

UNREPORTED
IN THE COURT OF SPECIAL APPEALS
OF MARYLAND

No. 0087

September Term, 2014

JASPER CUMMINGS, et ux.

v.

EDWARD S. COHN, et al. SUBSTITUTE
TRUSTEES

Kehoe,
Hotten*,
Leahy,

JJ.

Opinion by Leahy, J.

Filed: December 31, 2015

*Michele D. Hotten, J., participated in the hearing of this case while still an active member of this Court but did not participate in either the preparation or adoption of this opinion.

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

Appellants Jasper and Marie Cummings purchased their home, located at 11000 Spyglass Hill, Mitchellville, Maryland 20721 (the “Property”), on August 27, 1987. On or about January 14, 2008, in the wake of the financial crisis, Appellants refinanced their home under the federal Home Affordable Modification Program (“HAMP”)—enacted as part of the Emergency Economic Stabilization Act of 2008, 12 U.S.C. § 5219a. By late 2012, however, Appellants were unable to meet their obligations under the “Interest-Only Period Fixed Rate Note,” they signed, and Appellees (Substitute Trustees Edward S. Cohn, *et al.*) began foreclosure proceedings. On April 30, 2013, the Property was sold at auction to the highest bidder, the Federal National Mortgage Association (“Fannie Mae”).

Over Appellants’ opposition, the Circuit Court for Prince George’s County entered a Final Order of Ratification of Sale on December 17, 2013. Three days later, on December 20, Appellants filed a motion to vacate presenting new evidence and arguing that Appellees failed to provide notice of the proposed sale to the record owner of the property in accordance with Maryland Code (1974, 2010 Repl. Vol.), Real Property Article (“RP”), § 7-105.2. An order denying Appellants’ motion was signed on March 14, 2014, and they filed a notice of appeal on April 1, 2014.¹ On July 24, 2014, the circuit court stayed enforcement of the auction purchasers’ writ of possession pending the outcome of the appeal in this Court.

¹ Appellants also filed a motion for reconsideration in the circuit court on April 3, 2014, which was denied on July 10, 2014.

Appellants present the following issues, which we have rephrased:²

- 1) In considering Appellants' Motion Opposing Ratification of Sale and Exceptions to the Sale, did the court clearly err in finding, without holding a hearing, that Appellees properly notified the Appellants of the foreclosure sale of their home?

² Appellants' brief presented the following issues:

- i. Whether the April 30, 2013 foreclosure sale which was conducted without notice to Appellants deprived the Appellants of a property interest in violation of the due process clause of the Fourteenth Amendment to the United States Constitution and Article 24 of the Maryland declaration of rights.
- ii. Whether the Circuit Court erred in denying the Motion for Reconsideration of the Motion to Vacate Foreclosure Sale and the Ratification of the Foreclosure Sale when the evidence that the court relied upon, the Affidavit of Notice of Foreclosure Sale by the Substitute Trustee, was not based on Personal Knowledge as required by Maryland Rule 5-602, Maryland Rule 14-209 and Maryland Rule 14-210.
 - a. The Substitute Trustee's affidavit amounted to "fraud" or in the very least, a material irregularity, which is a valid reason to overturn the ruling ratifying the foreclosure sale and remanding the case back to the lower court.
- iii. Whether the Circuit Court erred in denying the Motion for Reconsideration and/or to Vacate Foreclosure Sale when irregularity existed under Maryland Rule 2-535(b) sufficient to set aside an enrolled judgment, when the irregularity consisted of:
 - a. The Substitute trustees affidavit that is not based on personal knowledge nor does it state when, where and to whom the Notice was sent, only that he saw the Notice of Foreclosure Sale and that there was an "unclaimed letter["];
 - b. The Substitute Trustee's affidavit contradicts their third[-]party affidavit from High Cotton Marketing in Birmingham, Alabama;
 - c. Affidavit by the manager with the United States Postal Service that stated the tracking numbers that were given by the Substitute Trustee had not entered the U.S.P.S. system; and
 - d. The Substitute Trustee did not provide any supporting evidence, such as a paid receipt after being challenged by the Appellants.

- 2) Did the court err in denying Appellants’ Motion to Vacate where new evidence regarding a procedural irregularity was presented?

In reviewing the circuit court's factual findings, we do “not substitute our judgment for that of the lower court unless it was clearly erroneous,” *Rosenberg*, 178 Md. App. at 68 (quoting *Young v. Young*, 37 Md. App. 211, 220 (1977)), and, therefore, we hold that the court did not err in denying the motion opposing ratification. However, in reviewing Appellants’ motion to vacate ratification of the foreclosure sale and responses thereto, we determine that the circuit court failed to acknowledge the new evidence presented by both parties and did not affirmatively exercise its discretion in ruling on Appellants’ motion. “The court's failure to exercise this discretion . . . is, itself, an abuse of discretion.” *101 Geneva LLC v. Wynn*, 435 Md. 233, 241 (2013) (citations and internal quotation marks omitted). Therefore, we vacate the circuit court’s order denying Appellants’ motion to vacate ratification of sale in light of the considerable new evidence and inconsistencies presented, and remand for an evidentiary hearing to establish whether notice of the sale was properly given pursuant to Maryland Rule 14-210.

BACKGROUND

On January 14, 2008, Appellants executed an “Interest-Only Period Fixed Rate Note” (“Note”) with Universal Trust Mortgage Corp. (“Lender”). The \$403,500.00 loan was secured by a Deed of Trust on the Property and recorded among the Prince George’s County Land Records at Liber No. 29722, Folio 567-83. Subsequently, the Note was endorsed to Fannie Mae.

Appellees' Affidavit of Mailing of Notice of Intent to Foreclose affirms that, on October 9, 2012, Appellees sent a Notice of Intent to Foreclose to the Appellants through the United States Postal Service ("USPS") "by certified mail, postage prepaid, return receipt requested and first class mail." Appellants do not dispute that this Notice of Intent was received. On October 12, 2012, Sean Kelly, servicing agent for loan servicer Flagstar Bank, FSB ("Flagstar"), executed an Affidavit of Default and Notice of Intent to Foreclose, which stated:

1. The default for which the instant foreclosure action has been initiated occurred on August 2, 2009, and this action has been initiated because the mortgage loan payment is 1165 days past due, as of October 10, 2012.
2. At the time the Notice of Intent to Foreclose was sent, the contents of the Notice of Intent to Foreclose were accurate.

On October 22, 2012, Flagstar executed an affidavit of default/indebtedness for Appellants' loan and indicated that Appellants had "failed to make all payments due since August 1, 2009."

On November 27, 2012, Appellees filed an order to docket the foreclosure action on Appellants' Deed of Trust.³ Appellees affirmed personal delivery of required foreclosure and loss mitigation forms to Appellants in another affidavit dated

³ Along with the request to docket the foreclosure action, Appellees filed copies of the following documents: Appointment of Substitute Trustees, Affidavit of Statement of Debt and Right to Foreclose, Non-Military Affidavit, the Deed of Trust, Affidavit Certifying Ownership of Debt Instrument, Notice of Intent to Foreclose, Affidavit of Default and Notice of Intent to Foreclose, Notice to Occupants, Preliminary Loss Mitigation Affidavit, Loss Mitigation Application and Eligibility Requirements and Instructions for completing same.

December 13, 2012, and, on January 9, 2013, filed their final loss mitigation affidavit, which averred that “[b]orrower has not provided the required financial package needed in order to review for loss mitigation options. Did not fulfill investor requirements/guidelines.”

On January 10, 2013, Appellants filed a request for mediation. Subsequently, Appellants and Flagstar signed an agreement to mediate and began mediation in the Office of Administrative Hearings on March 14, 2013. The next day, the mediator filed a notification of status in the circuit court indicating that no agreement was reached. Another mediation session was attempted; however, the mediation status report filed on March 26, 2013, again indicated that no agreement was reached. On April 11, 18, and 25, public notice of the sale of the Property was published in The Prince George’s Post. That public notice provided that, “[u]nder a power of sale contained in a certain Deed of Trust from [Appellants]. . .” the Property would be sold “at public auction . . . on **APRIL 30, 2013 AT 11:00 AM.**” (Emphasis in original). A few days later, on April 29, 2013, the circuit court entered an order allowing the secured party to schedule the foreclosure sale.

On April 30, 2013, Appellees filed an “Affidavit of Notice by Mail” affirming that, on April 11, 2013, they “mail[ed] notice of the time, place, and terms of sale, by certified mail and by first class mail, to the borrower(s), the record owner(s) of the property, and the holder of any subordinate interest in the property subject to lien, not more than 30 days and not less than 10 days before the date of the sale[.]” The affidavit listed those notified as Flagstar, Appellants, and the Prince George’s County Office of Finance.

The foreclosure sale was conducted that same day. Appellees' report of sale (filed May 8, 2013) provided:

Substitute Trustees did conduct the sale on April 30, 2013 at 11:00 AM, or thereafter, subsequent to the filing of a trustees' bond, and then did proceed to offer for sale the following property covered by said Deed of Trust commonly known as:

11000 Spyglass Hill Drive, Bowie, Maryland 20721

And the said Substitute Trustees sold said property unto Federal National Mortgage Association (Fannie Mae), Purchaser, for the sum of \$536,695.77, the said Purchaser being the highest and successful bidder.

On May 8, 2013, Appellees filed a proposed Order of Ratification, and the Clerk of the Circuit Court for Prince George's County entered a notice of the pending ratification on May 17. Appellees gave public notice of the pending ratification through publication in The Prince George's Post on May 23, May 30, and June 6.⁴

On May 30, 2013, Appellants filed a motion opposing ratification and exceptions to the sale. Appellants alleged, among other things, that they were never provided with notice of the pending sale, that the sale price was unconscionable, and that the public advertisement of the sale was insufficient. Appellees responded on June 21, 2013, that the allegation of failure to notify was incorrect, and, in support, attached what they claimed were copies of the notice of sale sent to Appellants by first class and certified mail. The attached documents included photocopies of the purported notice and of two envelopes

⁴ Appellants filed for Chapter 13 Bankruptcy on May 22, 2013, and the automatic stay pursuant to 11 U.S.C.A. § 362(a) was triggered. However, the parties entered into a consent order in the bankruptcy court terminating the automatic stay for the purposes of this foreclosure action on September 24, 2013. That order was filed with the circuit court on October 7, 2013.

addressed to Appellants Mr. Cummings and Ms. Cummings—bearing the return receipt stickers numbered 9171-6100-1162-9049-1143-00 and 9171-6100-1162-9049-1142-94. Neither photocopied envelope bears any postage or mark from the postal service to indicate that it was actually sent and processed.

In their June 27, 2013, response to Appellees’ opposition, Appellants again denied receiving any notice of the foreclosure sale and stated:

2. . . . [Appellees] enclosed what was purported to be the registered or certified mail in [Appellees’] Exhibit #2 . . . with the tracking number #9171-6100-1162-9049-1142-94 to Marie Cummings.
3. [Appellants] ha[ve] verified with the USPS website that that tracking number was not used as of June 24, 2013. *Please see Defendant’s Exhibit #1.*
4. Also, [Appellants] ha[ve] verified with the local branch of the Postal Service in Laurel, Maryland that this tracking number was not used.

* * *

6. . . . [Appellees] enclosed what was purported to be the registered or certified mail in [Appellees’] Exhibit #1 . . . with the tracking number #9171-6100-1162-9049-1142-00 to Jasper Cummings.
7. [Appellants] ha[ve] verified with the USPS website that that tracking number was not used as of June 24, 2013. *Please see Defendant’s Exhibit #3.*
8. Also, [Appellants] ha[ve] verified with the local branch of the Postal Service in Laurel, Maryland that this tracking number was not used.

The attached exhibits were printouts from USPS.com for each of the tracking numbers, which provided: “Delivery status information in not available for your item via this web

site. *A return receipt after mailing may be available through your local Post Office.*” (Emphasis added).

On November 4, 2013, Appellants filed a request for a hearing on their motion and exceptions, citing Rule 14-305(d)(2) which provides that, in the context of exceptions to a foreclosure sale, “[t]he court shall hold a hearing if a hearing is requested and the exceptions or any response clearly show a need to take evidence.”

Appellees’ next response was to file the affidavit of Substitute Trustee Richard J. Rogers on December 5, 2013. In his affidavit, Mr. Rogers affirms that he was the Substitute Trustee directing the foreclosure sale of the Property. Regarding notice of the sale, Mr. Rogers’s affidavit stated: “I have reviewed the records of the substitute Trustees and have personally seen and reviewed the copies of the Notice of Sale as well as the ‘returned’ certified mail envelopes to the [Appellants] coming back from the post office as ‘unclaimed.’”

That same day, the circuit court signed an order denying Appellants’ motion opposing ratification and their request for a hearing on the motion. That order was entered on December 11, 2013.⁵ The circuit court’s order provided, in part:

[Appellants] next argue that [Appellees] failed to notify them of the impending foreclosure sale by registered or certified mail. However, in their Opposition, [Appellees] attach copies of the notices sent to [Appellants] by

⁵ Both Mr. Rogers’s affidavit and the court’s order denying Appellants’ opposition were signed on December 5 and docketed on December 11, 2013. It is unclear from the record which was filed first and whether the circuit court received and considered the affidavit before making its decision on the motion. Docket entries in the circuit court’s civil case summary list the affidavit first; however, the detailed docket activity entries list the order before the affidavit. The court’s December 5 order does not reference the affidavit.

both first class and certified mail. This Court finds that [Appellees] properly notified [Appellants] of the sale.

[Appellants] also challenge the sale price of the Property as “unconscionable” and argue that the advertising of the sale was insufficient. This Court finds that the Property was sold at a public auction for a reasonable price. This Court further finds that the sale was properly advertised in the Prince George’s Post.

* * *

[T]he Court finds that [Appellants] have not presented any legal or equitable basis, pursuant to Maryland Rule 14-305, under which the sale should be overturned.

On December 17, 2013, the circuit court entered a final order of ratification of the sale.

On December 18, 2013, at the request of Appellants’ counsel, USPS local Branch Manager Tracy D. Daniels executed an affidavit affirming that the return receipt tracking numbers provided by Appellees were never processed through the mail system. Regarding both tracking numbers, Ms. Daniels, who has been with the postal service for more than 20 years, stated in her affidavit:

After checking our computer system and performing an internal audit; I have found that the tracking number[s] . . . ha[ve] not been utilized or processed within the postal service system; therefore, we are not able to establish the receipt of an article of certified mail, letter, package, etc. through the United States Postal Service system.

* * *

If [the] tracking number[s] had been utilized, the United States Postal Service would have had a record of the transaction, which would include the Label Number, Type of Service, Status of the Item, Date and Time, Location as well as Features[,] Arrival at the unit scan by Postal Staff.

With that affidavit attached, Appellants filed a motion to vacate the circuit court’s ratification of the foreclosure sale on December 20, 2013.^{6,7} Appellants again argued that Appellees failed to provide notice of the foreclosure sale, and relying on Ms. Daniels’s affidavit and the exhibits presented with their earlier motions, Appellants argued:

[Appellees] never provided this court with proof of certified mail as required by Maryland Rule Section 7-105.2. The Circuit Court for Prince George’s County has not received a copy of a green card nor the United States Postal Service Certified Mail Receipt by [Appellees].

* * *

[Appellees] provided an “Affidavit Pursuant to Md. Ann. Code RP Secs. 7-105.2 (C)(3)(11, 7-105.3(D)(2), and Maryland Rule 14-210 (E) . . .” however, this Affidavit was signed by Richard J. Rogers, Substitute Trustee, on or about April 30, 2013, yet, there is no date as to when the certified mail was received by the postal service, no green card and no receipt.

Appellants also argued that, by “submitting exhibits which purport[] to prove a fact that is not in existence, i.e., proof of certified mail when there has not been a mailing . . . knowing that the courts would rely on those statements,” Appellees had committed fraud.

⁶ Pursuant to Rule 8-202(c) a timely post-judgment motion filed pursuant to Rule 2-532, 2-533, or 2-534, tolls the time for filing a notice of appeal until there is “(1) a notice withdrawing the motion or (2) an order denying a motion pursuant to Rule 2-533 or disposing of a motion pursuant to Rule 2-532 or 2-534.”

⁷ In the context of a ten-day motion to under Rule 2-534, “the court may open the judgment to receive additional evidence, may amend its findings or its statement of reasons for the decision, may set forth additional findings or reasons, may enter new findings or new reasons, may amend the judgment, or may enter a new judgment.” *See also Renbaum v. Custom Holding, Inc.*, 386 Md. 28, 45-46 (2005) (recognizing that under Rule 2-534 “the Circuit Court retains almost a full measure of its discretion regarding a motion filed within ten days following the entry of judgment,” and that the court may consider “additional evidence that may cause the trial judge to enter a different, more appropriate judgment.”).

On January 8, 2014, Appellees filed a request for enforcement of judgment and a motion for possession of the Property. Two days later, on January 10, 2014, in response to the motion to vacate, Appellees submitted the affidavit of Ms. Stacie Lee, Implementation Manager for High Cotton USA, Inc., d/b/a High Cotton Direct Marketing (“High Cotton”). High Cotton was employed by Appellees for the purpose of mailing foreclosure notices. Ms. Lee’s affidavit, dated January 7, 2014, stated:

[O]n April 11, 2013, at the request of [Appellees] High Cotton sent out the notices for the foreclosure sale of 11000 Spyglass Hill Drive[,] and [] the attached is a copy of the stamped receipt from the United States Post Office reflecting the thirteen (13) certified mailings.

The document attached to Ms. Lee’s affidavit is labeled a PS Form 3877 and dated April 11, 2013. The document lists certified mailings, under the tracking numbers referenced above, to both Appellants, and it is marked with a semi-legible stamp reflecting the date April 11 and the zip code 35210-9998 (where High Cotton is located in Alabama). Appellees’ response to the motion to vacate also included new photocopies of the envelopes purportedly mailed to Appellants. This time, the photocopies show markings from the postal service indicating that the mail was returned as unclaimed and a postage machine stamp indicating that the mailing was made from a different zip code: 35217.

On January 14, 2014, Appellants filed a reply to the evidence presented by Appellees and alleged, *inter alia*, that Appellees were “using a return receipt label that was pulled off from another letter which is fraud.” In support, Appellants presented a second affidavit from USPS Branch Manager Tracy Daniels containing allegations that the return receipts relied on by Appellees did not conform to USPS procedures and were likely

fraudulent. Ms. Daniels reaffirmed that the tracking numbers had never been used and that “[e]ven Unclaimed Certified Mail would be in [the] system and available for tracking.”

Ms. Daniels also affirmed that she reviewed the documents attached to Appellees’ response (the second versions of the photocopied envelopes) and stated:

Upon inspection and further review, this is what I discovered:

- a. There is nothing indicating that the courier ever received the mail. At each attempt to deliver certified mail, the carrier will notate the letter with “NL” which means Notice Left, which should accompany the carrier initials or the carrier route number. . . . At the case at hand, there is no notation from the carrier.
- b. As each mail enter[s] the postal system, it is given a postal bar code which reflects the destination zip code. Here, the destination zip code is Towson, Maryland, which is a zip code of 21204. However, the destination zip code should have been 20721, which is Bowie, Maryland.
- c. The postal bar code reflects specific tasks. Here on the Return Receipt Label that was provided by [Appellees] the last several numbers on the top right hand corner reflects first, the route number and second, the date of mailing. There is 00, which is not a correct route number, but the date is 06/17/2013. If the letter was mailed on April 11, 2013, within 14 days of the letter being unclaimed, the letter would go back to the Forwarding Unit and returned to sender. Two months is not acceptable practice nor would holding mail for sixty days be tolerated.
- d. The evidence that has been provided by [Appellees] [is] missing the following items:
 - USPS Bar Code showing Received in Postal System – Received Scan.
 - Green Card
 - Carrier Notation
 - Inability to Track Documents
 - Conflict with Origination of Return Label Receipts which Reflects Towson Maryland not Alabama

- USPS Bar Code reflecting Destination Zip Code that proves it went through the postal system

While Appellants' motion to vacate was still pending, Appellees filed an amended motion for possession on February 3, 2014. Appellants responded to that motion on February 12, 2014.

On March 14, 2014, the circuit court signed an order denying Appellants' motion to vacate. The court stated:

As the basis for their Motion, [Appellants] argue that [Appellees] did not notify [Appellants] of the date and time of the April 30, 2013 foreclosure sale, as required by Md. Rule 14-210(b). Upon review of the file, [Appellants] made this same argument in their Motion Opposing Ratification of Sale (DE#14). In the Order denying [Appellants'] Motion Opposing Ratification of Sale (DE#22), the Court ruled that [Appellees] properly notified [Appellants] of the sale, and that [Appellants] did not present "any legal or equitable basis, pursuant to Maryland Rule 14-305, under which the sale should be overturned." [Appellants] have presented no new evidence or arguments in their instant Motion to support their allegation that the [Appellees] did not comply with the requirements of Md. Rule 14-210(b), nor have they presented any other evidence that would warrant vacating the ratification of the sale.

For reasons that are not clear from the record before this Court, this order was not entered until July 10, 2014. Nevertheless, Appellants filed a notice of appeal from this order on April 1, 2014.⁸ Appellants also filed a motion for reconsideration on April 3; however, the

⁸ Despite the premature filing of the notice of appeal, Rule 8-602(d) allows this Court, "through application of a legal fiction, to treat the [notice of appeal] as if timely filed after a final judgment." *Doe v. Sovereign Grace Ministries, Inc.*, 217 Md. App. 650, 662-63 *cert. denied sub nom. Doe v. Sovereign Grace Ministries*, 440 Md. 116 (2014) (citation omitted). Maryland Rule 8-602(d) provides:

(continued...)

docket entries in the circuit court reveal that no determination was made on that motion filed after Appellants’ notice of appeal.

On July 14, 2014, the circuit court entered a writ of possession in favor of the foreclosure sale purchaser (Fannie Mae) as well as an order to enforce possession and instructions to the sheriff. However, all execution in the case was stayed on July 24, 2014, pending the outcome of this appeal.

DISCUSSION

Standard of Review

“In ruling on exceptions to a foreclosure sale and whether to ratify the sale, trial courts may consider both questions of fact and law.” *Jones v. Rosenberg*, 178 Md. App. 54, 68 (2008) (citing *S. Md. Oil, Inc. v. Kaminetz*, 260 Md. 443, 451 (1971) (stating that questions of fact and law may be raised in exceptions to foreclosure sales)). A trial court’s factual findings are not clearly erroneous as long as they are supported by any competent material evidence in the record. *Saxon Mortgage Servs., Inc. v. Harrison*, 186 Md. App. 228, 262 (2009) (citing *Figgins v. Cochrane*, 403 Md. 392, 409, 942 A.2d 736 (2008)). “Questions of law decided by the trial court are subject to a *de novo* standard of review.” *Rosenberg*, 178 Md. App. at 68 (2008) (citing *Liddy v. Lamone*, 398 Md. 233, 246–47 (2007)). Finally, in reviewing the decision of the circuit court on a motion to vacate, “the

A notice of appeal filed after the announcement or signing by the trial court of a ruling, decision, order, or judgment but before entry of the ruling, decision, order, or judgment on the docket shall be treated as filed on the same day as, but after, the entry on the docket.

only issue before the appellate court is whether the trial court erred as a matter of law or abused its discretion in denying the motion.” *Canaj, Inc. v. Baker & Div. Phase III, LLC*, 391 Md. 374, 400-01 (2006) (quoting *In re Adoption/Guardianship No. 93321055/CAD*, 344 Md. 458, 475 (1997)).

I.

Exceptions to Foreclosure Sale

After a foreclosure sale, a debtor may file exceptions challenging procedural irregularities in the foreclosure sale under Rule 14–305(d). *Rosenberg*, 178 Md. App. at 69 (citation omitted). Rule 14-305(d) provides:

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).

This Court has recognized that procedurally inadequate notice of the foreclosure sale is a valid exception. *See, e.g., Jones v. Rosenberg*, 178 Md. App. at 69 (“The procedural irregularities might include: allegations such as the advertisement of sale was insufficient or misdescribed the property[.]”). However, “[t]here is a presumption in favor of the

validity of a judicial sale, and the burden is on the exceptant to establish to the contrary.” *Id.* (citing *Jackson v. Townshend*, 249 Md. 8, 13–14 (1968); *PAS Realty, Inc. v. Rayne*, 46 Md. App. 445, 446 (1980)). Notwithstanding that presumption, Rule 14-305(d)(2) requires that where “the exceptions or any response clearly show a need to take evidence,” the court must hold a hearing if one has been requested.

Appellants argue that they properly noted their exception to the sale based, in part, on their claim that Appellees failed to comply with the notice requirements of RP 7-105.1 and Maryland Rule 14-210, and that failure resulted in a deprivation of Appellants’ due process rights under both the Fourteenth Amendment to the United States Constitution and Article 24 of the Maryland Declaration of Rights. In addition, they maintain that, at the least, their exceptions and responses clearly showed a need to take evidence, and, thus, the circuit court erred by failing to hold the requested hearing on their exceptions and motion to vacate.

Appellees argue that the circuit court had before it sufficient evidence from which it could determine that the notices of sale were properly sent to both Appellants. Appellees maintain that the circuit court’s December 11, 2013, factual finding—that Appellees properly notified Appellants of the sale—must be upheld because this court must consider evidence presented in the lower court in light most favorable to the prevailing party.

Notice Requirements Under Maryland Rule 14-210

Maryland Rule 14-210(b) requires:

Before selling the property subject to the lien, the individual authorized to make the sale **shall also send notice of the time, place, and terms of sale (1) by certified mail and by first-class mail to (A) the borrower, (B) the**

record owner of the property, and (C) the holder of any subordinate interest in the property subject to the lien **and (2) by first-class mail to “All Occupants” at the address of the property.** The notice to “All occupants” shall be in the form and contain the information required by Code, Real Property Article, § 7-105.9 (c). Except for the notice to “All Occupants,” the mailings shall be sent to the last known address of all such persons, including to the last address reasonably ascertainable from a document recorded, indexed, and available for public inspection 30 days before the date of the sale. The mailings shall be sent not more than 30 days and not less than ten days before the date of the sale.

(Emphasis added). In *Griffin v. Bierman*, the Court of Appeals acknowledged that Maryland’s foreclosure notice scheme, properly executed, complies with the requirements of procedural due process and that “actual receipt of notice is not the test.” 403 Md. 186, 198 (2008) (quoting *Golden Sands Club Condo. v. Waller*, 313 Md.313 Md. 484, 500 (1988)). Indeed, “[d]ue process does not require a showing . . . that an interested party received actual notice, and [n]otice by mail is ordinarily presumed to be constitutionally sufficient.” *Id.* (internal quotation marks omitted) (quoting *Crum v. Vincent*, 493 F.3d 988, 993 (8th Cir. 2007)).

Here, Appellants do not simply argue that there was a lack of actual notice. Rather, they maintain that Appellees failed to establish that they mailed notice via certified and first class mail to Appellants in compliance with Rule 14-210. At the time that the circuit court denied Appellants’ motion opposing ratification and made the factual finding that Appellees had properly notified Appellants of the sale (upon which the court would later rely as dispositive of subsequent motions), the evidence before the court tending to establish that notice was properly mailed was limited to Appellees’ affidavit of notice by mail, and the photocopies of two envelopes addressed to Appellants Mr. Cummings and

Ms. Cummings respectively—bearing the return receipt stickers numbered 9171-6100-1162-9049-1143-00 and 9171-6100-1162-9049-1142-94—but not bearing any marks from the postal service whatsoever.⁹ In support of Appellants’ contention that no notice of sale was sent, the circuit court received Appellants’ response containing printouts from the USPS website showing that the tracking numbers on the photocopies provided by Appellees could not be located in the postal system.

Although we note that the information presented by Appellants before the court’s ruling on the motion opposing ratification created at least some legitimate ambiguity as to whether notice via certified mail was sent,¹⁰ in reviewing the circuit court’s factual findings, we do “not substitute our judgment for that of the lower court unless it was clearly erroneous,” *Rosenberg*, 178 Md. App. at 68 (quoting *Young v. Young*, 37 Md. App. 211, 220 (1977)). Thus, we give deference to the court’s factual findings and determine that the court did not err in denying the motion opposing ratification. Where the court did not err

⁹ As discussed, *supra* at note 5, it is unclear from the record whether the affidavit of Richard J. Rogers was filed and considered by the court before it made its decision on the motion opposing ratification. As Appellants point out in their briefing, the affidavit of Richard J. Rogers that Appellees had submitted before lacked personal knowledge of the actual mailing. Mr. Rogers could only affirm his personal knowledge that he reviewed “the records . . . and the copies of the Notice of Sale as well as the ‘returned’ certified mail envelopes.” Although he also affirmed that he directed the foreclosure sale, he did not state that he directed another party to mail the notice.

¹⁰ We note also that, where the purchaser at auction is the note holder as in this case, the foreclosure sale is subject to a heightened level of scrutiny. “When the purchaser at the foreclosure sale is the mortgagee or his assignee, the Courts will examine the sale closely to determine whether or not the sale was bona fide and proper. The Courts will set aside such a sale upon slight evidence of partiality, unfairness, or want of the strictest good faith.” *Fagnani v. Fisher*, 418 Md. 371, 395 (2011) (internal quotation marks omitted) (quoting *S. Md. Oil, Inc. v. Kaminetz*, 260 Md. 443, 450 (1971)).

in finding—based on the evidence before it at that time—that Appellees properly notified Appellants of the sale, there was no factual dispute that “clearly show[ed] a need to take evidence” as contemplated in Rule 14-305(d)(2). Thus, the court did not abuse its discretion in declining to hold an evidentiary hearing at that time. *See Buckingham v. Fisher*, 223 Md. App. 82, 95 n.5 (2015) (observing that, where it appears that, despite minor inconsistencies the notice of sale complied with Rule 14-210, the court did not err in declining to hold an evidentiary hearing).

II.

Motion to Vacate the Ratification of Foreclosure Sale

By the time the circuit court was deciding Appellants’ motion to vacate, however, it had been presented with copious additional information. As reported, *supra*, the USPS website page concerning the certified mail tracking numbers at issue carried the message that “[a] return receipt after mailing may be available through your local Post Office.” Apparently, after Appellants checked with their local post office and found no return receipt or records available there either, they obtained and filed with the motion to vacate two affidavits from local USPS Branch Manager Tracy D. Daniels affirming that the return receipt tracking numbers provided by Appellees were never processed through the mail system and pointing out the numerous inconsistencies in the exhibits provided by Appellees.

In response, Appellees presented an affirmation by a person claiming to have overseen the mailing of the notices of sale from Stacie Lee of High Cotton Direct Marketing. Ms. Lee’s affidavit, dated January 7, 2014, stated that “High Cotton sent out

the notices for the foreclosure sale of 11000 Spyglass Hill Drive” and attached a the document labeled “PS Form 3877.” As noted above, Appellees also included new photocopies of the same envelopes purportedly mailed to Appellants; however, the new photocopies showed markings from the postal service. Interestingly, as Ms. Daniels noted in her second affidavit, among those new postal markings were the postal bar codes reflecting the destination zip code for those envelopes, which indicated the wrong zip code. The destination zip code on the envelopes was 21204 when it should have been 20721 if mailed to Appellants at their home in Bowie, Maryland.

Notwithstanding the serious inconsistencies presented, the circuit court denied Appellants’ motion to vacate, without a hearing, based on the earlier factual finding from the December 11 denial of the motion opposing ratification and stating that “[Appellants] have presented no new evidence or arguments in their instant Motion to support their allegation that the [Appellees] did not comply with the requirements of Md. Rule 14-210(b), nor have they presented any other evidence that would warrant vacating the ratification of the sale.” We disagree.

It is clear from the record that a significant amount of new evidence was presented to the court between the time the court denied the motion opposing ratification and when it signed the order denying the motion to vacate on March 14, 2014. In reviewing the motion to vacate, the circuit court failed to acknowledge that new evidence was presented by both parties and based its decision on the factual findings made three months earlier. The record does not reflect that the circuit court affirmatively exercised its revisory power, and “[t]he court's failure to exercise this discretion . . . is, itself, an abuse of discretion.”

101 Geneva LLC v. Wynn, 435 Md. 233, 241 (2013) (citations and internal quotation marks omitted); *see also Johnson v. State*, 325 Md. 511, 520 (1992) (“The failure to exercise discretion when its exercise is called for is an abuse of discretion.”). In the face of the apparent inconsistencies and considerable new evidence presented by both parties, the court’s order does not reflect that it resolved the factual dispute that was the heart of Appellants’ motion to vacate.

Accordingly, we vacate the circuit court’s order denying Appellants’ motion to vacate the ratification of sale and remand for an evidentiary hearing to establish whether notice of the sale was properly given pursuant to Maryland Rule 14-210. Because we remand for the court to re-examine Appellants’ motion to vacate based on lack of notice of the sale, we do not decide whether Appellees properly notified the Appellants of the foreclosure sale of their home. That will be an issue for the circuit court, as fact-finder, to address in an evidentiary hearing.

**ORDER OF THE CIRCUIT COURT
FOR PRINCE GEORGE’S COUNTY
DENYING APPELLANTS’ MOTION TO
VACATE RATIFICATION OF
FORECLOSURE SALE, ENTERED
JULY 10, 2014, VACATED. CASE
REMANDED FOR FURTHER
PROCEEDINGS CONSISTENT WITH
THIS OPINION.**

COSTS TO BE PAID BY APPELLEES.