Circuit Court for Prince George's County
Case No. CAEF15-08311

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 137

September Term, 2018

JIMENEZ BERNADEAU

v.

JAMES E. CLARKE, ET AL.

Fader, C.J.
Gould,
Alpert, Paul E.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Alpert, J.

Filed: July 30, 2019

Jimenez Bernadeau, appellant, following a foreclosure sale of property he owned, filed exceptions with the Circuit Court for Prince George's County arguing that the sale should be vacated. After the circuit court overruled appellant's exceptions, he appealed, presenting the following questions for our review, which we have rephrased:

I. Did the circuit court err in overruling appellant's exceptions because he was not given proper notice of the foreclosure action?

II. Did the circuit court err in overruling appellant's exceptions because the substitute trustees did not have the legal authority to initiate the foreclosure action?

III. Did the circuit court err in overruling appellant's exceptions because of fraudulent procedural irregularities surrounding the foreclosure action?

For the following reasons, we shall affirm.

BACKGROUND

In 2007, appellant executed an adjustable rate promissory note (the "Note") in favor of Home Loan Center, Inc., dba LendingTree Loans ("Lending Tree") in the amount of $461,000 and secured by a deed of trust on property located at 11019 Old York Road, Bowie, Maryland 20721. The Note was endorsed by a corporate representative of Lending Tree "to the order of JP Morgan Chase Bank[.]" The Note was then endorsed by a corporate representative of JP Morgan Chase Bank in blank "[w]ithout [r]ecourse."

In August 2014, appellant flew to Haiti because of a family emergency, purportedly leaving an individual in charge of his finances, including the timely payment of his mortgage. The mortgage payments, however, were not made.

On March 9, 2015, The Bank of New York Mellon Trust Company NA ("The Bank of New York"), as trustee for Chase Mortgage Finance Trust Multi-Class Mortgage Pass-Through Certificates, Series 2007-S5 ("Chase Mortgage"), appointed James E. Clarke, Renee Dyson, Brian Thomas, Erin M. Cohen, High J. Green, and Patrick M.A. Decker, as substitute trustees. Less than a month later, on April 1, 2015, the substitute trustees initiated foreclosure proceedings against appellant in the Circuit Court for Prince George's County.

On April 7 and 9, 2015, the substitute trustees attempted to personally serve appellant with notice of the foreclosure action, but no one answered the front door of the property. Additionally, on April 9, foreclosure documents[1] were posted on the front door of the property and, on that same date, the documents were sent by first-class and certified mail to the property address. The documents sent by certified mail were returned to the substitute trustees as undeliverable. On July 21, 2016, the property was sold at a foreclosure sale to The Bank of New York, as trustee for Chase Mortgage for $377,910.

About six weeks later, in early September 2016, appellant returned to the United States and apparently learned for the first time of the foreclosure action. On September 8, 2016, appellant filed a request for production of the original loan documents, and a few days later, he filed a request for postponement of foreclosure proceedings so he could retain legal counsel. The appellees opposed appellant's motions. On October 18, 2016, the

[1] The documents consisted of the Order to docket the foreclosure action and supporting documents; a loss mitigation application form and supporting documents; and an envelope preprinted with the address of the attorney handling the foreclosure.

circuit court treated appellant's motions as exceptions to the foreclosure sale and overruled them. Appellant then filed a motion setting forth exceptions to the foreclosure action, specifically arguing that he never received notice of the foreclosure action. Appellees opposed the motion. The circuit court overruled appellant's exceptions, finding service adequate.

On March 1, 2018, the ratification order of the foreclosure sale was docketed in the circuit court. Appellant appeals from the ratification order.

STANDARD OF REVIEW

The standard of review of foreclosure proceedings is well-settled.

> In ruling on exceptions to a foreclosure sale and whether to ratify the sale, trial courts may consider both questions of fact and law. *See S. Md. Oil, Inc. v. Kaminetz*, 260 Md. 443, 451 (1971) (explaining questions of fact and law may be raised in exceptions to foreclosure sales). In reviewing a trial court's finding of fact, we do "not substitute our judgment for that of the lower court unless it was clearly erroneous" and give due consideration to the trial court's "opportunity to observe the demeanor of the witnesses, to judge their credibility and to pass upon the weight to be given their testimony." *Young v. Young*, 37 Md. App. 211, 220 (1977). Questions of law decided by the trial court are subject to a *de novo* standard of review. *See Liddy v. Lamone*, 398 Md. 233, 246–47 (2007).

Jones v. Rosenberg, 178 Md. App. 54, 68, *cert. denied*, 405 Md. 64 (2008). "'[T]here is a presumption that the sale was fairly made'" and "'the burden is upon one attacking the sale to prove the contrary.'" *Hood v. Driscoll*, 227 Md. App. 689, 696-97 (2016) (quoting *Burson v. Capps*, 440 Md. 328, 342-43 (2014)).

DISCUSSION

I.

Appellant argues that the circuit court erred in overruling his exceptions to the foreclosure sale because his due process rights were violated. Specifically, he argues that the service rendered was defective because he was out of the country and did not know about the foreclosure proceedings. He argues, without any authority, that the notice requirements of Md. Rule 2-121(b), requiring "something more" than the service rendered here, are applicable in his situation. Citing *Griffin v. Bierman*, 403 Md. 186 (2008), appellees disagree.

Maryland's notice requirements prior to the sale of property in foreclosure actions can be found in Md. Code Ann., Real Property ("Real Prop."), § 7-105.1 and Md. Rule 14-209, governing notice of a foreclosure action. Real Prop. § 7-105.1(h)(1)(i) provides that the foreclosure complaint shall be served on the mortgagor by personal process. When that effort is unsuccessful, the statute provides:

> If at least two good faith efforts to serve the mortgagor or grantor under paragraph (1) of this subsection on different days have not succeeded, the plaintiff may effect service by:
>
> (i) Filing an affidavit with the court describing the good faith efforts to serve the mortgagor or grantor; and
>
> (ii) 1. Mailing a copy of all the documents required to be served under paragraph (1) of this subsection by certified mail, return receipt requested, and first-class mail to the mortgagor's or grantor's last known address and, if different, to the address of the residential property subject to the mortgage or deed of trust; and

> 2. Posting a copy of all the documents required to be served under paragraph (1) of this subsection in a conspicuous place on the residential property subject to the mortgage or deed of trust.

Real Prop. § 7-105.1(h)(5). Similarly, Md. Rule 14-209(a) provides that "[w]hen an action to foreclose a lien on residential property is filed, the plaintiff shall serve on the borrower . . . a copy of all papers filed to commence the action[.] . . . Except as otherwise provided by section (b) of this Rule, service shall be by personal delivery of the papers[.]" If personal service is unsuccessful, the Rule provides:

> **Service on Borrower and Record Owner by Mailing and Posting.** If on at least two different days a good faith effort to serve a borrower . . . pursuant to section (a) of this Rule was not successful, the plaintiff shall effect service by (1) mailing, by certified and first-class mail, a copy of all papers filed to commence the action . . . to the last known address of [the] borrower . . . and, if the person's last known address is not the address of the residential property, also to that person at the address of the property; and (2) posting a copy of the papers in a conspicuous place on the residential property. Service is complete when the property has been posted and the mailings have been made in accordance with this section.

Rule 14-209(b). In sum, the provisions of both Real Prop. § 7-105.1(h) and Md. Rule 14-209 require notice of foreclosure by personal service on the mortgagor but, if those efforts fail, service can be effectuated by posting and mailing copies of the notice by certified and first-class mail.

Here, the substitute trustees complied with Maryland's foreclosure notice requirements by sending the foreclosure documents by both certified and first-class mail, and by posting notice of the foreclosure proceedings on the property, after two attempts at personal service were unsuccessful.

Appellant argues, however, that because actual notice is essential to due process, the notice requirements of Md. Rule 2-121, governing the service of process generally in civil cases, is applicable in this situation where he was out of the country when the foreclosure proceedings were initiated. That Rule provides:

> **(a) Generally.** Service of process may be made within this State or, when authorized by the law of this State, outside of this State (1) by delivering to the person to be served a copy of the summons, complaint, and all other papers filed with it; (2) if the person to be served is an individual, by leaving a copy of the summons, complaint, and all other papers filed with it at the individual's dwelling house or usual place of abode with a resident of suitable age and discretion; or (3) by mailing to the person to be served a copy of the summons, complaint, and all other papers filed with it by certified mail requesting: "Restricted Delivery—show to whom, date, address of delivery." Service by certified mail under this Rule is complete upon delivery. Service outside of the State may also be made in the manner prescribed by the court or prescribed by the foreign jurisdiction if reasonably calculated to give actual notice.
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> *** * ***
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> **(c) By order of court.** When proof is made by affidavit that good faith efforts to serve the defendant pursuant to section (a) of this Rule have not succeeded and that service pursuant to section (b) of this Rule [governing evasion of service] is inapplicable or impracticable, *the court may order any other means of service that it deems appropriate in the circumstances and reasonably calculated to give actual notice*.
>
> **(d) Methods not exclusive.** The methods of service provided in this Rule are in addition to and not exclusive of any other means of service that may be provided by statute or rule for obtaining jurisdiction over a defendant.

(Emphasis added). Appellant argues that the italicized language above is applicable in his situation, and therefore, the circuit court was obligated to pursue "other means" of service following appellees' unsuccessful attempts to notify him of the foreclosure action.

We disagree and find *Bierman, supra*, controlling. In *Bierman*, the Court of Appeals considered a due process challenge to Maryland's foreclosure notice requirements found in Real Prop. § 7-105 where a homeowner filed exceptions to the foreclosure sale of her home, claiming that she had not received the complaint initializing the foreclosure action. The trustees mailed the initial complaint to her by certified mail and first-class mail. 403 Md. at 192-93. The certified letter was returned to the trustees marked "unclaimed" but the first-class mail was not returned. *Id*. at 193-94. The circuit court denied the homeowner's exceptions. The homeowner appealed, and the Court of Appeals affirmed.

The Court reiterated that "[a]n elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprize interested parties of the pendency of the action and afford them an opportunity to present their objections." *Id*. at 197 (quotation marks and citation omitted). "It is well settled that due process of law is not violated . . . because the interested party did not receive actual notice." *Id*. at 208 (citations omitted). The Court observed that "[t]he proper inquiry is whether the state acted reasonably in selecting means likely to inform persons affected, not whether each property owner actually received notice." *Id*. at 197 (quotation marks and citation omitted).

The Court reasoned:

> We properly evaluate the [Maryland foreclosure] notice system, as it is, to determine if it suffers from a constitutional defect. We cannot say that the Maryland notice system fails to balance the competing interests within the constitutionally allowable spectrum and, thus, the facts of this case, where that system was followed, did not result in an unconstitutional application or result as to Griffin. The "function of the courts is . . . to ascertain whether [a legislative scheme] exceeds constitutional limits. These limits are not

> exceeded under the due process clauses of the Maryland and Federal Constitutions unless the party challenging the ordinance can show that it is arbitrary, oppressive, or unreasonable." *A. & H. Transp., Inc. v. Mayor & City Council of Balt.*, 249 Md. 518, 529 (1968).
>
> The Maryland foreclosure scheme requires that the Trustees send notice by both certified and first-class mail, two "efficient and inexpensive means of communication" that we conclude are calculated reasonably to inform interested parties of the pending foreclosure action. *Mullane* [*v. Central Hanover Bank & Trust Co.*], 339 U.S. [306] at 319[(1950).] "In balancing the interests of the parties, the General Assembly has looked to economy, efficiency, and minimal involvement of the judiciary." *Golden Sands* [*Club Condominium, Inc. v. Waller*], 313 Md. [484] at 495 (1988). We cannot say that that judgment was unreasonable.

Id. at 211-12 (second brackets in original) (footnote omitted). The Court noted that the only substantive difference between Maryland's notice foreclosure scheme and the notice schemes found satisfactory by the United States Supreme Court, "is that Maryland requires first-class mail to be sent in all cases, whereas the Supreme Court suggested that it was necessary only in cases where the certified mail is returned to the sender undelivered." *Id.* at 201-02 (citation and footnote omitted). The Court then held that the notice given was sufficient and that there was no due process violation. In a footnote, the Court stated in dicta that "had the first-class mail notices been returned undelivered . . . or the certified mail had been returned as something more revealing than 'unclaimed,'" the Trustees would have known "that their attempts to convey notice to Griffin failed" and "reasonable follow-up measures to attempt to give notice to the interested property owner might be required." *Id*. at 202 n.11 (citations omitted).

As stated above, the substitute trustees here provided notice as required under Maryland's foreclosure laws. Therefore, under *Bierman*, this satisfied the requirements of

due process and Rule 2-121's additional notice by "other means" requirement is inapplicable. Appellant suggests that because he allegedly contacted the servicer on his loan while he was out of the country, informing that person that his passport had been stolen, he was entitled to some sort of additional notice. Appellant's bald allegation made for the first time on appeal without any proof or details as to who he spoke with, when he made contact, or what information appellant relayed, is not preserved. *See* Md. Rule 8-131(a) ("Ordinarily, the appellate court will not decide any other issue unless it plainly appears by the record to have been raised in or decided by the trial court[.]"). Even if preserved, however, we would deem his allegation insufficient to fall within whatever life can be found in the *Bierman* dicta/footnote about information known to the trustees that might require "reasonable follow-up measures[.]"

II.

Appellant argues that the substitute trustees for The Bank of New York committed fraud because they are not holders of the Note, and therefore, had no right to foreclose on the property. Appellant argues that he was prejudiced by the fraud because he was prohibited from presenting "his case fully to th[e] court." Appellees respond that this argument is meritless. We agree.

The Note was endorsed by a corporate representative of Lending Tree "to the order of JP Morgan Chase Bank[.]" The Note was then endorsed by a corporate representative of JP Morgan Chase Bank in blank "[w]ithout [r]ecourse." Pursuant to Real Prop. § 7-105.1(e)(2)(iii) and Md. Rule 14-207(b)(3), appellees filed an "Affidavit of Note Ownership" that states:

> The Bank of New York Mellon Trust Company NA, successor to The Bank of New York Trust Company, NA, as trustee, for Chase Mortgage Finance Trust Multi-Class Mortgage Pass-Through Certificates, Series 2007-S5 is the owner of the debt instrument evidenced by the Note and has authorized Select Portfolio Servicing, Inc. to be the holder of the Note for purposes of executing this Affidavit and conducting this foreclosure action.

As required, a copy of the Note was attached to the Affidavit.

Because 1) the Note was endorsed in blank, 2) the Affidavit stated that Chase Mortgage is the owner of the Note, and 3) Chase Mortgage appointed appellees as substitute trustees, the substitute trustees had the right to enforce the Note through the instant foreclosure action. *See* Md. Code Ann., Commercial Law ("Com. Law") Art., § 3-301 (describing a person entitled to enforce an instrument as the "holder of the instrument") and *Deutsche Bank Nat. Trust Co. v. Brock*, 430 Md. 714, 732-33 (2013) (holding that the entity in possession of a Note that is endorsed in blank is the holder of the Note and, as the holder, is entitled to enforce it, citing Com. Law § 3-301). Accordingly, appellant has failed to show any fraud requiring us to vacate the foreclosure action. *See Thomas v. Nadel*, 427 Md. 441, 449-53 (2012) (holding that possible gaps in the chain of title did not constitute fraud that would allow a mortgagor to challenge a foreclosure post-sale).

Even if appellant had produced evidence of fraud, his allegations amount to intrinsic fraud, which is not a cognizable claim on appeal.

Md. Rule 2-535(b) provides that in civil circuit court cases, "[o]n motion of any party filed at any time, the court may exercise revisory power and control over the judgment in case of fraud, mistake, or irregularity." The terms "fraud, mistake, or irregularity" are "narrowly defined and are to be strictly applied." *Early v. Early*, 338 Md. 639, 652 (1995)

(citation and footnote omitted). "[A] litigant seeking to set aside an enrolled decree must prove extrinsic fraud and not intrinsic fraud." *Billingsley v. Lawson*, 43 Md. App. 713, 718-19 (1979), *cert. denied*, 446 U.S. 919 (1980). Intrinsic fraud is fraud "employed during the course of the hearing" and includes the "use of forged documents, perjured testimony or any other frauds[.]" *Manigan v. Burson*, 160 Md. App. 114, 120-21 (2004) (quotation marks and citation omitted). Fraud is extrinsic when "it actually prevents an adversarial trial[.]" *Id*. at 121 (citation omitted).

Prior to a foreclosure sale, a mortgagor may contest the validity of the lien, the lien instrument, or the right of the plaintiff to foreclose because, among other things, the trustees failed to comply with Maryland foreclosure law or because the lender does not possess the note. *See* Md. Rule 14-211. After the foreclosure sale, the mortgagor "may challenge *only* procedural irregularities at the sale or . . . the statement of indebtedness[.]" *Bates v. Cohn*, 417 Md. 309, 320 (2010) (quotation marks and citation omitted). Challenges to the sale include: "allegations such as the advertisement of sale was insufficient or misdescribed the property, the creditor committed a fraud by preventing someone from bidding or by chilling the bidding, challenging the price as unconscionable, etc." *Id.* at 321 (quotation marks and citation omitted). Accordingly, appellant's claim that the holder of the Note committed fraud because it did not rightfully possess the Note is not properly before us.

III.

Lastly, appellant argues that the circuit court erred in denying his exceptions because of fraudulent procedural irregularities in the foreclosure action. Although his argument is somewhat unclear, appellant seems to allege that we should vacate the

foreclosure sale because Chase Mortgage Finance Trust has been "committing scams" by selling "certificates to investors for five years" that "are essentially junk bonds" not "backed up by any collateral." We agree with appellees that the argument is not preserved because appellant has raised it for the first time on appeal. *See* Md. Rule 8-131(a), *supra*. Appellant does not argue to the contrary in his reply brief.

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

COSTS TO BE PAID BY APPELLANT.