Circuit Court for Prince George's County
Case No. CAEF15-20853

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 0045

September Term, 2020

RENE MITCHELL

v.

KEITH YACKO, ET AL.

Nazarian,
Leahy,
Wells,

JJ.

Opinion by Leahy, J.

Filed: February 26, 2021

Before this Court is the final entry of an appeals trilogy addressing a foreclosure. The underlying litigation began in the Circuit Court for Prince George's County when the appellees, who are the substitute trustees for the loan servicer, Keith M. Yacko, Robert E. Frazier, Thomas J. Gartner, Jason L. Hamlin, Glen H. Tschirgi, and Gene Jung (collectively, "Substitute Trustees"), filed an order to docket to foreclose on a note and deed of trust pursuant to a power of sale. The borrower, who is the appellant, Rene Mitchell, responded by filing a motion to stay sale and dismiss the action because the loan instruments were invalid. The motion was denied without a hearing.

In Part I, we held that, because Ms. Mitchell stated a "facially valid defense to the foreclosure" that the instruments were forged, the circuit erred in denying Ms. Mitchell's motion without a hearing. *Mitchell v. Yacko*, 232 Md. App. 624, 627 (2017). We required the Substitute Trustees to "demonstrate, upon remand, that this particular foreclosure has not 'be[en] marred by [] fraudulent, illegal, or inequitable conduct.'" *Id.* at 641 (quoting *Wells Fargo Home Mortg., Inc. v. Neal*, 398 Md. 705, 730 (2007)).

In Part II, on the Substitute Trustees' appeal from the subsequent nine-day evidentiary hearing, we held, among other things, that substantial evidence supported the circuit court's factual findings that the lien and lien instruments were invalid and that the Substitute Trustees did not have a right to foreclose. *Yacko v. Mitchell (Yacko II)*, ___ Md. App. ____, ____, No. 1586, Sept. Term 2019, slip op. at 2 (filed Feb. 26, 2021).

In this Part III, in the aftermath of the circuit court's order dismissing the foreclosure, we consider whether the court was clearly erroneous in denying Ms.

Mitchell—the victor after Part II—any attorneys' fees pursuant to Maryland Rules 1-341 and 2-706.[1]

For the reasons that follow, we hold that the circuit court was clearly erroneous in failing to consider two issues in its decision to deny Ms. Mitchell any attorneys' fees: (1) whether the Substitute Trustees were justified in filing their opposition to the motion to dismiss and maintaining the first appeal in light of their argument that the interest rate was modified; and (2) whether the Substitute Trustees had substantial justification to recast their theory of the case entirely after the case was remanded. To be clear, we do not hold that the circuit court erred in determining that the order to docket was not filed in bad faith or without substantial justification. However, though the *current* Trustees established, on remand, that they were not responsible for any forgery or variation in the lien instruments, by their own admission in opposition to the motion to dismiss, they were on notice that the lien instrument in their possession, as well as the copy filed in the land records, did not reflect the fixed-rate mortgage that, they averred, the lender,

[1] We consolidate the following two questions presented in Ms. Mitchell's opening brief:

> "a. Did the [c]ircuit [c]ourt err in denying Ms. Mitchell's Motion for Attorney Fees by solely addressing whether the Substitute Trustee initiated its Order to Docket action in bad faith and ignoring whether the Substitute Trustees' maintained its Order to Docket action without substantial justification and continued to harass Ms. Mitchell for almost five years in bad faith?
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> b. Did the [c]ircuit [c]ourt err in denying Ms. Mitchell's Motion for Attorney Fees were the [c]ircuit [c]ourt's Findings of Facts demonstrates that the Substitute Trustee initiated its Order to Docket in bad faith?"

Fremont Investment and Loan, gave Ms. Mitchell after the closing. Accordingly, we affirm, in part, and reverse, in part, the circuit court's decision and remand for further proceedings, consistent with this opinion.

BACKGROUND

We incorporate the facts and procedural history recited in our opinion in Part II, filed contemporaneously with this opinion. Our factual background begins with Ms. Mitchell's motion for attorneys' fees and costs.

Motion for Attorneys' Fees and Costs

On October 8, 2019, Ms. Mitchell filed her motion for attorneys' fees and costs—approximately one month after the circuit court granted her motion to stay sale and dismiss action for failure to state a claim, and four days after the Substitute Trustees noted a timely appeal. Pursuant to Maryland Rules 1-341 and 2-706, Ms. Mitchel sought costs and fees totaling $448,243.50, consisting of: (1) $56,175.00 for Ms. Mitchell's purported lost wages, determined by ascribing an hourly rate of $350.00 per hour to Ms. Mitchell's work in preparation of her case, multiplied by 160.5 hours; (2) $386,818.50 for attorneys' fees and costs defending the foreclosure; and (3) $5,250.00 in attorneys' fees and costs incurred in the first appeal, consisting of $5,000.00 for a flat fee and $250.00 to make and file the record extract and briefs with this Court.

In support of her motion, Ms. Mitchell averred that the Substitute Trustees "should have known that the order to docket foreclosure included documents-clearly false and materially altered to look genuine, namely a 'Redacted' adjustable rate note and deed of

trust, and [should have] refrained from filing the Order to Docket foreclosure on August 24, 2015." According to Ms. Mitchell, this Court

> determined that [the Substitute Trustees] failed to meet their requirement under Md. Rule 14-207(b)(1) of providing a "true and accurate copy" of the Note and Deed of Trust with the Order to Docket. Instead, the Court of Special Appeals determined that [the Substitute Trustees] provided questionable affidavits under Rule 14-207(b)(1)-(3) and an invalid note and invalid lien instrument. Through these false documents—specifically, without a valid lien, note or lien instrument—[the Substitute Trustees] presented neither a colorable claim under Rule 14-207(a)(1) nor came forward with a proper motive.

Ms. Mitchell averred that the Substitute Trustees' "attempt to foreclose under Rule 14-207(a)(1) with false documents was unjustified, frivolous and without proper purpose." To Ms. Mitchell, "the only apparent purpose of the foreclosure action was to harass and economically bludgeon [Ms. Mitchell] into submission using these false documents."

Ms. Mitchell advanced three main contentions in support of her motion. First, this Court, in Part I, "found that there is no 'evidence that a valid deed or note exists' and the [c]ircuit [c]ourt in apparent agreement found that '[the Substitute Trustees] failed to submit a valid adjustable rate lien instrument and note." Second, the circuit court "upon remand found that '[a]fter nine evidentiary hearings, [the Substitute Trustees] never explained why the documents filed with the Order to Docket are different from those filed with the land records, why they are redacted, what exactly was redacted, or why [the Substitute Trustees] have two different versions of the loan documents, i.e. redacted and not redacted." Third,

> During the Evidentiary Hearings, the [Substitute Trustees] for the first time proffered the contents of a so-called "Collateral File" that contained yet

> another version of the forged Promissory Note and Deed of Trust attached to the [Substitute Trustees'] Order to Docket.

Ms. Mitchell contended that, throughout the foreclosure, the Substitute Trustees "used the judicial system to heap financial and emotional abuse on [her] to force [her] to acquiesce to their fraudulent, illegal and improper use of the forged note and deed of trust."

The Substitute Trustees' Opposition

On October 23, 2019, the Substitute Trustees filed their opposition to Ms. Mitchell's motion for attorneys' fees and costs. They averred that they "had not taken Ms. Mitchell's allegations lightly" but had "diligently investigated them."

The Substitute Trustees documented their investigative efforts and the "evidence that supports the Substitute Trustees' side of the story."[2] First, the Substitute Trustees reviewed the "original collateral file in the foreclosing lender's possession" and determined that the "file does not have a single indication that the 2005 loan closing was cancelled, that the originals did not contain Ms. Mitchell's authentic and genuine signature, and does not contain a single copy of any loan documents with cancelled or void markings." Second, the Substitute Trustees averred that "[c]omparing the four corners of the copies of the Note and Deed of Trust filed with the order to docket and the

[2] As we explained in our most recent opinion, the Substitute Trustees initially argued, in response to Ms. Mitchell's motion to dismiss and in the first appeal, that "the 'record supported' the supposition that the parties did not intend to cancel the note or deed of trust but, instead, agreed to alter the interest rate (from variable to fixed)." *Yacko II*, slip op. at 5, 14-15. After we remanded the case, however, the Substitute Trustees "shifted their theory altogether and argued during the evidentiary hearing, and now on appeal, that the loan was never modified or cancelled." *Id.* at 5, 31. Instead, the Substitute Trustees claimed that, "after Ms. Mitchell defaulted, and foreclosure was imminent, she conjured her story and the supporting documents." *Id.* at 5.

originals, it is apparent that the Substitute Trustees only redacted loan identifier information" on the copies filed in the land record. Third, the Substitute Trustees' handwriting expert "concluded and opined that the signatures on the original Note and Deed of Trust . . . are not forged but were written and signed by Ms. Mitchell." Fourth, "in the thousand of pages of loan documents in the servicing file . . . , which includes copies of documents dating back to the closing in 2005, there is not a single document from which a reasonable person would believe or suspect that the loan was cancelled at the closing." Fifth, the Substitute Trustees reached out to others who may have been present at the closing—none recalled anything atypical, and nothing in the title company's file indicated "that the loan was canceled."

According to the Substitute Trustees, because a genuine dispute of fact existed concerning whether Ms. Mitchell canceled the closing and whether the note and deed of trust contained her signature, they had justification to initiate and maintain the foreclosure action. The Substitute Trustees argued that the following facts justified the foreclosure:

> (1) The foreclosure lender has possession of an original Note and original Deed of Trust with no void stamps or cancellation markings forwarded from Fremont; copies of these originals were filed to initiate the foreclosure; (2) title policies were issued on the loan and the purchase money loan funded on July 11, 2005; (3) the title company's closing file contained no documents indicating the loan contained no document indicating the loan closing was cancelled; (4) there were no copies of any documents submitted to the [c]ourt by Ms. Mitchell in the loan servicing file; (4) there was no indication in the loan servicing file that the adjustable rate note had been canceled; (5) Ms. Mitchell did not actually tell Ocwen or the Substitute Trustees that the July 11, 2005 loan closing was canceled until after the current foreclosure was initiated by way of the notice of intent to foreclose; (6) a forensic document examiner concluded that Ms.

> Mitchell's signatures on the original documents in the foreclosing lender's possession are genuine and authentic.

They argued: "[t]hat this [c]ourt ultimately disagreed [with the Substitute Trustees presentation of evidence and testimony], does not render the foreclosure initiated in bad faith or without substantial justification, justifying the extraordinary relief of sanctions."

The Substitute Trustees next asserted that "[f]or the same reasons as set forth above, the Substitute Trustees did not act in bad faith or without substantial justification in defending Ms. Mitchell's original appeal where Ms. Mitchell challenged this [c]ourt's order denying her motion to dismiss on the papers." Because the Substitute Trustees were the appellee in Part I of our appellate trilogy, to find that they did not have substantial justification to defend the appeal, the trial court "must, in essence, find that its own decision denying the motion to dismiss was without substantial justification or in bad faith. There is no evidence to support such a finding."

The Substitute Trustees then averred that Ms. Mitchell could not claim lost wages pursuant to Maryland Rule 1-341. Relying on *Frison v. Mathis*, 188 Md. App. 97 (2009), they contended that "there is no legal basis to award Ms. Mitchell her time spent reviewing pleadings or researching the law *pro se* or otherwise as she did not incur these amounts."

Finally, the Substitute Trustees declared that the "requested attorneys' fees are not reasonable or properly supported." Specifically, the Substitute Trustees contended that the fees lack "verified statements" and "supporting documentation" and are insufficiently

supported by vague, block billing descriptions, which hinder a court's ability to assess whether the time expended is reasonable.

Ms. Mitchell's Reply

In her reply, filed on November 19, 2019, Ms. Mitchell suggested that if the Substitute Trustees were successful, they "would have smugly asserted that they were entitled to attorney fees and costs as per Section 7(E) of the invalid Note and Section 14 of the invalid Deed of Trust without a care whether they met a high burden for the extraordinary relief of attorney fees and costs they now require of [Ms. Mitchell]." Ms. Mitchell pointed out that the circuit court found that the Substitute Trustees presented contradictory arguments which "call into question [the Substitute Trustees'] credibility regarding the events that took place during and after the closing."

Next, Ms. Mitchell criticized the Substitute Trustees' '"investigative efforts [as] . . . cursory and self-serving – as evidenced by the simple fact that [the Substitute Trustees] failed to meaningfully engage Ms. Mitchell prior to the filing of this fraudulent foreclosure action[.]"

Finally, Ms. Mitchell argued that *Frison v. Mathis*, 188 Md. App. 97 (2009), was inapplicable because Ms. Mitchell is not an attorney and her "lost wages are expenses [she] incurred by having on numerous occasions to take leave without pay[.]" Ms. Mitchell then provided three "verified statements" in support of her claim for attorneys' fees.

Memorandum Opinion and Order

On February 7, 2020, the circuit court entered a memorandum opinion and order denying Ms. Mitchell's motion for fees and costs. The circuit court explained its ruling:

> The Court of Appeals ha[s] stated that litigants generally pay their own attorney's fees. The exception to this Rule is [Maryland Rule] 1-341, which was intent[ed] to function primarily as a deterrent against abusive litigation." Christian v. Maternal-Fetal Med. Assocs. of Md., LLC, 459 Md. 1, 18 (2018). Therefore, awarding attorney's fees is considered "an extraordinary remedy, which should be exercised only in rare and exceptional cases." Id. To find bad faith under this rule, a court is required to make two separate determinations. First, the Court must determine whether the action was brought "without substantial justification or in bad faith." Legal Aid Bureau, Inc. v. Bishop's Gath [A]ssocs. Ltd. P'ship, 75 Md. App. 214, 220 (1998). Second, the Court must find "that the acts committed in bad faith or without substantial justification warrant the assessment of attorney's fees." Christian, 459 Md. at 21.
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> **THE COURT FINDS** that Ms. Mitchell does not meet the bad faith threshold, and is therefore not entitled to attorney fees under Md. Rule [] 1-341 and Md. [Rule] 2-706. Evidence from the record does not suggest that the Substitute Trustees brought this claim without substantial justification or in bad faith. Ms. Mitchell defaulted on the loan in January 2013, and on August 24, 2015, Substitute Trustees commenced the instant foreclosure action. This claim was not maintained under bad faith, but on a genuine dispute over whether the original lender canceled the loan, and whether M.s Mitchell signed the original Note and Deed of Trust. Furthermore, Ms. Mitchell won her appeal because the Court of Special Appeals concluded th[at] Ms. Mitchell presented a meritorious defense, which warranted a hearing by the circuit court judge. For these reasons, Ms. Mitchell is not entitled to attorney fees.

Ms. Mitchell noted a timely appeal to this Court on March 3, 2020.

DISCUSSION

I.

Maryland Rules 1-341 and 2-706

Maryland Rule 1-341 allows a court to award attorneys' fees for an "unjustified proceeding" brought "in bad faith or without substantial justification" by an opposing party. The Rule provides, in relevant part:

> In any civil action, if the court finds that the conduct of any party in maintaining or defending any proceeding was in bad faith or without substantial justification, the court, on motion by an adverse party, may require the offending party or the attorney advising the conduct or both of them to pay to the adverse party the costs of the proceeding and the reasonable expenses, including reasonable attorneys' fees, incurred by the adverse party in opposing it.

Md. Rule 1-341(a). Maryland Rule 2-706 requires "[a] party who seeks an award of attorneys' fees incurred in connection with an appeal, application for leave to appeal, or petition for certiorari shall file a motion for such fees in the circuit court that entered the judgment or order that is the subject of the appellate litigation." Ms. Mitchell does not contend that Maryland Rule 2-706 entitles her to attorneys' fees for her appeal under a different standard but analyzes her right due to the operation of Rule 1-341. Accordingly, we analyze Ms. Mitchell's right to attorneys' fees for her appeal as well as at the trial court by application of Maryland Rule 1-341.

The Rule "constitutes a limited exception to the American Rule, which is that, generally, 'litigants pay their own attorney's fees regardless of the lawsuit's outcome.'" *Christian v. Maternal-Fetal Medicine Assocs. of Md.*, 459 Md. 1, 18 (2018) (quoting *Johnson v. Baker*, 84 Md. App. 521, 527 (1990)). As the Court of Appeals has explained,

"it is clear from the history of the Rule, and the case law interpreting it, that Rule 1-341 was intended to function primarily as a deterrent" against abusive litigation. *Id.* at 19 (quoting *Worsham v. Greenfield*, 435 Md. 349, 369 (2013)).

Sanctions under Rule 1-341 serve as '"judicially guided missiles pointed at those who proceed in the courts without any colorable right to do so."' *Parler & Wobber v. Miles & Stockbridge*, 359 Md. 671, 706 (2000) (quoting *Legal Aid Bureau, Inc. v. Bishop's Garth Assoc. Ltd. P'ship*, 75 Md. App. 214, 224 (1988)). However, the Rule "is not intended to punish legitimate advocacy" or "chill[] access to the courts," and, consequently, should only be exercised "sparingly" in "rare and exceptional cases." *Christian*, 459 Md. at 19.

This Court explained in *Needle v. White, Mindel, Clarke & Hill*:

> The objective of the Rule is to fine-tune the judicial process by eliminating the abuses arising from the tendency of a few litigants and their counsel initiating or continuing litigation that is clearly without merit. The inherent danger in the process is that over zealous pursuit of the objective may result in what the Court, in *Eastway Construction Corp. v. City of New York*, 762 F.2d 243, 254 (2nd Cir. 1985), described as "stifling the enthusiasm or chilling the creativity that is the very lifeblood of the law."
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> * * * *
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> The cases make clear that the principle we stated in *Dent v. Simmons*, 61 Md. App. 122, 124, 485 A.2d 270 (1985) (Alpert, J.), is to be zealously guarded. That principle confirms that:
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> > [F]ree access to the courts is an important and valuable aspect of an effective system of jurisprudence, and a party possessing a colorable claim must be allowed to assert it without fear of suffering a penalty more severe than that typically imposed on defeated parties.

81 Md. App. 463, 470-71 (1990).

The Rule requires that before imposing the sanction, a court must find that the action was brought either in bad faith or without substantial justification. "In the context of Rule 1-341, we have defined bad faith 'as vexatiously, for the purpose of harassment or unreasonable delay, or for other improper reasons.'" *Christian*, 459 Md. at 21-22 (quoting *Inlet Assocs. v. Harrison Inn Inlet, Inc.*, 324 Md. 254, 268 (1991)). A claim lacks "substantial justification" when there is no "reasonable basis for believing that a case will generate a factual issue for the fact-finder at trial." *Inlet Assocs.*, 324 Md. at 268. Instead, "the parties' position should be 'fairly debatable' and 'within the realm of legitimate advocacy.'" *Id.* The Court of Appeals has stressed that "[w]hen considering whether a claim lacks substantial justification, the lack thereof cannot be found exclusively on the basis that a court rejects the position advanced by counsel and finds it to be without merit." *Christian*, 459 Md. at 25 (citation and quotations omitted)

When reviewing a circuit court's decision to grant or deny the imposition of attorneys' fees under Rule 1-341, we review "two separate findings that are subject to scrutiny under two related standards of appellate review." *Inlet Assocs.*, 324 Md. at 267 (1991). First, "[p]rior to ordering an award under Rule 1-341(a), a court must make an explicit finding that a party conducted litigation either in bad faith or without substantial justification. This finding should be supported by a brief exposition of the facts upon which it is based." *Ibru v. Ibru*, 239 Md. App. 17, 49 (2018). The court should base its decision on '"an examination of the merits' under the totality of the circumstances presented to the court[.]" *Christian*, 459 Md. at 23. The trial court's finding "will be upheld on appellate review unless it is clearly erroneous or involves an erroneous

application of law." *URS Corp. v. Fort Myer Constr. Corp.*, 452 Md. 48, 72 (2017). "So long as 'there is any competent material evidence to support the factual findings of the [] court, those findings cannot be held to be clearly erroneous.'" *Christian*, 459 Md. at 21 (citation omitted). In conducting this review, we view the evidence "in a light most favorable to the prevailing party," and require the appealing party to carry the "burden of demonstrating that a court committed clear error[.]" *Id.*

Second, if the court determines that litigation was pursued in bad faith or without substantial justification, the trial court must "separately find that the acts committed in bad faith or without substantial justification warrant the assessment of attorney's fees." *Id.* at 21. It is equally within the judge's discretion to not award fees as it is to award them, and the "findings of the amount of fees awarded must be clearly delineated lest the court abuse its discretion." *Id.* at 31. Among other things, the court must find that fees sought are "reasonable" and that they were actually "incurred by the party requesting the fees." *Id.*

In the present case, the circuit court determined that the evidence did not support that the "Substitute Trustees brought this claim without substantial justification or in bad faith" and, thus, did not reach the second level findings required to impose attorneys' fees. We analyze the court's determination after first describing the parties' contentions on appeal.

A. Parties' Contentions

Before this Court, Ms. Mitchell constructs three arguments in support of her contention that the circuit court erred in declining to award attorneys' fees under

Maryland Rules 1-341 and 2-706. First, Ms. Mitchell contends that the circuit court "did not apply the proper law when it denied [Ms. Mitchell's] Motion for Attorney Fees." Specifically, Ms. Mitchell avers that the circuit court "failed to consider both whether this action was initiated in bad faith and/or substantial justification [and] whether this action was maintained in bad faith and/or without substantial justification for the award of attorney[s'] fees" under Maryland Rules 1-341 and 2-706.

Second, Ms. Mitchell avers that the circuit court and this Court "found numerous instances of bad faith and lack of substantial justification" by the Substitute Trustees. In support, Ms. Mitchell claims that "several Audit Letters dated December 13, 2005, December 11, 2006, and December 10, 2007 . . . were transferred to U.S. Bank and U.S. Bank Trustee in September 2010" but were either intentionally removed or failed to be retained. According to Ms. Mitchell, "the retention of only the forged Note and Deed [of Trust] is evidence of the Substitute Trustees' bad faith."

Ms. Mitchell avers that, following this Court's ruling in the 2017 Appeal, she was forced to spend hours defending herself "to save her home" for the circuit court to "reach the same conclusion." Ms. Mitchell argues that "since the [c]ircuit [c]ourt found that the lien and the lien instrument presented by the [Substitute Trustees] in its Order to Docket are invalid, this Court should impose the extraordinary remedy of awarding attorney[s'] fees to the homeowner to deter the extraordinary action of seeking to foreclose on a home based on an invalid lien and lien instrument." She also contends that the "circuit court erred by insinuating the Substitute Trustee did not initiate the Order to Docket in bad faith." In support, Ms. Mitchell argues that the Substitute Trustees lacked a "substantial

justification" because the Substitute Trustees did not have "any witnesses" to dispute Ms. Mitchell's account and, accordingly, did not have a '"a reasonable basis for believing that their claims would generate an issue of fact." In her reply brief, Mitchell further avers that an "Order to Docket proceeding . . . was not the appropriate course under the facts in this case and is indicative of the malice and reckless disregard of Ms. Mitchell's rights by the Substitute Trustees."

Third, Ms. Mitchell contends, in her reply brief without citation to any authority, that public policy and equity dictate that she should be awarded attorneys' fees. Ms. Mitchell references contractual provisions in the invalid note and deed of trust, which entitle the lender and note holder to reimbursement for certain costs or attorneys' fees in pursuing a foreclosure action. Because the Substitute Trustees could have sought fees under these provisions had they been successful, Ms. Mitchell reasons, there should be "no surprise or objection" that she also is entitled to attorneys' fees "[b]ased on the forged ARM [adjustable rate mortgage] Loan Note and Deed of Trust."[3] Ms. Mitchell urges that "[e]quity demands the awarding of attorneys' fees and costs" to deter lenders

[3] We reject Ms. Mitchell's contention, raised before this Court for the first time in her reply brief, that the court should have relied on provisions in the invalid loan instruments and/or recognized a public policy predicate to award attorneys' fees. Initially, we note that the function of a reply brief is "limited to responding to points and issues raised in the appellee's brief. . . . It is impermissible to hold back the main force of an argument to a reply brief and thereby diminish the opportunity of the appellee to respond to it." *Oak Crest Vil v. Murphy*, 379 Md. 229, 241-42 (2004). Regardless, her contention fails for the simple reason that the instruments are invalid. Although fee shifting pursuant to a valid contractual provision is a limited exception to the American Rule, *Henriquez v. Henriquez*, 413 Md. 287, 294 (2010), it is inapplicable when the contract itself is invalid and unenforceable.

from "taking ill-advised and unfounded actions" without any consequence and to relieve the financial and legal disparity between the parties.

The Substitute Trustees defend the circuit court's determination, maintaining that "[c]ompetent evidence supports the [c]ircuit [c]ourt's finding that the Substitute Trustees did not initiate the foreclosure in bad faith or without substantial justification." In support of this averment, the Substitute Trustees state that they initiated the foreclosure because, among other things, Ms. Mitchell "borrowed $444,728.00 to purchase the property; she defaulted several times;" and the former loan servicer "had possession of an original, 'wet-ink' Note and Deed of Trust with no void stamps or cancellation markings." The Substitute Trustees emphasize that "[n]othing in [the] servicing records indicated that the loan had been canceled;" and that Ms. Mitchell "had (1) regularly made payments on the loan and (2) there was no indication that she ever raised the issue of her loan's alleged cancellation until the foreclosure proceedings began."

Likewise, the Substitute Trustees assert that competent evidence supported their decision to maintain the foreclosure action "because there was a genuine dispute of fact over whether the original lender cancelled the loan, and whether [Ms.] Mitchell signed the original Note and Deed of Trust filed with the Order to Docket." Further, according to the Substitute Trustees, Ms. Mitchell's three "de novo type arguments" do not support a finding of bad faith or lack of substantial justification." First, while Ms. Mitchell asserts that the loan servicer received three "audit letters" from Fremont alerting the servicer that the loan had been canceled, the Substitute Trustees state that "there is absolutely no evidence or testimony in the record that Fremont transferred the 'audit

letters,' even assuming they are genuine[.]" Second, the Substitute Trustees assert that this Court did not make in findings of fact in the first appeal and that, because Ms. Mitchell changed her story, she "sold this Court a bill of goods." Finally, the Substitute Trustees maintain that the "[c]ircuit [c]ourt's findings at the close of evidence are not findings of bad faith [] and do not establish a lack of substantial justification." According to the Substitute Trustees, Ms. Mitchell has not "identified anything . . . suggesting that the [c]ircuit [c]ourt applied the wrong legal standard, or failed to consider whether the action was maintained in bad faith or without substantial justification."

B. Analysis

We begin our analysis by noting that the Substitute Trustees are sophisticated professionals in the foreclosure process. The proper focus in this case is to examine their pursuit of a "summary" in rem foreclosure proceeding after Ms. Mitchell bought to their attention, in her motion to dismiss, that among other irregularities, the terms of her sales contract and the letters in her possession from the lender, Fremont, conflicted with the terms of lien instrument attached to the order to docket. The statutes and rules that govern foreclosure proceedings establish, as we reiterated in our most recent opinion, that "[t]he remedy afforded a lender in a foreclosure is premised on the requirement that the lender submit a true and accurate copy of the lien instruments. If a lender cannot establish, for whatever reason, the validity of its lien, it must pursue another avenue to assert its rights under the mortgage." *Yacko II*, slip op. at 3. In other words, there can be "no doubt as to the validity of the lien and lien instruments" and "an order to docket foreclosure is premised on the requirement that the lender has submitted true and accurate

copies of the lien instruments, has a right to foreclose, and can calculate the debt." *Id.* at 52.

We analyze the Substitute Trustees' justification to initiate and maintain the order to docket foreclosure in three stages: (1) commencement of the action on August 24, 2015 after the Substitute Trustees filed an order to docket foreclosure in the Circuit Court for Prince George's County; (2) the Substitute Trustees' opposition to Ms. Mitchell's "Motion to Dismiss for Improper Service and Motion to Stay Sale and Dismiss Action for Failure to State a Claim" under Maryland Rule 14-211; and (3) the Substitute Trustees' election to press forward, after this Court remanded this matter for an evidentiary hearing, which ballooned into a nine-day hearing.

Commencement of the Action

In light of the trial court's ruling on the merits, we fail to see how the court was clearly erroneous in determining that the order to docket was not filed in bad faith and was not filed without substantial justification. None of the parties disputes that Ms. Mitchell borrowed funds to purchase the property; that the lender disbursed payments under the loan to the former owners of the property and Ms. Mitchell's real estate agent for her commission; or that Ms. Mitchell moved into the house and regularly made payments on the loan for eight years, until her default. Significantly, the court found that the Substitute Trustees demonstrated they had in their possession an original, "wet-ink" note and deed of trust with no "VOID" stamps or other markings indicating that the loan had been canceled or modified. This means, that whatever went wrong with the

underlying mortgage transaction in this case originally, after two banks and three loan servicers, the trial court found that was not at the hand of the current Trustees.

We reject Ms. Mitchell's contentions on appeal that this Court and the circuit court "found numerous instances of bad faith and lack of substantial justification" by the Substitute Trustees. As an initial matter, we remanded the case to the trial court to take evidence and make the requisite factual findings that we cannot. *See Hartford Fire Ins. Co. v. Estate of Sanders*, 232 Md. App. 24, 39 (2017). Following a prolonged evidentiary hearing, the trial court explicitly found that there was no evidence suggesting that the "Substitute Trustees brought this claim without substantial justification or in bad faith."

Ms. Mitchell's Motion to Dismiss and the First Appeal

The record demonstrates that when Ms. Mitchell filed her motion to stay and/or dismiss under Maryland Rule 14-211,[4] the Substitute Trustees were put on notice that the

[4] We highlight that the mere filing of a motion to stay and dismiss under Maryland Rule 14-211 does not ordinarily derail an order to docket foreclosure. The motion must comply with the requirements of the Rule and, among other things, be "under oath or supported by affidavit"; "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"; and, "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[.]" Md. Rule 14-211(a)(3). Even then, once a defendant complies with these requirements, for a hearing to proceed on the merits, the court must find that the motion was timely, or excuse the non-compliance for good cause, and, conclude that the motion substantially complies with the requirements of the Rule. Significantly, the motion must "state[] on its face a defense to the validity of the lien or the lien instrument or to the right of the plaintiff to foreclose in the pending action." Md. Rule 14-211(b)(2). In the underlying case, the defendant had documentary evidence to support her compelling and corroborated attestations, and the Substitute Trustees themselves indirectly admitted that their documents were not correct.

lien instrument upon which they filed their summary order to docket foreclosure may not be valid. In their opposition to the motion, they admitted that it did not bear the fixed interest rate that Fremont subsequently "gave" Ms. Mitchell. Specifically, in response to Ms. Mitchell's contention in her motion to dismiss that the variable-rate loan documents had been cancelled, the Substitute Trustees asserted that the loan had not been cancelled, but rather, "Fremont gave [Ms. Mitchell] a fixed[-]rate mortgage" after the closing. Likewise, on appeal before this Court, the Substitute Trustees continued to assert that what occurred was a "modification of the adjustable interest rate mortgage to a fixed[-]rate mortgage" and that "Ms. Mitchell and Fremont agreed to modify the interest rate (from an adjustable interest rate to a fixed[-]rate mortgage) but did not cancel the Note and Deed of Trust."

Title VII of the Real Property Article ("RP") of the Maryland Code (1974, 2015 Repl. Vol.) and Title 14 of the Maryland Rules require that a plaintiff must affirm the validity of the lien and lien instruments in a foreclosure action commenced by filing an order to docket pursuant to a power of sale. Specifically, RP § 7-105.1(e) directs that "an order to docket or a complaint to foreclose a mortgage or deed of trust on residential property shall" include an affidavit stating, among other things, "[t]he date on which the default occurred and the nature of the default;" to be accompanied by "[t]he original or a certified copy of the mortgage or deed of trust; . . . [a] copy of the debt instrument accompanied by an affidavit certifying ownership of the debt instrument;" and "[i]f applicable, the original or a certified copy of the assignment of the mortgage for purposes

of foreclosure or the deed of appointment of a substitute trustee[.]" Likewise, Maryland Rule 14-207 requires that an order to docket "include or be accompanied by:"

> (1) a copy of the lien instrument supported by an affidavit that it is a true and accurate copy . . . ;
>
> (2) an affidavit by the secured party, the plaintiff, or the agent or attorney of either that the plaintiff has the right to foreclose and a statement of the debt remaining due and payable;
>
> (3) a copy of any separate note or other debt instrument supported by an affidavit that it is a true and accurate copy and certifying ownership of the debt instrument;
>
> (4) a copy of any assignment of the lien instrument for purposes of foreclosure or deed of appointment of a substitute trustee supported by an affidavit that it is a true and accurate copy of the assignment or deed of appointment[.]

Md. Rule 14-207(b).

In the instant case, the fallacy of proceeding with the summary order to docket foreclosure was patent when even after four years of litigation, including a two-year evidentiary hearing, the validity of the lien documents could not be established. We hold that the circuit court's failure to address whether the Substitute Trustees' continued pursuit of a *power of sale* foreclosure pursuant to an order to docket constituted bad faith or a lack of substantial justification was clearly erroneous. Specifically, the court should have considered whether the Substitute Trustees were justified in maintaining this action in light of their argument that the interest rate was modified. As we note above and in our prior opinion, an order to docket proceeding requires that a "lender has submitted true and accurate copies of the lien instruments, has a right to foreclose, and can calculate the debt." *Yacko II*, slip op. at 52.

Evidentiary Hearing on Remand

After the first appeal, we directed the Substitute Trustees to demonstrate, upon remand, that the foreclosure had not been "marred by fraudulent, illegal, or inequitable conduct." *Mitchell*, 232 Md. App. at 641 (citation omitted) (cleaned up). We decline to ascribe ***bad faith*** to the Substitute Trustees conduct, given that they merely complied with this Court's instruction in our first opinion.

However, as we noted in our most recent opinion, the Substitute Trustees "shifted their theory altogether and argued during the evidentiary hearing, and now on appeal, that the loan was never modified or cancelled." *Yacko II*, slip op. at 5. The circuit court did not address whether the Substitute Trustees were substantially justified in reversing their theory of the case and whether this switch was "fairly debatable" and "within the realm of legitimate advocacy." *Inlet Assocs.*, 324 Md. at 268. We further question whether the Substitute Trustees' new theory on remand resulted in expanding these proceedings beyond the summary purpose that they were intended. We hold that the circuit court clearly erred in failing to address whether the Substitute Trustees had substantial justification to alter their presentation of the case after the first appeal.

In sum, to guide proceedings on remand,[5] we reiterate that we discern error only in regard to the two issues that were not addressed in the circuit court's February 7, 2020

[5] As explained above, the circuit court did not reach the second level factual determinations concerning the reasonableness of the attorneys' fees requested, or even, whether any actions committed in bad faith or without substantial justification "warrant the assessment of attorney's fees." *Christian*, 459 Md. at 21. For guidance on remand, we note that we have not located any authority in Maryland law that supports Ms. (Continued)

memorandum opinion and order. Once again, the two issues are: (1) whether the Substitute Trustees were justified in filing their opposition to the motion to dismiss and maintaining the first appeal in light of their argument that the interest rate was modified; and (2) whether the Substitute Trustees had substantial justification to recast their theory of the case entirely after the case was remanded.[6]

JUDGMENT OF THE CIRCUIT COURT FOR PRINCE GEORGE'S COUNTY AFFIRMED, IN PART, AND REVERSED, IN PART; CASE REMANDED FOR FURTHER PROCEEDINGS CONSISTENT WITH THIS OPINION; COSTS TO BE PAID 50% BY APPELLANT AND 50% BY APPELLEES.

Mitchell's request to recover lost wages as "the costs of the proceeding," "reasonable expenses," or "reasonable attorneys' fees" under Maryland Rule 1-341. *C.f. Frison v. Mathis*, 188 Md. App. 97, 102-03 (2009) ("[T]he plain language of Rule 1-341 limits the attorney's fees recoverable to those incurred. A pro se attorney litigant has not 'incurred' any actual expenses in the nature of attorney's fees."); s*ee also Melkersen v. Ray Const. Co.*, 315 B.R. 45, 49 (D. Md. 2004) ("Travel expenses incurred to litigate one's claims and time lost from work are characteristic 'costs' in virtually every litigated case and are never deemed reimbursable as court costs.").

[6] While we are required to remand to the circuit court, we are very concerned at the prospect of continued litigation, given that the parties appear entrenched in their theories, and what still remains outstanding are the terms of any mortgage the lender may have on Ms. Mitchell's property. We advise the parties to consider alternative means to resolve this dispute and accept the circuit court's wise and considered determination that neither party to this appeal is directly responsible for the initial failed mortgage transaction.