Circuit Court for Baltimore County
Case No. 03-C-17-011270

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 232

September Term, 2020

WKW PARTNERS, LLC

v.

JOHN E. DRISCOLL, III, *et al.*

Nazarian,
Gould,
Wright, Alexander, Jr.,
(Senior Judge, Specially Assigned),

JJ.

Opinion by Wright, J.

Filed: August 30, 2021

The appellees in this case are substitute trustees appointed by the Bank of New York Mellon Trust Company, N.A. ("the Bank of New York"), the once holder of a promissory note secured by a deed of trust on 1027 Foxwood Lane in Essex, Maryland ("the Property"). The appellees sold the Property at a foreclosure auction held on July 24, 2018. At that auction, the appellant, WKW Partners, LLC, made the winning bid of $69,000, thereby acquiring an inchoate equitable title to the Property subject to a deed of trust held by the Deutsche Bank National Trust Company ("Deutsche Bank").[1] *See G.E. Capital Mortg. Servs., Inc. v. Levenson*, 338 Md. 227, 243 (1995) ("[I]f the mortgage being foreclosed is junior to one or more liens, ordinarily the sale will be 'subject to' said [senior lien] and the advertisement will customarily and ideally so indicate." (Quotation marks and citation omitted)).

The Circuit Court for Baltimore County ratified the foreclosure sale on June 21, 2019. According to the appellant, in the interim, Deutsche Bank (whose senior lien the appellant had not satisfied), through its substitute trustees, initiated a second foreclosure action. After filing an order to docket in the circuit court, the appellant claims, the Deutsche Bank substitute trustees sold the Property at a public auction to a third party on Feb. 15, 2019.[2] Having been informed that the senior lienholder's foreclosure sale (which had not

[1] While we are mindful of the distinctions between a "mortgage" and a "deed of trust," those differences have no bearing on the disposition of this appeal. Accordingly, we will at times refer to these two instruments interchangeably. *See Anderson v. Burson*, 424 Md. 232, 234 n.1 (2011).

[2] The record does not contain documentation of the senior lien foreclosure sale.

yet been ratified) had extinguished the junior lien, the appellant declined to settle with the appellees. Accordingly, on Aug. 21, 2019, the appellees filed a "Petition to Order Resale at Sole Risk and Expense of Defaulting Purchaser." On Sept. 30, 2019, the appellant filed an opposition to the appellees' petition, in which it moved to vacate the foreclosure sale and requested that the court order the return of its $20,000 deposit. In an order entered on Feb. 4, 2020, the court ordered that the Property be resold and that the appellant's deposit be forfeited. On March 4, 2020, the appellant filed a motion for reconsideration, which the court denied without explanation on April 8, 2020.

The appellant noted this appeal on May 5, 2020, and presents two questions for our review, which we have consolidated and rephrased as follows:

> Did the circuit court abuse its discretion by denying the appellant's motion to reconsider the order directing the forfeiture of the appellant's deposit?[3]

For the reasons stated herein, we shall dismiss this appeal. In doing so, we need not address the questions presented.

BACKGROUND

[3] The appellant framed its questions presented as follows:

1. Should a purchaser bear the loss when various delays outside of their control render completion of a foreclosure sale impracticable?

2. Is a purchaser in a foreclosure sale required to pay off a superior lien prior to ratification of their own sale?

On or about August 11, 2005, Bernard and Beverly Fryza executed a promissory note in the amount of $77,800 to Ameriquest Mortgage Company ("Ameriquest").[4] That promissory note was secured by a deed of trust encumbering the Property, which was recorded in the Land Records of Baltimore County on Dec. 8, 2006. On Feb. 11, 2009, Ameriquest assigned the Fryzas' loan to Deutsche Bank, as trustee for Ameriquest, asset-backed pass through certificates series 2005–R9, pursuant to a "Pooling and Servicing Agreement."[5] That assignment was recorded on Feb. 19, 2009. Through its loan servicer, Ocwen Loan Servicing, LLC ("Ocwen"), Deutsche Bank appointed Laura O'Sullivan, Chasity Brown, Rachel Kiefer, Michael Cantrell, and Jessica Horton (collectively, "the Deutsche Bank substitute trustees") as substitute trustees under the deed of trust.

On Oct. 10, 2006, Mr. Fryza obtained a second loan from GMAC Mortgage Corporation DBA ditech.com ("GMAC") in the principal amount of $40,000, also secured by a deed of trust to the Property, which was subsequently recorded. The following September, GMAC assigned its interest in the Property to the Bank of New York, as trustee for GMACM Home Equity Loan Trust 2006-HE5. That assignment was recorded on Sept. 22, 2007. On Nov. 20, 2007, the appellees filed an order to docket suit in the Circuit Court for Baltimore County seeking to foreclose on the Property. Given that Mr. Fryza was then

[4] A copy of the promissory note is not included in the record but is repeatedly referenced in the deed of trust.

[5] "'A pooling and servicing agreement establishes two entities that maintain the trust: a trustee, who manages the loan assets, and a servicer, who communicates with and collects monthly payments from the mortgagors.'" *Deutsche Bank Nat'l Tr. Co. v. Brock*, 430 Md. 714, 718 (2013) (quoting *Anderson v. Burson*, 424 Md. 232, 237 (2011)).

deceased, the appellees named his estate and Sandra Rose, the personal representative thereof, as the defendants. Beginning on July 5, 2018, the appellees advertised the foreclosure sale in "The Jeffersonian" (a newspaper of general circulation in Baltimore County) once per week for three consecutive weeks.[6] That advertisement provided, in pertinent part:

> THE PROPERTY IS SUBJECT TO A PRIOR MORTGAGE. IF AVAILABLE THE AMOUNT WILL BE ANNOUNCED AT THE TIME OF SALE.
>
> * * *
>
> The property will be sold subject to all conditions, liens, restrictions, and agreements of record affecting same[.]
>
> * * *
>
> TERMS OF SALE: A deposit of $20,000 payable only by certified funds shall be required at the time of sale. CASH WILL NOT BE AN ACCEPTABLE FORM OF DEPOSIT. The balance of the purchase price with interest at 8.35% annum from the date of sale to the date of payment will be paid within TEN DAYS after the final ratification of the sale.
>
> * * *
>
> Time is of the essence for the purchaser, otherwise the deposit will be forfeited, and the property may be sold at risk and costs of the defaulting purchaser.

[6] In so doing, the appellees complied with the requirements of Md. Rule 14–210(a), which provides:

> Notice of the sale of an interest in real property shall be published at least once a week for three successive weeks, the first publication to be not less than 15 days before the sale and the last publication to be not more than one week before the sale. Notice of the sale of personal property shall be published not less than five days nor more than 12 days before the sale.

* * *

> If the sale is not ratified or if the Substitute Trustees are unable to convey marketable title in accord with these terms of sale, the purchaser's only remedy is return of the deposit.

Upon prevailing at the July 24, 2018 foreclosure auction, the appellant, through its representative, endorsed a "Memorandum of Purchase at Public Auction" ("memorandum of purchase"), which incorporated by reference the terms of sale set forth in above-excerpted advertisement.

On Dec. 10, 2018, the Deutsche Bank substitute trustees filed a motion (i) seeking leave to intervene in the pending foreclosure action as a matter of right pursuant to Md. Rule 2–214(a) and (ii) requesting that the court permit the Deutsche Bank substitute trustees to docket an independent foreclosure proceeding.[7] The court granted the substitute trustees' request to intervene in an order entered on Jan. 8, 2019.[8]

In October 2018, the appellees filed a request for ratification of sale. The court deferred ruling on that motion because the appellees had not filed a complete "Final Loss Mitigation Affidavit," as prescribed by Maryland Code (1974, 2015 Repl. Vol.), § 7–105.1(i) of the Real Property Article and Code of Maryland Regulations 09.03.12.04. On Feb. 8, 2019, the appellees filed a renewed request for ratification, to which they attached a supplemental final loss mitigation affidavit, which included the information that had been

[7] In that motion, the Deutsche Bank substitute trustees inexplicably referred to the Property as 4425 Ponce de Leon Boulevard, Berlin, Maryland 21811.

[8] In its order, the court did not address the appellees' request to docket an independent foreclosure proceeding.

omitted from their initial affidavit. That deficiency having been cured, the court ratified the foreclosure sale on June 21, 2019.

In an e-mail sent to a legal assistant in the office of the appellees' counsel on July 19, 2019 – nearly a month after the circuit court had ratified the initial foreclosure sale – a representative of the appellant's title company wrote:

> [O]n November 7, 2018, you provided us with [a] payoff statement for the senior (first mortgage) from Ocwen Loan Servicing, LLC . . . under the name[s] of Beverly and Bernard Fryza, Jr. (foreclosed parties) securing the property, 1027 Foxwood Lane, Essex, Maryland. Would you kindly provide an updated payoff statement for this loan? We wish to complete the deed transfer for our client, WKW Partners, LLC.

Three days later, the legal assistant to whom that e-mail had been sent responded that the appellees' junior lien had been extinguished by a Feb. 15, 2019, foreclosure sale conducted on behalf of the senior lienholder. Given that its interest in the Property had purportedly been extinguished, the appellant did not make a "payoff" to Deutsche Bank, its substitute trustees, or Ocwen, nor did it settle with the appellees.

As recounted *supra*, on Aug. 21, 2019, the appellees filed a petition to order the resale of the Property, which the court granted on Feb. 3, 2020. In that order, the court directed that "the $20,000.00 sale deposit shall be forfeited" and "[a]ny portion of purchaser's deposit that is not applied to the expenses of the resale is hereby forfeited and is to be paid/applied towards the debt due the noteholder[.]" **[E at 39]** In a motion for reconsideration filed on March 4, 2020, the appellant presented the following unavailing arguments:

> The Court of Appeals has stated that a purchaser has only an inchoate and equitable interest prior to the ratification of the sale and that "[b]efore ratification the transaction was merely an offer to purchase which had not been accepted." *See Simard v. White*, 383 Md. 257, 311 (2004). As a result, expecting or requiring a purchaser to pay off a superior lien prior to its own purchase being ratified puts the purchaser at risk of losing that investment should the sale not be ratified.
>
> The remedy sought and granted, resale of the property, is not a practical possibility. Once the sale under the senior lien is ratified, it will become an impossibility.
>
> Purchaser was ready to proceed with the purchase and satisfy the senior lien at the time of sale.
>
> It was only due to Plaintiffs' error and subsequent delay in correcting that error that time was given to the senior lienholders to proceed in their case. Had this error been promptly corrected, the sale would have been finalized prior to the senior lienholders conducting a foreclosure sale of their own and the matter would be closed.
>
> To allow them to keep the deposit despite their own failings in this matter rewards them for their lack of urgency and would be an unjust enrichment.

We will include additional facts as necessary below.

DISCUSSION

We must first determine whether this appeal is properly before us. Although neither party raised the finality of the order at issue, we will do so *sua sponte*. *See Miller and Smith at Quercus, LLC v. Casey PMN, LLC*, 412 Md. 230, 240 (2010) ("[W]e must dismiss a case *sua sponte* on a finding that we do not have jurisdiction[.]"); *Zilichikhis v. Montgomery County*, 223 Md. App. 158, 172 ("[W]e can raise the issue of finality on our own motion." (Citation omitted)), *cert. denied*, 444 Md. 641 (2015).

Generally, this Court has jurisdiction only over appeals from final judgments. *See Baltimore Home Alliance, LLC v. Geesing*, 218 Md. App. 375, 381 (2014) ("The requirement that a party appeal from only a final judgment is a jurisdiction requirement." (citation omitted)). "Whether a judgment is final . . . is a question of law to be reviewed *de novo*." *Id*. (citation omitted). To constitute a "final judgment," a "ruling must . . . determine *and conclude* the rights involved or . . . deny the appellant the means of further prosecuting or defending his or her rights and interests in the subject matter of the proceedings." *Rohrbeck v. Rohrbeck*, 318 Md. 28, 41 (1989) (emphasis retained; citations omitted). The ruling must, moreover, "'leave nothing more to be done in order to effectuate the court's resolution of the matter.'" *Remson v. Krausen*, 206 Md. App. 53, 72 (2012) (quoting *Rohrbeck*, 318 Md. at 41). "By contrast, an order 'that adjudicates less than an entire claim, or that adjudicates the rights and liabilities of fewer than all the parties to the action . . . is not a final judgment[.]'" *Geesing*, 218 Md. App. at 381 (quoting Md. Rule 2–602(a)).

"In a foreclosure case, a court does not enter a final judgment *at least* until it has ratified the foreclosure sale." *McLaughlin v. Ward*, 240 Md. App. 76, 83 (2019) (emphasis added). Our opinion in *Baltimore Home Alliance, LLC v. Geesing* is instructive in assessing the finality of the court's judgment in this case. The appellant in that case purchased property at a foreclosure sale from the appellees, substitute trustees. That sale was subsequently ratified by the circuit court. Although the appellant had tendered an initial deposit, it did not settle within 10 days of the sale's ratification as required by the

terms of sale. In the event of such default, those terms provided: "[D]eposit shall be forfeited. The Sub[stitute] Trustees may then resell the property at the risk and cost of the defaulting purchaser." *Id*. at 379. The appellees filed a motion "requesting that the court order appellant's deposit be forfeited, and the Property resold at appellant's risk and expense." *Id*. The court granted that motion, ordering that "the deposit . . . paid by the defaulting purchaser shall be forfeited and the subject property may be resold at the risk and expense of the defaulting purchaser[.]" *Id*. at 380.

On appeal, we held that the court's order did not constitute a final judgment, reasoning, in part, that the order to resell "created additional responsibilities of the parties, rather than 'leav[ing] nothing to be done in order to effectuate the court's disposition of the matter,'" as do final judgments. *Id*. at 383 (quoting *Remson*, 206 Md. at 72). We explained that "[b]ecause the court authorized the Property to be resold, [the] appellees were entitled to conduct a second foreclosure sale, which in turn obligated the court to consider whether to ratify that second sale." *Id*. at 383. *See also Greentree Series V, Inc. v. Hofmeister*, 222 Md. App. 557, 562 n.1 (2015) (stating in *dicta* that the circuit court's order to resell did not constitute a final judgment because "the court would be obligated to consider whether to ratify that second sale"). As an interlocutory order, moreover, the ruling remained subject to revision at the court's discretion *See Banegura v. Taylor*, 312 Md. 609, 618–19 (1988) ("[A]n interlocutory order [is] subject to revision within the general discretion of the trial court until a final judgment was entered on the claim."). As in *Geesing*, the record in this case does not reflect the court having ratified the directed

resale.[9] The court's ruling, therefore, constituted an interlocutory order – and not a final judgment.

Although a party may not ordinarily appeal from an interlocutory order, Md. Code (1974, 2020 Repl. Vol.), § 6–408 of the Courts and Judicial Proceedings Article ("CJP") § 12–303 sets forth exceptions to that general rule, two of which are arguably applicable here. The first, CJP § 12–303(3)(v), permits an appeal from an interlocutory order "[f]or the sale, conveyance, or delivery of real or personal property[.]" That exception, however, is limited to transfers "which, on their face, [are] self-executing without the need for further involvement by the court[.]" *Winkler Constr. Co. v. Jerome*, 355 Md. 231, 245 (1999). As addressed above, although the court's order directed the resale of the Property, its "involvement with the Property and the parties was not complete upon issuance of the Order." *Geesing*, 218 Md. App. at 383 n.5. Rather, the court remained tasked with ratifying the resale prior to the close of the foreclosure proceedings.

The second potentially relevant exception to the final judgment rule permits appellate review of an interlocutory order when that order "[d]etermin[es] a question of right between the parties and direct[s] an accounting to be stated on the principle of such

[9] In its brief, the appellant claims that "the senior lienholders' foreclosure sale was . . . ratified on September 22, 2020." Although the appendix to the appellees' brief contains docket entries supporting the appellant's representations, we must disregard those docket entries because they were not in the record. *See Colao v. County Council of Prince George's County*, 109 Md. App. 431, 469 (1996) ("[A] party may not supplement the record with documents that are not part of the record."). Given that the record lacks evidence of this purported ratification, for our purposes no such ratification took place. *See Green v. State*, 23 Md. App. 680, 683 (1974) ("In our consideration of an appeal, we must . . . stay within the record.").

determination[.]" CJP § 12–303(3)(vi). In this case, the court did not direct that an accounting be stated. Accordingly, this exception to the final judgment rule is also inapplicable. *See Geesing*, 218 Md. App. at 384 ("Because no account was directed by the court in the Order, nor did the Order determine relevant rights of the parties, the Order is not appealable under CJP § 12–303.").

Given that the appellant noted this appeal prior to the entry of final judgment, and absent any applicable exception to the final judgment rule, this appeal was prematurely noted. Lacking appellate jurisdiction, we must, therefore, dismiss on this ground. *See Doe v. Sovereign Grace Ministries, Inc.*, 217 Md. App. 650, 662 ("[A] premature appeal is a jurisdictional defect," and, as such, is "generally of no force and effect." (Quotation marks and citation omitted)), *cert. denied*, 440 Md. 116 (2014).

APPEAL DISMISSED. COSTS TO BE PAID BY THE APPELLANT.