

Circuit Court for Prince George's County
Case No.: CAEF 16-25422

UNREPORTED
IN THE COURT OF SPECIAL APPEALS
OF MARYLAND

No. 0334

September Term, 2017

3411 PENNSY DRIVE LTD. PARTNERSHIP

v.

GARY K. BAHENA et al.,
SUBSTITUTE TRUSTEES

Meredith,
Beachley,
Eyler, James R.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Eyler, James R., J.

Filed: June 19, 2018

*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.

3411 Pennsy Drive Limited Partnership, appellant, owned a parcel of commercial property located at 3411 Pennsy Drive in Landover (the “Property”). On August 16, 2016, Gary Bahena (“trustee”), original trustee under the deed of trust for the Property, initiated a foreclosure action as to the Property in the Circuit Court for Prince George’s County. Following the foreclosure sale and ratification of the sale by the circuit court, appellant filed an emergency motion for reconsideration of the circuit court’s ratification order, which the circuit court denied. In its appeal, appellant presents the following questions for our review:

1. Did the circuit court err in denying appellant’s motion to reconsider because the notice of sale was not properly served?
2. Did the circuit court err in denying appellant’s motion to reconsider because the order to docket was not properly served?
3. Did the circuit court err in denying appellant’s motion to reconsider because it was not timely filed?

For the reasons set forth below, we affirm.¹

BACKGROUND

On November 17, 2014, appellant obtained a commercial real estate loan in the amount of \$1,041,666.67 from The Rapid Funding Corporation Profit Sharing Plan and Trust (“Lender”) by executing a promissory note and credit line deed of trust. Peter Komorowski was the guarantor of the promissory note. On March 21, 2016, trustee sent

¹ Trustee moved to dismiss the instant appeal on the ground that the issues raised by appellant had been “waived” or “withdrawn” before the circuit court. Trustee’s motion to dismiss was denied by this Court on November 28, 2017.

notice of default to appellant, by UPS overnight mail, advising appellant that it was in default due to its failure to remit payment in the amount of \$11,284.72; its non-payment of real estate taxes for 2015 in the amount of \$52,348.81; and its failure to maintain insurance on the Property. Trustee also sent the March 21, 2016 notice of default to Komorowski, by UPS overnight mail, at 842 Leigh Mill Road, Great Falls, VA 22066. On August 3, 2016, trustee sent a second notice of default to appellant and Komorowski, by UPS overnight mail.

On August 16, 2016, trustee initiated a foreclosure action. Trustee attempted to serve the order to docket on appellant’s registered agent via private process server at the Property address, but the process server was notified that the resident agent was no longer at that address. On August 19, 2016, trustee served the order to docket on Maryland State Department of Assessments & Taxation (“SDAT”) via private process server. Trustee filed an affidavit of service of the order to docket on SDAT.

On August 23, 2016, trustee sent a notice of default and notice of foreclosure sale to appellant, via certified mail, postage prepaid, return receipt requested, and first-class mail, advising appellant that absent a cure of the default, the Property would be sold at foreclosure on September 13, 2016. Trustee also sent the August 23, 2016 notice of default and notice of foreclosure sale to Komorowski at 842 Leigh Mill Road, Great Falls, VA 22066, via certified mail, postage prepaid, return receipt requested, first-class mail, and e-mail. The August 23, 2016 certified mail notice to appellant was returned to trustee as “attempted - not known,” and the certified mail notice addressed to Komorowski was returned marked “return to sender.” On August 30, 2016, trustee filed an affidavit attesting

to the mailing of the notice of sale. The notice of foreclosure was also advertised by publication.

On September 13, 2016, the Property sold at public auction to Lender for \$1,200,000. On September 27, 2016, trustee filed a report of sale and request for ratification. A copy of the report of sale was served on appellant at the Property via first class mail. The circuit court published notice of the report of sale, requiring that any exceptions to the sale be filed by November 7, 2016. On December 5, 2016, having received no exceptions, the circuit court entered an order ratifying the sale.

On February 8, 2017, Komorowski, proceeding pro se on behalf of appellant, filed an emergency motion for reconsideration of the order of ratification, arguing that neither he nor appellant received notice of the foreclosure action or the foreclosure sale. In the motion, Komorowski stated that he learned of the foreclosure sale when a building inspector sought access to the Property to conduct an inspection for the “new owners of the building.” On February 16, 2017, counsel for appellant filed a memorandum of law in support of appellant’s emergency motion for reconsideration, asserting that the foreclosure sale price was inadequate and that “it did not receive actual notice of that foreclosure sale or this [c]ase,” and requesting that the court vacate the ratification order under Maryland Rule 2-535(b).²

² Appellant’s counsel also filed a second memorandum of law in support of appellant’s emergency motion for reconsideration and an amendment to its second memorandum of law.

On March 15, 2017, the circuit court denied appellant’s motion under Md. Rule 2-525(b), finding that: 1) appellant failed to present a valid defense or meritorious argument; 2) appellant presented no new facts or issues sufficient to warrant reconsideration; 3) trustee complied with Md. Rule 14-210 by sending notice to appellant prior to the sale; 4) the foreclosure sale price, which was 48% of the fair market value, was adequate³; 5) Komorowski was not an interested party, and therefore, lacked standing; and 6) appellant’s filings were untimely. This appeal followed.

DISCUSSION

Appellant argues that the ratification order was the product of a procedural irregularity because the notice of foreclosure sale did not satisfy procedural due process, there was no proof of service of the order to docket on appellant or Komorowski, and the notice of sale was not served on the occupants of the Property. Appellant further argues that the circuit court erred in finding that its revisory motion was untimely under Md. Rule 2-535(b). As a result, appellant argues that the circuit court erred in denying its request to vacate the ratification order.

We review the circuit court’s denial of a request to revise a final judgment for abuse of discretion. *Pelletier v. Burson*, 213 Md. App. 284, 289 (2013) (citing *Jones v. Rosenberg*, 178 Md. App. 54, 72 (2008)). We will reverse the denial of a motion to revise a final judgment only where “no reasonable person would take the view adopted by the

³ On appeal, appellant does not challenge the circuit court’s determination that the foreclosure sale price of the Property was adequate.

[trial] court, or when the court acts without reference to any guiding rules or principles.” *Powell v. Breslin*, 430 Md. 52, 62 (2013) (internal quotation marks and citation omitted).

Maryland Rule 2-535(b) provides, “[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.” In order to prevail on a motion under Rule 2-535(b), the movant must demonstrate “[t]he existence of fraud, mistake, or irregularity” by “clear and convincing evidence.” *Davis v. Attorney Gen.*, 187 Md. App. 110, 123-24 (2009) (internal quotation marks and citation omitted).

“Maryland courts have narrowly defined and strictly applied the terms fraud, mistake, [and] irregularity, in order to ensure finality of judgments.” *Thacker v. Hale*, 146 Md. App. 203, 217 (2002) (“Moreover, the party moving to set aside the enrolled judgment must establish that he or she act[ed] with ordinary diligence and in good faith upon a meritorious cause of action or defense.”) (internal quotation marks and citation omitted). “Irregularity” as used in Md. Rule 2-535(b), has been defined as “a failure to follow required procedure or process.” *Powell*, 430 Md. at 72 (relying on *Early v. Early*, 338 Md. 639, 653 (1995)).

Maryland Rule 14-210(b) governs the notice procedures required in foreclosure sales, and provides that, in addition to notice by publication:

[T]he 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).... The mailings shall be sent not more than 30 days and not less than ten days before the date of the sale.

(Emphasis added). The secured party must then “file an affidavit stating that (1) the [authorized party] has complied with the mailing provisions of this Rule or (2) the identity or address of the borrower ... is not reasonably ascertainable.” Rule 14-210(e).

The corresponding provision of Md. Code (1975, 2015 Repl. Vol., 2017 Supp.), § 7-105.2(c)(1) of the Real Property Article (“R.P.”), provides that, in addition to notice by publication, a written notice “*shall be sent*: (i) [b]y certified mail, postage prepaid, return receipt requested, bearing a postmark from the United States Postal Service, to the record owner . . . ; and (ii) [b]y first-class mail.” R.P § 7-105.2(c)(3) further requires that the person giving notice file a return receipt or affidavit stating that the provisions of R.P § 7-105.2(c) have been complied with or that the address of the record owner is not reasonably ascertainable.

Trustee sent the notice of foreclosure sale to appellant, via certified mail, postage prepaid, return receipt requested, and first-class mail. The certified mail notice to appellant was returned to trustee as “attempted - not known” and the certified mail notice addressed to Komorowski was returned marked “return to sender,” but the first-class mail notices were not returned. The notice of foreclosure was also advertised by publication. On August 30, 2016, trustee filed an affidavit attesting that the “notices to the record owner and grantor” were sent in compliance with R.P § 7-105.2 and Md. Rule 14-210.

Appellant contends that trustee’s notice of sale did not satisfy procedural due process because there was evidence that the notices to appellant and Komorowski were not

received. Appellant relies on a footnote in *Griffin v. Bierman*, 403 Md. 186, 202 n.11 (2008), to support his argument that, because the certified mail notices were returned, the trustee was obligated to make “reasonable follow-up measures to attempt to give notice” to appellant. In *Griffin*, however, the Court explained that additional service efforts may have been warranted had appellant’s first-class mail also been returned undelivered or had the certified mail been returned for “something more revealing than ‘unclaimed[.]’” *Id.* (citation omitted). The Court concluded that Maryland’s foreclosure notice procedures satisfy due process, explaining that in the context of procedural due process, “actual receipt of notice is not the test.” *Id.* at 198 (internal quotations and citation omitted). All that due process requires is “notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.” *Id.* at 197 (quoting *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950)).

In the present case, there was no evidence that the first-class mail notice to appellant had not been received. Moreover, trustee sent the notice to Komorowski via email and first-class mail at his address of 842 Leigh Mill Road, Great Falls, VA 22066, which was the same address provided by Komorowski in his emergency motion for reconsideration. Accordingly, we discern no abuse of discretion in the circuit court’s determination that Trustee complied with the notice requirements set forth in Md. Rule 14-210(b), and that appellant failed to establish the existence of a procedural irregularity in the notice of sale.

Appellant also argues that trustee failed to comply with Md. Rule 14-210 by failing to send notice of the foreclosure sale to “All Occupants” of the Property. Appellant did

not raise this issue before the trial court, and we decline to consider it. *See* Md. Rule 8-131(a) (“Ordinarily, the appellate court will not decide any [] issue unless it plainly appears by the record to have been raised in or decided by the trial court[.]”). Appellant’s claim that trustee was obligated to send notice to the occupants of the Property, even if considered, is without merit. The notice to “All Occupants” required by Rule 14-210(b), applies to the notice provisions required for the foreclosure sale of residential property, pursuant to R.P. §7-105.9(c). As the Property at issue here was commercial property, the requirement that notice be sent to “All Occupants” of the property did not apply.

Next, appellant argues that “[p]roof that the [o]rder to [d]ocket was delivered to Maryland SDAT, without more, is not sufficient proof that service was actually effected.” Trustee contends that appellant’s challenge to the service of the order to docket was “expressly withdrawn” or, alternatively, unpreserved, as it was not raised before the circuit court.

Appellant argued before the circuit court that trustee was obligated to serve Robert Dykes, its registered agent, and that its failure to do so constituted ineffective service of process. Appellant now urges that service of the order to docket upon SDAT was ineffective because the affidavit of service does not state the position of the person who accepted service, nor did trustee submit an affidavit from a representative of SDAT confirming that SDAT mailed the order to docket to appellant. Because appellant raises the service of the order to docket on SDAT for the first time on appeal, it is not preserved for our review, and we decline to consider it. Moreover, appellant does not cite any legal

authority in support of its position that service of the order to docket upon SDAT was ineffective. *See Anderson v. Litzenberg*, 115 Md. App. 549, 578 (1997) (“It is not our function to seek out the law in support of a party’s appellate contentions.”).

Even if we were to review appellant’s claim, however, we would conclude that it is without merit. Maryland Rule 2-124(o) provides that service may be made upon a limited partnership by serving SDAT if the registered agent is “no longer at the address for service of process maintained with [SDAT].” Upon learning that appellant’s registered agent was no longer located at the Property address, trustee served the order to docket on SDAT via private process server. No further action with regard to SDAT was required. Appellant’s argument that service of the order to docket upon SDAT was ineffective because trustee failed to demonstrate that the individual who accepted service at SDAT was authorized to do so, and because trustee failed to submit an affidavit from SDAT confirming that the order to docket was, in fact, mailed to appellant, is not supported by Rule 2-124(o) or case law.

Finally, appellant contends that its emergency motion for reconsideration was not untimely because its motion concerned irregularity of process, and under Md. Rule 2-535(b), a court may exercise revisory power and control over a judgment in case of fraud, mistake or irregularity at any time. While a motion under Rule 2-535(b) may be filed at any time, in considering whether to revise a judgment under Rule 2-535(b), a court must also consider whether the moving party acted with “ordinary diligence” in seeking relief under that Rule. *See Thacker*, 146 Md. App. at 217. We find no abuse of discretion in the

circuit court’s determination that appellant’s filing of its revisory motion five months after the foreclosure sale was untimely, and that appellant failed to demonstrate a procedural irregularity that would entitle it to relief under Rule 2-535(b).

**JUDGMENT OF THE CIRCUIT COURT
FOR PRINCE GEORGE’S COUNTY
AFFIRMED. COSTS TO BE PAID BY
APPELLANT.**