Circuit Court for Montgomery County
Case No.: 475075V

UNREPORTED

IN THE APPELLATE COURT

OF MARYLAND*

No. 72

September Term, 2022

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DINA JACKSON

v.

JEFFREY NADEL, ET. AL.

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Kehoe,
Ripken,
Meredith, Timothy E.
(Senior Judge, Specially Assigned),

JJ.

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Opinion by Kehoe, J.

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Filed: February 3, 2023

*At the November 8, 2022 general election, the voters of Maryland ratified a constitutional amendment changing the name of the Court of Special Appeals of Maryland to the Appellate Court of Maryland. The name change took effect on December 14, 2022.

Pursuant to a deed of trust that gave them the authority to do so, Jeffrey Nadel, Scott Nadel, Daniel Menchel and Doreen Strothman (the "Substitute Trustees") filed a foreclosure proceeding against a residence owned by appellant, Dina Jackson. After the Circuit Court for Montgomery County ratified the foreclosure sale, Ms. Jackson filed post-sale exceptions, which the circuit court denied. On appeal, Ms. Jackson raises one issue: Did the trial court err in issuing the order of ratification of sale?

Because the answer to this question is no, we will affirm the judgment.

## BACKGROUND

In 2006, Ms. Jackson signed a purchase money deed of trust to the benefit of Wells Fargo Bank, N.A., to secure repayment of a $400,000 loan to her as part of the purchase price of a home in Silver Spring, Maryland. Unfortunately, Ms. Jackson had difficulty making payments and eventually defaulted on the loan. In June of 2019, Ms. Jackson received a notice of intent to foreclose from her loan servicer, Specialized Loan Servicing LLC, identifying Deutsche Bank National Trust Company as the trustee for the secured party, HSI Asset Securitization Corporation Trust 2007—WF1 (hereafter "Deutsche Bank").

The following dates are relevant to the issues raised in this appeal:

(1) On November 6, 2019, the Substitute Trustees filed an order to docket seeking to foreclose on the property under Md. Code Ann., Real Prop. § 7-105.1.[1]

[1] An order to docket "is the filing that initiates a foreclosure action in Maryland state courts." *Best v. Fed. Nat'l Mortg. Ass'n*, 450 F.Supp.3d 606, 618 n.6 (D. Md. 2020). *See* (continued)

(2) On December 26, 2019, the Substitute Trustees filed the final loss mitigation affidavit as required by Md. Rule 14-211(a)(2)(A).

(3) On February19, 2020, Ms. Jackson filed a suggestion of bankruptcy.

(4) On August 19, 2021, the substitute trustees filed a notice that Ms. Jackson's bankruptcy petition had been dismissed by the bankruptcy court on March 18, 2020. The property was thereafter scheduled for sale at public auction on November 17, 2021.

(5) On November 12, 2021, Ms. Jackson filed an "Emergency Objection and Request to Cancel Foreclosure Sale Scheduled For November 17, 2021[,]" challenging, among other things, the securitization of her deed of trust note.

(6) On November 15, 2021, the circuit court denied Ms. Jackson's motion for failure to comply with Maryland Rule 1-204(b).[2]

(7) On November 16, 2021, Ms. Jackson filed an "Emergency Motion to Stay Foreclosure Sale and to Dismiss Case (Md. R. 14-211)" in which she again challenged the securitization of her deed of trust note and also asserted that she "was never served with any documents filed in this action."

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RP § 7-105.1(e). Substitute Trustees noted their appointment as substitute trustees in a document filed simultaneously with the order to docket.

[2] Md. Rule 1-204(b) permits a court to enter an ex parte order shortening time:

> only if the motion sets forth (1) facts which satisfy the court that the moving party attempted but was unable to reach agreement with the opposing party and that the moving party notified or attempted to notify the opposing party of the time and place the moving party intends to confer with the court; or (2) facts which satisfy the court that the moving party would be prejudiced if required to comply with the requirements of subsection (b)(1) of this Rule.

Although Ms. Jackson's motion did not contain a request to shorten time, the court presumably treated it as such given the fact that the motion was filed just five days prior to the scheduled sale. *See* Md. Rule 2-311(b) (permitting a party "against whom a motion is directed [to] file any response within 15 days after being served with the motion[.]")

(8) On November 17, 2021, the property was sold at auction to Deutsche Bank National Trust Company, as trustee for HSI Asset Securitization Corporation Trust, for a bid of $494,182.26, which was a "credit bid," that is, a bid equal to the amount due on the deed of trust note.

(9) On December 9, 2021, the circuit court dismissed Ms. Jackson's November 16, 2021 emergency motion as moot because the foreclosure sale had already occurred. The court also noted that Ms. Jackson's motion was not filed in the time frame permitted by Md. Rule 14-211(a)(2).

This brings us to the motion that is the subject of this appeal, which is Ms. Jackson's "Objection to Sale and Request for Order to Show Cause." In it, she asserted that:

*First*, the deed of trust note signed by her was unenforceable. Ms. Jackson contends that her deed of trust note had been illegally and improperly "securitized," a process that took place when the note was transferred by Wells Fargo to Deutsche Bank. She argued that the transfer through MERS[3] was ineffective with the result that her loan "has been permanently converted to a securities transaction, resulting in a situation where every dollar submitted by [her] in mortgage payments was not applied toward 'interest' and 'principal' but [was] used for an improper purpose where the mortgage debt could never be paid off, or even paid down, by any amount."

*Second*, Deutsche Bank did not have the authority to make a credit bid at the auction. She states:

[3] "MERS" is an acronym for "Mortgage Electronic Registration System," which is "a private land-title registration system created by mortgage banking companies to expedite the [mortgage] securitization process." *Anderson v. Burson*, 424 Md. 232, 237–38 (2011).

> In the instant case, it is doubtful that the party identified as the "lender" in Defendant's loan documents (Wells Fargo Bank, N.A.) actually loaned its own money; however, it was not Wells Fargo that purportedly "transferred" the loan to the securitized trust (HSI Asset Securitization Corporation Trust 2007-WF1) through its "trustee" (Deutsche Bank National Trust Company), it was the "straw man" entity known as Mortgage Electronic Registration Systems, Inc. ("MERS") by way of the 2012 "Assignment of Deed of Trust."

*Finally*, she "demand[ed] an opportunity to impeach" Cynthia Wallace, who signed an affidavit to the effect that the principal balance due on the note at the time the foreclosure action was filed was $464,939.15, consisting of $401,000 in unpaid principal and $63,939.15 in accrued interest and costs. She continues:

> the bottom line is that for these numbers to be true, the amounts of "interest" and "principal" must appear on the books and records of the securitized trust for tax and accounting purposes; and considering the securitized trust was created as a "pass-through" entity, where NONE of the mortgage payments were ever accounted for as "receivables" for this tax-exempt "conduit," but instead, "passed through" to the ultimate recipients – the secondary-market investors – this false statement will be impossible for Ms. Wallace to "prove," and should be enough for the Court to dismiss the case and cancel the fraudulent "sale" immediately.

On February 28, 2022, the circuit court held a hearing on the motion. The court explained that it was treating Ms. Jackson's motion as filing as exceptions to the foreclosure sale under Md. Rule 14-305(e). On February 28, 2022, the court heard and denied Ms. Jackson's motion, explaining that:

> [W]e're at a point in the process now where this property was sold at a foreclosure. There were several motions filed to stay, which were denied.
>
> [F]ollowing the sale there was a report of sale that was filed by the trustees, and at this point the right that exists of Ms. Jackson is that she has the right

> to show that there was . . . either some problem with the report or there was some irregularity that occurred during the sale. And that deals with issues such as notice. Typically that's usually the issue. But notice of the sale, when and how it was transacted, whether the funds were collected, how they were accounted for, things of that nature. So there's been nothing that has been demonstrated here that shows that the sale, that there was any irregularity in the sale that occurred.
>
> So at this point I'll deny the motion that's been filed here, and I'll ratify the sale.

On March 11, 2022, the court signed an order ratifying the foreclosure sale. Ms. Jackson filed a timely notice of appeal.

## THE STANDARD OF REVIEW

Appellate courts defer to a trial court's factual findings unless the findings are clearly erroneous, but we pay no deference to a trial court's rulings on legal issues. Md. Rule 8-131(c). The arguments that Ms. Jackson presents in her brief are legal ones.

## ANALYSIS

Ms. Jackson contends that the court erred in ratifying the sale because her loan was securitized, a practice that she maintains is illegal. Therefore, according to her, "every mortgage payment submitted by [her] was misapplied; i.e., used for an improper purpose[.]" The Substitute Trustees respond that loan securitization is legal and assert that the court's order should be affirmed because Ms. Jackson's exceptions failed to raise any issues with the procedure or manner of the sale. We conclude that the circuit court did not err when it denied Ms. Jackson's motion.

There are three matters of frequent dispute related to foreclosure proceedings and the Maryland Rules set out three distinct procedural pathways specifying how and when

those issues are to be presented to the circuit court. The first involves challenges to the *right* of the party attempting to foreclose the deed of trust to do so; the second involves challenges to the *way that the foreclosure sale was conducted*; and the third involves disputes over the *disposition of the proceeds of the sale*. The Maryland Rules set out different timeframes and procedural pathways for each category of objection.

First, prior to the sale, a borrower can ask the court to decide whether the party seeking foreclosure has the legal right to do so by filing a "motion to dismiss the foreclosure action or stay or enjoin a threatened sale" under Md. Rule 14-211(a). *Hood v. Driscoll*, 227 Md. App. 689, 693 (2016). The overriding theme of Ms. Jackson's appellate contentions is that the substitute trustees did not have the authority to file the foreclosure action. In the context of Ms. Jackson's appeal, such a motion *must* be filed *no later than 15 days after* the substitute trustees file the final loss mitigation affidavit. Md. Rule 14-209.1(c)(2).[4] The final loss mitigation affidavit was filed on December 26, 2019. Ms. Jackson did not file a challenge to the authority of the substitute trustees to foreclose on her property within 15 days of that date. Instead, she filed for bankruptcy and notified the circuit court of this fact on February 19, 2020. The bankruptcy court dismissed her bankruptcy petition and the circuit court received notice that it was dismissed on August 19, 2021. Assuming for purposes of analysis that her filing her petition for bankruptcy

[4] Md. Rule 14-209.1(c)(A)(ii) provides a different deadline if the property owner files a postfile request for mediation. This doesn't apply to this case because Ms. Jackson did not file such a request.

somehow reset the clock, Ms. Jackson would have been required to file her motion to stay the sale and dismiss the foreclosure proceeding within 15 days of August 19, 2021. But she did not file her motion until November 16, 2021. By any measure, Ms. Jackson's motion objecting to the sale and requesting an order to show cause was untimely.

As we have explained, there are two other means of challenging a foreclosure sale: A borrower may "file exceptions to a sale that already has occurred" under Md. Rule 14-305(e). Additionally, a borrower may file "exceptions to the auditor's report following ratification of a sale" under Md. Rule 2-543(g). *Hood*, 227 Md. App. at 693-94 and n.1. Ms. Jackson's motion falls into the "exceptions to a sale that already has occurred" category.

The Supreme Court of Maryland[5] has cautioned 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." *Bates v. Cohn*, 417 Md. 309, 328 (2010). In *Bates*, the Court further explained that Md. 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." 417 Md. at 327. After the sale occurs, a homeowner no longer has the right to challenge the lender's right to foreclose; instead the homeowner

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can file "exceptions" to challenge the way that the sale was conducted. *Bates*, 417 Md. at 319 n.9.

As a result, the focus of post-sale exceptions "is on the conduct of the sale, not whether the trustee had a right to have the property sold." *Hood*, 227 Md. App. at 695. In other words, "only procedural irregularities in the foreclosure sale" may be challenged in exceptions filed under Md. Rule 14-305. *Jones*, 178 Md. App. at 69. The concept of "procedural irregularities" extends to matters such as: errors in the advertisement of sale, wrongful conduct by the secured party to prevent someone from bidding or otherwise interfering with the bidding process, and/or challenging the sale price as unconscionably low. *Jones*, 178 Md. App. at 69. (citation omitted).[6]

In her brief, Ms. Jackson does not challenge the circuit court's denial of her pre-sale motions. She presents three contentions as to why the sale should be set aside:

*First*, Ms. Jackson asserts that Wells Fargo (the secured party in her deed of trust) transferred the note to Deutsche Bank in its capacity as trustee for the HSI Asset Securitization Corporation Trust 2007—WF1. As a result, she contends that:

> ALL of [her] mortgage payments were handled in accordance with the terms of the securitization transaction, and NONE of them were ever "applied" by the supposed "lender" toward the reduction of "principal" and "interest" as was required by the terms of the loan documents.

[6] Lastly, borrowers may file exceptions to an auditor's report under Md. Rule 2-543(b) in cases where "the court, on motion of any party or on its own initiative" refers an action to an auditor "to examine, state, or settle accounts." When Ms. Jackson filed her notice of appeal, the court had not issued an order referring the action to an auditor.

*Second*, Ms. Jackson took issue with the fact the appellees sold the property at auction to Deutsche Bank for $494,182.26, which was apparently the amount due on the deed of trust note. She asserts that "only a legitimate creditor" may make a credit bid, and that amount must be for principal balance due on the note. She continues:

> In the instant case, it is doubtful that the party identified as the "lender" in Defendant's loan documents (Wells Fargo Bank, N.A.) actually loaned its own money; however, it was not Wells Fargo that purportedly "transferred" the loan to the securitized trust (HSI Asset Securitization Corporation Trust 2007-WF1) through its "trustee" (Deutsche Bank National Trust Company), it was the "straw man" entity known as Mortgage Electronic Registration Systems, Inc. ("MERS") by way of the 2012 "Assignment of Deed of Trust."

She argued that the transfer through MERS was ineffective with the result that her loan:

> has been permanently converted to a securities transaction, resulting in a situation where every dollar submitted by [her] in mortgage payments was not applied toward "interest" and "principal" but used for an improper purpose where the mortgage debt could never be paid off, or even paid down, by any amount.

*Third*, she "demand[ed] an opportunity to impeach" Cynthia Wallace, who signed an affidavit to the effect that the principal balance due on the note at the time the foreclosure action was filed was $464,939.15, consisting of $401,000 in unpaid principal and $63,939.15 in accrued interest and costs. She continued:

> the bottom line is that for these numbers to be true, the amounts of "interest" and "principal" must appear on the books and records of the securitized trust for tax and accounting purposes; and considering the securitized trust was created as a "pass-through" entity, where NONE of the mortgage payments were ever accounted for as "receivables" for this tax-exempt "conduit," but instead, "passed through" to the ultimate recipients –

> the secondary-market investors – this false statement will be impossible for Ms. Wallace to "prove," and should be enough for the Court to dismiss the case and cancel the fraudulent "sale" immediately.

The fatal difficulty with the first and the third of Ms. Jackson's contentions is that they are directed at the validity of the substitute trustees' claim to have the authority to initiate and proceed with the foreclosure sale. Md. Rule 14-211 and the appellate court decisions interpreting it have made it clear that these challenges must be presented to the court *prior* to the foreclosure sale and cannot properly be asserted in post-sale exceptions. *See, e. g., Hood,* 227 Md. App. at 694–95 (explaining that Md. Rule 14-211 specifies that challenges to the validity of the foreclosure proceeding must be brought prior to sale, and that Rule 14-305 is limited to challenges to the way that the foreclosure sale was conducted.

This leaves us with Ms. Jackson's contention that the credit bid by Deutsche Bank was improper. She is not correct. "It is well-settled in Maryland that a mortgagee [i.e. Deutsche Bank in the present case] may purchase the mortgaged property at a foreclosure sale by applying the mortgage debt to the purchase price, rather than by paying with cash or a certified check." *Citibank Fed. Sav. Bank v. New Plan Realty Trust.*, 131 Md. App. 44, 52 (2000).

Finally, Ms. Jackson directs us to *Bank of New York Mellon v. Nagaraj*, 220 Md. App. 698, 708 (2014), for the proposition that the circuit court was required to inquire into the allegations of fraud presented by her. If she had presented those allegations in the

time frame set out in Md. Rule 14-211, the court would have been required to look into the matter. But, as we have explained, she did not do this.

*Nagaraj* is of no assistance to Ms. Jackson. She asks us to hold that the circuit court was required to consider her contention that the substitute trustees did not have the right to foreclose the deed of trust even though she did not present the issue to the circuit court within the time constraints of Md. Rule 14-211. The issue in *Nagaraj* was whether a homeowner had the right to relitigate the validity of a foreclosure sale after the foreclosure sale had been affirmed on appeal. This Court held that the homeowner did not. 220 Md. App. at 707. There is nothing in the Court's analysis to support Ms. Jackson's contention that the court was required to consider her untimely-filed objections on their merits.[7]

Finally, we note that the centerpiece of Ms. Jackson's appellate contentions is a report (the "Report") prepared by Steven Bernstein, a certified mortgage securitization auditor. She relies on Mr. Bernstein's report to show that HSI Asset Securitization Corporation Trust 2007—WF1 (the trust to which her note was assigned) was itself

[7] Ms. Jackson also directs us to *Albert v. Hamilton*, 76 Md. 304, 307 (1892), for the proposition that a property owner can challenge the authority of a secured party after the foreclosure sale occurs. But *Albert v. Hamilton* was decided 130 years ago and the laws regulating foreclosure proceedings have changed significantly in the intervening period. In *Bates v. Cohn*, 417 Md. 309, 324–27 (2010), the Supreme Court of Maryland explained that *Albert* and similar cases from that era were based on "interpretations of older, different, and more latitudinous versions" of the rules and statutes governing the procedures for foreclosures in Maryland. The statements of the Court in *Albert* that Ms. Jackson relies upon no longer accurately describe Maryland law.

"securitized," that is, that there were multiple beneficiaries of the trust who could transfer their interests in the trust. Mr. Bernstein's report supports this conclusion, but Ms. Jackson's argument misses the point—Maryland does not prohibit trusts from acquiring deed of trust notes. Nor does Maryland law prohibit trusts from having multiple beneficiaries. What matters is whether Deutsche Bank had the authority to authorize the substitute trustee to initiate and proceed with the foreclosure action. Mr. Bernstein's report states that Deutsche Bank was the trustee of the trust. *See* Report at 4 (Extract, page 124).

In conclusion, we see nothing in the record of this case that supports a conclusion that this foreclosure proceeding was tainted by fraud, mistake, or irregularity. Accordingly, and although we sympathize with Ms. Jackson, we affirm the judgment of the circuit court.

**THE JUDGMENT OF THE CIRCUIT COURT FOR MONTGOMERY COUNTY IS AFFIRMED. APPELLANT TO PAY COSTS.**