTE TRUSTEES

Krauser, C.J.,
Leahy,
Friedman,

JJ.

Opinion by Leahy, J.

Filed: May 25, 2016

Appellees Jeffrey B. Fisher, Doreen A. Strothman, Virginia S. Inzer, and William K. Smart (the "Substitute Trustees") initiated foreclosure proceedings on August 21, 2013 in the Circuit Court for Prince George's County on the home owned by Appellant Abdelhalim Elgalli. Mr. Elgalli had fallen into default on his mortgage in the midst of a battle with cancer. He attempted to negotiate a loan modification with the lender, Green Tree Serving, LLC ("Green Tree"), but, due to his readmission to the hospital, it was never finalized. Mr. Elgalli then received notice that the Substitute Trustees scheduled a sale of the property.

Mr. Elgalli did not file any pre-sale motions. Following the sale of the property, Mr. Elgalli filed an untimely motion to stay ratification and extend the time for filing exceptions, contending, *inter alia*, that he had entered into a valid loan modification agreement, and that the lender "fraudulently induced [Mr. Elgalli] to refrain from filing [a] pre-sale motion." The circuit court denied Mr. Elgalli's motion before ratifying the sale. On appeal Mr. Elgalli poses one question: "Does *Bates v. Cohn* preclude exceptions based on a pre-foreclosure sale modification agreement where the defendant fails to file a pre-sale motion to stay or dismiss?"

We must affirm. The law precludes Mr. Elgalli from asserting that there was a valid loan modification agreement as a *post-sale* exception under Maryland Rule 14-305. Although the record shows that Green Tree would not extend Mr. Elgalli any additional time or opportunity to remedy a deficiency in the loan modification documents after he was admitted to the hospital in August 2014 for cancer treatment, we cannot conclude that

this indifference to Mr. Elgalli's circumstances equated to fraud or purposefully misleading Mr. Elgalli from asserting pre-sale defenses in a timely manner. *See Bates v. Cohn*, 417 Md. 309, 328 (2010).

BACKGROUND

On December 16, 2003, Mr. Elgalli purchased the home in which he and his family lived at 6726 Fairwood Road in Hyattsville, Maryland (the "Property"). The Property was encumbered by a deed of trust that secured his mortgage under a multistate fixed rate note dated April 9, 2008.

The parties stipulate that they entered into a valid loan modification in 2010.[1] Sometime in 2012, Mr. Elgalli was diagnosed with cancer and on July 2, 2012, he defaulted on the loan. After sending a notice of intent to foreclose on November 30, 2012, the Substitute Trustees, on August 21, 2013, filed an order to docket foreclosure in the Circuit Court for Prince George's County.

The Substitute Trustees filed a final loss mitigation affidavit on February 11, 2014, followed by Mr. Elgalli's request for mediation filed on February 21, 2014. The parties participated in mediation on April 9, 2014, but no agreement was reached during the mediation session. Consequently, on April 23, 2014, the circuit court entered an order allowing the Substitute Trustees to schedule a foreclosure sale, subject to Mr. Elgalli's right to file a motion to stay the sale or dismiss the foreclosure under Maryland Rule 14-211.

[1] Prior to 2010, the lender was BankUnited, FSB. According to a loan modification agreement between Mr. Elgalli and Green Tree, dated January 21, 2010, Mr. Elgalli was to make monthly payments of $1,021.46 for the time period at issue in this case.

Although the mediator's notification to the court certified that the parties could not reach an agreement, they continued to talk, and on or about April 15, 2014, Mr. Elgalli and Green Tree had agreed to a loan modification trial period plan. On May 1, 2014, Green Tree "instructed [the Substitute Trustees] to place their action on hold for loss mitigation review."

Mr. Elgalli made payments pursuant to the trial plan in May, June, and July 2014. A June 24, 2014 letter from Green Tree to Mr. Elgalli informed Mr. Elgalli that he had been approved for a permanent modification and provided the following instructions:

> **What you need to do:**
> *To accept this offer and take advantage of this opportunity, you must sign and return the enclosed Agreement by 7/24/2014.* After the signed Agreement has been received, your mortgage will then be permanently modified. If you do not provide the required signed Agreement by the above-referenced date, this offer will end and your loan will not be modified.

(Bold emphasis in original; italics emphasis supplied). This correspondence did not mention any requirement to have the documents notarized. Green Tree then sent a second letter to Mr. Elgalli, dated July 8, 2014, with the following instructions: "Enclosed is a detailed explanation of the process to have your modification package signed and notarized. **Upon completion of having the documents signed and notarized**, please return the documents to iMortgage Services[, the partner of Green Tree,] in the enclosed prepaid postage envelope." (Emphasis supplied). The second letter did require notarization, and the attached document contained an area specified for notarization.

Mr. Elgalli signed the loan modification agreement on July 29, 2014—five days after the return deadline.[2] Green Tree would later contend that they never received a notarized copy.

Mr. Elgalli then made what he thought was the first payment under the permanent loan modification plan on August 12, 2014. Mr. Elgalli's August 2014 account statement evidences a debit of $1,149.39 on that date from an electronic check to Green Tree. However, in August 2014, Mr. Elgalli also entered the hospital for cancer treatment. He remained in either a hospital or a rehab facility until October 31, 2014. Mr. Elgalli did not make his September or October payments.

On October 1, 2014, Green Tree sent a letter to Mr. Elgalli stating that he was no longer eligible for mortgage modification assistance because Mr. Elgalli "failed to provide the executed final modification documents within the required time frame." This ended Green Tree's efforts to approve a permanent loan modification.

In an attempt to salvage the loan modification, on October 15, 2014, Mr. Elgalli faxed the executed permanent loan modification agreement to Green Tree. The signature

[2] In his brief on appeal, however, Mr. Elgalli claims he signed and returned an earlier set of documents, stating that "[o]n July 8, 2014, **subsequent to Appellant returning the executed permanent modification**, Greentree [sic] sent a second letter indicating that it needed the permanent modification executed in the presence of a notary." (Emphasis supplied). The record, however, does not contain any copy or mention of an executed modification that predated July 8, 2014. Moreover, there is nothing in the record that shows Mr. Elgalli ever made the contention, prior to this appeal, that he sent an earlier set of documents to Green Tree.

block on the document faxed by Mr. Elgalli reads "7-29-2014," and the signature page contains an illegible signature in the notary block. [3]

On October 22, 2014, the Substitute Trustees provided notice of a scheduled foreclosure sale to Mr. Elgalli via first-class mail. The notice, clearly marked "**NOTICE OF FORECLOSURE SALE**," stated that the sale was scheduled for November 14, 2014 at 9:30 AM at the Circuit Court for Prince George's County and that advertisement of the sale would be running in the Washington Times. (Emphasis in original). Mr. Elgalli received this letter, but he did not file any motion to dismiss the foreclosure action or stay the sale.

The Substitute Trustees sold the Property and filed a report of sale on November 14, 2014. On December 18, 2014, the circuit court issued the order specified by Maryland Rule 14-305(c), stating that the sale of the Property would be ratified by January 21, 2015, so long as publication occurred and no cause to the contrary was shown through exceptions.

On February 24, 2015, a month after the deadline to file exceptions, Mr. Elgalli filed a motion to stay ratification and to extend the time to file exceptions to the sale. Mr. Elgalli argued, relying on *Granados v. Nadel*, 220 Md. App. 482 (2014), that the notice of sale was ineffective because he successfully modified his mortgage and cured the prior default.

[3] Underneath the signature is written the phrase, "[m]y commission expires 1-28-2017." No notarial seal is visible. At the top of this signature page are markings indicating that this document was faxed on October 15, 2014, at 1:03 PM. The Substitute Trustees contend that this document is "clearly without the proper notarization," but do not precisely explain their contention. Regardless, this document was faxed on October 15, 2014, several months after the original deadline for the notarized document.

Thus, according to Mr. Elgalli, the foreclosure action docketed on August 21, 2013 should have been dismissed and a new notice of intent to foreclose was required. He further contended that the foreclosure sale was a fraud in violation of the Maryland Mortgage Fraud Protection Act ("MMFPA").[4] Mr. Elgalli also maintained that the circuit court had broad equitable powers and should use these powers to set the sale aside because Green Tree and the Substitute Trustees had unclean hands. Finally, Mr. Elgalli's most important argument—because it is the only argument remaining on appeal—was that his defenses based on loss mitigation in a post-sale motion under extraordinary circumstances, including fraud, were not barred under *Bates v. Cohn*, *supra*. Specifically, Mr. Elgalli contended that the facts of his case fell within a potential exception announced in *Bates*, whereby the foreclosure is the product of the lender affirmatively and purposefully misleading the borrower and dissuading him from asserting timely pre-sale defenses.

The Substitute Trustees filed a response on March 18, 2015.[5] They asserted that loan modification and loss mitigation matters are not proper grounds for post-sale

[4] The MMFPA is codified at Maryland Code (1974, 2015 Repl. Vol.), Real Property Article ("RP"), § 7-401 *et seq.*

[5] Attached to this motion was a copy of a letter dated February 27, 2015 from Green Tree to Mr. Elgalli. It appears that, despite their tenacious requirement for precision and timeliness, Green Tree sent a letter to Mr. Elgalli at the end of February—*after* the Property had been sold and *after* exceptions were filed—informing him that they had "completed a review of [Mr. Elgalli's] inquiry into the loan modification." The letter explained that Green Tree had sent Mr. Elgalli a new set of the same documents for proper execution on July 30, 2014, (which is not in the record on appeal) via FedEx, along with a prepaid return envelope. According to Green Tree, they never received properly executed documents and they made several attempts to call Mr. Elgalli. The letter (continued…)

exceptions to the sale because, under *Bates*, these issues must be raised *before* the sale. They also maintained that post-sale exceptions are limited to the propriety and fairness of the sale itself. Further, they contended that Mr. Elgalli knew of the November 14, 2014 sale and chose not to file a motion to stay or dismiss. The Substitute Trustees argued that the default was never cured for the reason that the loan was never modified because Mr. Elgalli never properly executed the loan modification agreement. The Substitute Trustees also contended that Mr. Elgalli had no standing under the MMFPA, and that, regardless, the MMFPA provided Mr. Elgalli no relief.

The court held a hearing on the motion to stay ratification and extend time to file exceptions on June 3, 2015. At the start of the hearing, Mr. Elgalli's counsel asked the court to take notice that the June 24, 2014 letter from Green Tree did not contain any request for notarization, and that Mr. Elgalli returned the paperwork pursuant to that letter and, thereby, modified his loan. Mr. Elgalli's counsel further argued that his client failed to make his September and October payments because he was admitted to the hospital,[6] and that the failure to make these payments operated as a new default that required a new foreclosure action to be filed.[7]

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also stated that Green Tree cancelled the modification offer on October 1, 2014, because Green Tree had not received properly executed documents by that date.

[6] Counsel for Mr. Elgalli proffered the hospital visit as the reason for Mr. Elgalli's failure to provide the notarized page.

[7] Counsel for Mr. Elgalli repeated his arguments concerning the requirement of a second notice of intent to foreclose under *Granados*, *supra*, 220 Md. at 505. The Substitute Trustees conceded that, if the loan agreement had been validly modified, (continued…)

Mr. Elgalli took the stand and testified that Green Tree offered him a trial modification and that he made the three trial payments from May through July of 2014. He testified that he sent the paperwork back "in the last month [] in July," and that he made the payment in August pursuant to the modified loan agreement. When questioned about the notarization, Mr. Elgalli responded that he signed and notarized the last page of the document and returned it in a FedEx envelope that Green Tree sent him. On cross-examination, Mr. Elgalli admitted that Green Tree informed him that they had not received the executed modification agreement, but stated that he faxed the modification in July after being informed of this. Brian Staley, the custodian of records for Green Tree, testified that although the documents had been received, the notarized copy was missing.

Mr. Elgalli admitted that Green Tree informed him in October that it would not negotiate a loan modification agreement with him further, as reflected in the following colloquy between Mr. Elgalli and his counsel:

> [COUNSEL:] Now, Mr. Elgalli, when you returned from the hospital and/or the rehab facility, did you know that you were behind on your mortgage?
>
> [MR. ELGALLI:] Yeah. Yeah.
>
> [COUNSEL:] And did you reach out to [Green Tree] to ask if you can pay back those payments?
>
> [MR. ELGALLI:] Yes. Yes, I did.

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the Substitute Trustees would have been required to send a second notice of intention to foreclosure. However, the Substitute Trustees maintained that no loan modification agreement was executed because Mr. Elgalli never provided a notarized agreement as required in the July 8, 2014 letter from Green Tree.

> [COUNSEL:] And how did [Green Tree] respond?
>
> [MR. ELGALLI:] **They said no. They reject[ed] my offer and after that they sent me a letter saying they are going to take the house in November.**
>
> [COUNSEL:] Now, Mr. Elgalli, so you stated that they would not accept the payments?
>
> [MR. ELGALLI:] Yeah.

(Emphasis supplied).

In closing, Mr. Elgalli argued that the potential exception left open for silent fraud in *Bates* would allow a defendant to bring pre-sale loss mitigation or loan modification arguments as a defense in a motion for exceptions to sale. The Substitute Trustees argued that *Bates* closed the door for a pre-sale argument to be raised post-sale. They also observed there was no evidence that Mr. Elgalli ever sent the notarized document and that Mr. Staley testified that Green Tree never received the notarized document.

The circuit court denied Mr. Elgalli's motion for "multiple reasons." First, the court found that, under *Bates*, Mr. Elgalli's failure to litigate these issues pre-sale was fatal to his cause. The court noted that Mr. Elgalli testified that he was aware of the date of the sale and that he filed no motion to stay the sale and that the issue of whether there was a valid modification of the loan agreement could have been litigated before—but not after—the sale.

Second, the court observed that, according to the court's December 18, 2014 order, the motion for exceptions had to be filed by January 21, 2015, and Mr. Elgalli's motion

was not filed until February 24, 2015, making the motion tardy by more than a month. Third, the court noted that Mr. Elgalli did not call the notary to testify at the hearing, implying that the notary could have testified as to the circumstances of his notarization.

The court concluded:

> I find as a fact that the Defendant did not comply with the requirements set forth in the letter of July 8th, 2014; failed to comply to file presale under *Bates v. Cohn*; and did not file a timely motion or exceptions to the sale, and, therefore, the motion is denied.

On June 17, 2015, the circuit court entered an order ratifying the sale, and Mr. Elgalli timely noted the instant appeal on June 24, 2015.

DISCUSSION

When we review a trial court's ruling on exceptions of to a foreclosure sale, both law and facts are relevant. *See Jones v. Rosenberg*, 178 Md. App. 54, 68 (2008) (citing *S. Maryland Oil, Inc. v. Kaminetz*, 260 Md. 443, 451 (1971)). "In reviewing a trial court's finding of fact, we do 'not substitute our judgment for that of the lower court unless it was clearly erroneous' and give due consideration to the trial court's 'opportunity to observe the demeanor of the witnesses, to judge their credibility and to pass upon the weight to be given their testimony.'" *Id.* at 68 (quoting *Young v. Young*, 37 Md. App. 211, 220 (1977)). "Questions of law decided by the trial court are subject to a *de novo* standard of review." *Id.* (citing *Liddy v. Lamone*, 398 Md. 233, 246-47 (2007)).

A. The Relevant Maryland Rules on Foreclosure

As alluded to earlier, Maryland Rules 14-211 and 14-305 govern the situation at hand. Maryland law provides that, generally, a homeowner must assert known and ripe

defenses to a foreclosure, including the validity of the lien or lien instrument, *before* the foreclosure sale through a motion to stay the sale and dismiss the foreclose action pursuant to Maryland Rule 14-211. *Thomas v. Nadel*, 427 Md. 441, 442-43, 445 (2012) (citations omitted). Maryland Rule 14-211, which authorizes motions to stay a foreclosure sale and dismiss the action, provides, in pertinent part:

Rule 14-211. Stay of the sale; dismissal of action.

> (a) **Motion to Stay and Dismiss**.
>
> (1) Who May File. The borrower, a record owner, a party to the lien instrument, a person who claims under the borrower a right to or interest in the property that is subordinate to the lien being foreclosed, or a person who claims an equitable interest in the property may file in the action a motion to stay the sale of the property and dismiss the foreclosure action.
>
> (2) Time for Filing.
>
> (A) Owner-Occupied Residential Property. In an action to foreclose a lien on owner-occupied residential property, a motion by a borrower to stay the sale and dismiss the action shall be filed no later than 15 days after the last to occur of:
>
> (i) the date the final loss mitigation affidavit is filed;
>
> * * *
>
> (e) Final Determination. **After the hearing on the merits, if the court finds that the moving party has established that the lien or the lien instrument is invalid or that the plaintiff has no right to foreclose in the pending action, it shall grant the motion** and, unless it finds good cause to the contrary, dismiss the foreclosure action. If the court finds otherwise, it shall deny the motion.

(Emphasis supplied).

After the sale has occurred, a homeowner may file exceptions to the sale under Maryland Rule 14-305, but these exceptions generally may only concern irregularities with

the sale itself, *i.e.*, how the sale itself was conducted. *Thomas*, 427 Md. at 444-45. Maryland Rule 14-305, provides in pertinent part:

Rule 14-305. Procedure Following Sale.

* * *

> (c) Sale of Interest in Real Property; Notice. Upon the filing of a report of sale of real property or chattels real pursuant to section (a) of this Rule, the clerk shall issue a notice containing a brief description sufficient to identify the property and stating that the sale will be ratified unless cause to the contrary is shown within 30 days after the date of the notice. A copy of the notice shall be published at least once a week in each of three successive weeks before the expiration of the 30-day period in one or more newspapers of general circulation in the county in which the report of sale was filed.
> (d) Exceptions to Sale.
>
> > (1) How Taken. **A party**, and, in an action to foreclose a lien, the holder of a subordinate interest in the property subject to the lien, **may file exceptions to the sale. Exceptions shall be in writing, 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.** Any matter not specifically set forth in the exceptions is waived unless the court finds that justice requires otherwise.
> >
> > (2) Ruling on Exceptions; Hearing. The court shall determine whether to hold a hearing on the exceptions but it may not set aside a sale without a hearing. The court shall hold a hearing if a hearing is requested and the exceptions or any response clearly show a need to take evidence. The clerk shall send a notice of the hearing to all parties and, in an action to foreclose a lien, to all persons to whom notice of the sale was given pursuant to Rule 14-206(b).
>
> (e) Ratification. The court shall ratify the sale if (1) the time for filing exceptions pursuant to section (d) of this Rule has expired and exceptions to the report either were not filed or were filed but overruled, and (2) the court is satisfied that the sale was fairly and properly made. If the court is not satisfied that the sale was fairly and properly made, it may enter any order that it deems appropriate.

(Emphasis supplied). The Court of Appeals in *Bates v. Cohen,* discussed the interplay of these two rules governing the present case. *See* 417 Md. at 328-29.

B. *Bates v. Cohn*, its Progeny, and the Interplay Between the Two Rules

In *Bates*, the homeowner and the lender were in contact during the time between the declaration of default and the notice of the foreclosure sale, and the homeowner explored several options of working her way out of her default. 417 Md. at 312-13. On January 16, 2009, the trustees sent the homeowner a notice of intent to foreclose, and they followed this notice with an order to docket foreclosure on March 13, 2009. *Id.* at 313. On April 1, 2009, the homeowner called the lender, telling the lender that she had not pursued a loan modification more aggressively because she was waiting for a new federal program concerning distressed houses to become available; this program eventually did not apply to her situation. *Id.* at 313-314. She also called the trustees on that day, and an employee of the trustees informed her that the foreclosure sale had not yet been scheduled. *Id.* at 314. The trustees later served—by posting on the front door of Bates's home—the homeowner with the order to docket foreclosure and other required consumer notices informing her that she should obtain legal advice and that any motion for an injunction to stop the foreclosure sale must be filed before the foreclosure sale occurred. *Id.* The homeowner continued to communicate with the lender about a potential modification throughout this time. *Id.* at 314-15.

On May 6, 2009, the lender denied the homeowner's modification request, and, on May 13, 2009, the trustees sent the homeowner a letter stating that the foreclosure sale was scheduled for June 3, 2009. *Id.* at 316. Despite this, the lender sent a new letter on May 18, 2009, acknowledging a new loan modification request that the homeowner had

sent; this modification was denied two weeks later. *Id.* Meanwhile, however, the property was sold at public auction on June 3, 2009. *Id.* The homeowner then filed exceptions to the sale, under Maryland Rule 14-305(d), stating that the lender did not comply with federal pre-foreclosure loss mitigation requirements, and thus, the sale was not "'fairly and properly made'" and should be set aside. *Id.* at 316-17. The lender argued that such assertions were waived because, once a sale has occurred, the homeowner may only challenge procedural irregularities to the sale in a motion for exceptions after the sale. *Id.* at 317. The circuit court ruled in favor of the lender. *Id.* at 318.

In reviewing the case, the Court of Appeals observed that, before a foreclosure sale occurs, the homeowner may file a motion to stay the sale and dismiss the foreclosure action under Maryland Rule 14-211(a)(1). *Id.* The Court further observed that, after the property has been sold, a homeowner may file exceptions to the sale under Maryland Rule 14-305. *Id.* After reviewing the history of Maryland foreclosure cases over the previous five years, the Court "limit[ed under Maryland Rule 14-305] also the scope of review to exceptions alleging 'irregularity,' which [. . .] permits only those challenges to 'procedural irregularities at the sale or . . . the statement of indebtedness . . . .'" *Id.* at 326 (bracketed text added; unbracketed ellipses in original) (quoting *Greenbriar Condo., Phase 1 Council of Unit Owners, Inc. v. Brooks*, 387 Md. 683, 688 (2005)).

The Court instructed:

> We reaffirm the conclusion in *Greenbriar* 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. As we stated in *Greenbriar*, **after a foreclosure sale, "the debtor's later filing of exceptions . . . may challenge only procedural irregularities at the sale or . . . the statement of indebtedness**." [387 Md. at 688]. Such procedural allegations may charge that "the advertisement of sale was insufficient or misdescribed the property, the creditor committed a fraud by preventing someone from bidding or by chilling the bidding, challenging the price as unconscionable, etc." *Id.*

Id. at 327 (emphasis supplied). The Court held that "a homeowner/borrower ordinarily must assert known and ripe defenses to the conduct of a foreclosure sale prior to the sale, rather than in post-sale exceptions" and noted that a lender's failure to comply with loss mitigation requests pre-sale is a defense that must be raised pre-sale. *Id.* at 328.

The Court also discussed a possible exception:

> We do not rule here on whether a homeowner may raise under 14–305, 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. **Nor do we determine whether a homeowner/borrower may assert under 14–305, as a post-sale exception, claims 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.**

Id. at 327-28 (emphasis supplied). Thus, the Court left open the question of whether certain types of fraud, including fraud in dissuading the borrower from seeking to assert pre-sale defenses in a timely manner, could be raised post-sale in a motion under Maryland Rule 14-305. *Id.*

Thomas, *supra*, picked up where *Bates* left off. In *Thomas*, the homeowners alleged defects in the chain of title and characterized these defects as a "'fraud on the judicial system.'" 427 Md. at 443. The Court of Appeals, however, did not answer the question

left open in *Bates* and held only that a general allegation of fraud did not suffice to fall within this potential exception. *Id.* at 454. The Court noted that the homeowners in that case did not allege that they were tricked into signing the note or deed of trust and made no allegations of misrepresentation. *Id.* at 453. Thus, after *Thomas*, the potential exception left open in *Bates* remains just that—a potential exception. *See id.* at 454 (declining to answer the question left open in *Bates*).

This Court recently addressed the potential exception in *Devan v. Bomar*, 225 Md. App. 258 (2015). After reciting the *Bates* pre-sale/post-sale framework, *Id.* at 265-69, we found that the issue of fraud was not before us. *Id.* at 262. In *Devan*, the homeowner asserted in post-sale exceptions that the substitute trustees violated federal banking regulations. *Id.* at 262. The alleged violation in that case occurred a year before the foreclosure sale, and we held that offering this argument as an exception, rather than as a motion to stay the sale, was "too late." *Id.* at 269-70. In so doing, we stated that "[i]t was intended that knowable challenges to the legitimacy of a foreclosure action be raised in such a motion to dismiss and, if possible, be litigated before any foreclosure sale is authorized." *Id.* at 265.

C. Analysis

Mr. Elgalli argues that *Bates* reserved on the question of whether a borrower could assert, in a post-sale exception, a defense that the foreclosure sale was the product of the lender's affirmative and purposeful misleading of the borrower and dissuading him from asserting timely pre-sale defenses—and that his situation falls within this exception. He

contends that a valid contract in the modification agreement was formed when he returned the signed permanent modification agreement to Green Tree. Mr. Elgalli further maintains that the circuit court could have found that the legal requisites for a contract had been met but that the circuit court "failed to make a determination on whether a binding and enforceable agreement had been reached pursuant to the June 24, 201[4] letter." Mr. Elgalli argues that he did not anticipate that the Substitute Trustees would conduct the foreclosure sale because they had entered into an agreement to modify the loan and that this dissuaded him from filing a pre-sale motion. He concludes that, because the circuit court "failed to issue findings of fact as to the validity and enforceability of the permanent loan modification agreement, instead determining as a matter of law that such issue is precluded from consideration by *Bates v. Cohn* as a post-sale exception," the judgment should be reversed.

In riposte, the Substitute Trustees argue that, according to *Bates* and *Greenbriar*, a post-sale motion for exceptions may only challenge procedural irregularities in the foreclosure sale itself. Procedural irregularities include matters such as inadequacy of the property advertisement, inadequacy in the price obtained for the property, unfairness in the conduct of the sale, or improper notice of the sale. The Substitute Trustees maintain that the nothing adduced at the hearing revealed evidence of any "silent deceit"; and that, in fact, the evidence shows that Green Tree was very accommodating of Mr. Elgalli in that it gave him more than 62 days to provide the proper paperwork. The Substitute Trustees contend that, under *Bates*, a homeowner must assert "known and ripe defenses," including

pre-sale loss mitigation, before the sale. They point out that Mr. Elgalli knew about the sale, as reflected in his testimony and other evidence, and that he still did not file a motion before the sale to attempt to stop the sale, despite these matters being ripe for review. As such, the Substitute Trustees contend that the circuit court properly denied Mr. Elgalli's motion.

Finally, the Substitute Trustees argue that the circuit court's finding of fact that the parties did not enter into a valid loan modification agreement, as per the July 8, 2014 letter, was not clearly erroneous. They state that there is no evidence in the record, either testimonial or documentary, to support Mr. Elgalli's contention that he submitted the executed permanent modification documents before the July 8, 2014 letter.

Even Mr. Elgalli's arguments on appeal implicitly recognize that, unless the *Bates* exception applies, he is barred by law from making his post-sale, non-procedural contention that the foreclosure sale should be set aside because he had negotiated a valid mortgage modification agreement. *See* Maryland Rule 14-211; Maryland Rule 14-305; *Thomas*, 427 Md. at 442-46; *Bates*, 417 Md. at 328; *Greenbriar*, 387 Md. at 740-41; *Devan*, 225 Md. App. at 274-78. As the Court of Appeals explained in *Greenbriar*, setting aside a sale for reasons other than procedural irregularities "give[s] rise to conflicts among the interested parties." 387 Md. at 740 ("Generally, injunctions[8] are to be filed prior to the action which they seek to forestall. The timing of this remedy is not elective. Were a post-

[8] At the time of *Greenbriar*, the pre-sale motion to stay the sale and dismiss the foreclosure action was called a motion to enjoin the foreclosure. *See Thomas*, 427 Md. at 444 n.5

sale injunction retroactively overturning a sale permitted, such a remedy would not only be counter to the logic and nature of injunctions, but would give rise to conflicts among the interested parties. The debtor might seek another bite at the apple, or some other junior lien holder might enjoin only if the sale fetched a price insufficient to satisfy his debt.") There are more interested parties after the sale has been conducted, and, therefore, motions to stay the sale and dismiss the action should be filed *before* other interested parties, such as buyers, become involved. *See id.* at 740-41.

In reviewing whether the circuit court erred by denying Mr. Elgalli's post-sale motions under *Bates*, we observe contrary to Mr. Elgalli's argument that he "would not anticipate that the [Substitute Trustees] would, in fact, conduct the foreclosure sale[,]" the evidence does not demonstrate that Green Tree or the Substitute Trustees were affirmatively misleading him from asserting pre-sale defenses. There is ample evidence that Mr. Elgalli knew that the foreclosure sale could and would occur.

On October 1, 2014, Green Tree sent a letter to Mr. Elgalli stating that he was no longer eligible for mortgage modification assistance because Mr. Elgalli "failed to provide the executed final modification documents within the required time frame." Then on October 22, 2014, the Substitute Trustees sent Mr. Elgalli a notice of the sale of the Property scheduled for November 14, 2014. This letter is clearly marked "**NOTICE OF FORECLOSURE SALE**." (Emphasis in original). Further, Mr. Elgalli testified at the hearing that he received this letter and that he knew the sale was going to occur in

November.[9] Mr. Elgalli thus knew that the sale was going to occur in November 2014, and he still did not file a motion to stay the sale and dismiss the foreclosure action.

Mr. Elgalli's argument that a new contract was formed by a modification agreement—which is unsupported in the record save his own imprecise testimony—is not relevant to the issue on appeal. The fact that Mr. Elgalli did not file a pre-sale motion under Maryland Rule 14-211 is dispositive here. The circuit court noted:

> Under *Bates v. Cohn* we could have litigated that issue presale and determined whether there was or was not a valid agreement entered -- loan modification agreement entered into with the requisite degree of notarization and return. That was not done.

We agree with the circuit court that the proper forum for that argument was a pre-sale motion under Maryland Rule 14-211. *See Bates*, 417 Md. at 327. We hold that any issue concerning whether the loan was actually modified in the summer of 2014 should have been litigated prior to the sale of the home. We also hold that, even if the potential exception that *Bates* left open remains viable today, which we do not decide, it would not apply in this case because the record does not support the contention that Green Tree or the Substitute Trustees were dissuading Mr. Elgalli from filing a motion to stay the sale and dismiss the action. In fact, Green Tree and the Substitute Trustees had told Mr. Elgalli that (1) no modification was forthcoming, and (2) the foreclosure sale would occur on November 14, 2014.

[9] In the hearing, Mr. Elgalli said, "they sent me a letter saying they are going to take the house in November."

Finally, the circuit court denied, on an alternative basis, Mr. Elgalli's motion because the exceptions to the sale were filed a month after the court-mandated deadline for the filing exceptions. Maryland Rule 14-305(d) provides, in pertinent part, that "[e]xceptions shall be in writing, 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." The Rule 14-305(c) notice was entered in this case on December 18, 2014, and it specified that exceptions should be filed by January 21, 2015. Mr. Elgalli did not file his motion to stay the ratification of the foreclosure sale and to extend the time to file exceptions to the sale until February 24, 2015. Because the circuit court relied on untimeliness as a ground for denying Mr. Elgalli's motion, we may affirm on that ground as well.

JUDGMENTS OF THE CIRCUIT COURT FOR PRINCE GEORGE'S COUNTY AFFIRMED.

COSTS TO BE PAID BY APPELLANT.