

Circuit Court for Prince George's County
Case No. CAEF19-13256

UNREPORTED
IN THE COURT OF SPECIAL APPEALS
OF MARYLAND

No. 350

September Term, 2021

PHYLLIS M. JONES

v.

CARRIE M. WARD, *et al.*

Reed,
Ripken,
Battaglia, Lynne A.
(Senior Judge, Specially Assigned)

JJ.

Opinion by Ripken, J.

Filed: February 25, 2022

*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.

Phyllis Jones (“Jones”), in the Circuit Court for Prince George’s County, moved to dismiss or stay Appellees’ (“Substitute Trustees”) action to foreclose the mortgage on her home. The circuit court twice stayed the foreclosure sale but eventually allowed the sale to proceed. Following the sale of her property at a foreclosure auction, Jones filed exceptions seeking to vacate the sale. In her exceptions, she argued that the sale was conducted while she had a loss mitigation application pending and that the sale violated Governor Hogan’s Executive Orders on COVID-19. The court denied her exceptions and ratified the sale, and she now appeals to this Court pursuing the same claims of error alleged in the circuit court. For the reasons discussed below, we conclude that there was no error, and thus, we shall affirm.

FACTUAL AND PROCEDURAL BACKGROUND

On June 25, 2004, Jones obtained a loan for \$360,000, executed through a promissory note (“the Note”) and secured by a Deed of Trust encumbering her property at 17005 Longleaf Drive, Bowie, Maryland 20716 (“the Property”).¹ In February 2016, Jones defaulted on the mortgage payments due under the Note. The loan servicer sent Jones a notice of intent to foreclose in June 2018 based on her continued default. The notice included an application for loss mitigation as well as information for loss mitigation options. On April 18, 2019, Substitute Trustees initiated a foreclosure action by filing an order to docket in the Circuit Court for Prince George’s County. The Substitute Trustees

¹ We refer to the Deed of Trust as a mortgage. *See Legacy Funding LLC v. Cohn*, 396 Md. 511, 513 n.1 (2007).

filed a preliminary loss mitigation affidavit with the order to docket, indicating a representative had not yet made contact with Jones to assess foreclosure alternatives.²

Jones filed a Motion to Stay and/or Dismiss Foreclosure Proceedings. In her motion, she argued that the Note had been lost and that the Substitute Trustees lacked standing to foreclose. The court entered an order on September 26, 2019, temporarily staying the foreclosure sale until after a decision had been rendered following a full evidentiary hearing on Jones's motion.

On January 14, 2020, the court held the hearing where it heard testimony and oral argument from each side. Following the hearing, the court took the matter under advisement. On February 12, 2020, the court issued an order denying Jones's motion. The court lifted the temporary stay and allowed foreclosure proceedings to commence.³

Jones orally requested loss mitigation assistance from the loan servicer on November 16, 2020, which was confirmed by an email she received that same day stating: "This message is to acknowledge our receipt of your request for assistance based on financial impact from COVID-19. Please note, there is no need to contact us, we have

² According to the docket entries, the parties participated in mediation on August 19, 2019, but were unsuccessful in reaching an agreement.

³ Jones filed a Motion for Reconsideration on February 19, 2020, and the court denied that motion on October 26, 2020. On November 22, 2020, Jones filed an interlocutory appeal challenging the circuit court's denial of her motion, which was before this Court as *Jones v. Ward*, No. 1071, Sept. Term 2020.

received your application and it is under review. We will respond within 10 business days.”⁴

On November 22, 2020, Jones filed an Emergency Motion to Stay the Foreclosure Sale. She claimed that the Substitute Trustees failed to comply with Governor Hogan’s October 16, 2020 Executive Order (“Executive Order 1”).⁵ Specifically, paragraph IV of Executive Order 1 requires servicers of mortgage loans to notify borrowers that they are eligible to request a forbearance if experiencing financial hardship due to COVID-19. Jones claimed that Substitute Trustees never notified her of the right to a forbearance and, as a result, the foreclosure sale should be stayed. The court granted the motion on November 23, 2020.

Substitute Trustees thereafter filed a Motion to Lift the Stay. In that motion, they argued that the Maryland Commissioner of Financial Regulation issued guidance on November 9, 2020, following Governor Hogan’s Executive Order 1, which clarifies that paragraph IV was inapplicable. Specifically, Substitute Trustees quoted:

Section IV of the Order is intended to apply prospectively The Order is not intended to apply to a Mortgage Loan for which a[] [Notice of Intent] was sent to the Borrower *and* a copy is submitted to the Commissioner through the [Notice of Intent] Electronic System prior to April 3, 2020.

⁴ Jones’s loss mitigation application was later denied in a letter dated February 1, 2021.

⁵ That order is titled AMENDING AND RESTATING THE ORDER DATED APRIL 3, 2020, TEMPORARILY PROHIBITING EVICTIONS OF TENANTS SUFFERING SUBSTANTIAL LOSS OF INCOME DUE TO COVID-19, AND ADDITIONALLY PROHIBITING CERTAIN REPOSESSIONS, RESTRICTING INITIATION OF RESIDENTIAL FORECLOSURES, AND PROHIBITING COMMERCIAL EVICTIONS.

Substitute Trustees further argued that the Affidavit of Default and Mailing of Notice of Intent to Foreclose was sent to Jones on June 14, 2018, and the Notice of Intent was submitted to the Commissioner “on or before” June 19, 2018, as evidenced by a document from the Commissioner acknowledging receipt. Because both events occurred prior to April 3, 2020, the date set forth by the Guidance, Substitute Trustees argued that paragraph IV of Executive Order 1 did not apply. The court entered an order on December 28, 2020, granting Substitute Trustees’ motion to lift the stay.

On February 2, 2021, Jones filed a second Emergency Motion for Injunction and Motion to Stay Foreclosure Sale Scheduled for February 9, 2021. She renewed her argument as to her entitlement to a forbearance pursuant to Governor Hogan’s Executive Order 1. Jones also argued that any sale conducted during the state of emergency is in further violation of a separate Amended Executive Order (“Executive Order 2”),⁶ which provides:

- a. State and local government buildings and facilities with an expected occupancy or attendance of more than 10 people shall:
 - (i) Promptly and conspicuously post in the building or facility a copy of the MDH recommendations for social distancing; and
 - (ii) Provide all occupants and attendees with the capability to wash their hands.
- b. A copy of this Order shall be made available to all occupants or attendees at any State or local government building and facility with an expected occupancy or attendance of more than 10 people.

⁶ The order is titled AMENDING AND RESTATING THE ORDER OF OCTOBER 16, 2020, ALLOWING REOPENING OF CERTAIN BUSINESSES AND FACILITIES, SUBJECT TO LOCAL REGULATION, AND GENERALLY REQUIRING THE USE OF FACE COVERINGS.

According to Jones, the advertisements in the newspaper of the upcoming foreclosure sale did not demonstrate how compliance with Executive Order 2 would be ensured. Finally, Jones argued that the conducting of a sale during a State of Emergency would have a “chilling effect” on the sale price.

On February 4, 2021, the court entered an order finding again that Jones was not entitled to a forbearance under Executive Order 1 and that her request for a forbearance was not timely. The court thus denied her Emergency Motion. The foreclosure sale took place on February 9, 2021, and the secured party purchased the Property for \$490,000.

Jones filed Exceptions to the sale on March 16, 2021, seeking to vacate the sale. Relevant here, Jones claimed that the sale was invalid because she had a pending loss mitigation application at the time of the sale, and the sale did not meet Governor Hogan’s regulations set forth in Executive Order 2.

On April 21, 2021, the court entered an order denying Jones’s Exceptions. It stated that Jones “fail[ed] to raise any irregularity with particularity as to the procedure of the foreclosure sale pursuant to Md. Rule 14-305(d)(1).” The court entered an order ratifying the sale on May 13, 2021. This timely appeal followed.

ISSUES PRESENTED

On appeal, Jones presents two issues for our review:

- I. Did the Circuit Court err in failing to set aside a sale due to illegality that occurred when the homeowner had a pending loss mitigation application (also known as dual-tacking)?
- II. Did the Circuit Court err in failing to set aside a sale due to irregularity and illegality when the sale failed to meet the governor’s pandemic guidelines on public events?

For the reasons to follow, we hold that the circuit court did not err, and we affirm.

DISCUSSION

Foreclosure sales are governed by Maryland Real Property Article § 7-105 as well as the Maryland Rules. “Maryland Rule 14-305(d) provides that if a party perceives an irregularity in the foreclosure sale, it may file exceptions to the sale of the property.” *Fagnani v. Fisher*, 418 Md. 371, 384–85 (2011). “It is settled law that, ‘there is a presumption that the sale was fairly made, and that the antecedent proceedings, if regular on the face of the record, were adequate and proper, and the burden is upon one attacking the sale to prove the contrary.’” *Id.* (quoting *Webster v. Archer*, 176 Md. 245, 253 (1939)). “The party excepting to the sale bears the burden of showing the sale was invalid, and must show any claimed errors caused prejudice.” *Id.*

After a party files exceptions, the court shall ratify the sale if “the time for filing exceptions . . . has expired and exceptions to the report either were not filed or were filed but overruled” and “the court is satisfied that the sale was fairly and properly made.” Md. Rule 14-305(e). A court’s ratification of a foreclosure sale is presumed to be valid. *Fagnani*, 418 Md. at 384. But “[w]hen the purchaser at the foreclosure sale is the mortgagee or his assignee,” courts will closely examine allegations of misconduct in the foreclosure

sale and set aside the sale on “slight evidence of partiality, unfairness, or want of the strictest good faith.” *Id.* at 395. In reviewing a court’s ratification, we will not disturb the court’s findings unless they are clearly erroneous. *Id.* Questions of law decided by the trial court are reviewed *de novo*. *Jones v. Rosenberg*, 178 Md. App. 54, 68 (2008).

I. THE COURT DID NOT ERR IN OVERRULING JONES’S EXCEPTIONS REGARDING LOSS MITIGATION OPTIONS.

Jones first argues that the circuit court erred in overruling her post-sale exceptions, ratifying the sale, and failing to set aside the foreclosure sale due to illegality because her loss mitigation application was pending when the foreclosure sale was scheduled. She argues this process violated the federal Real Estate Settlement Procedures Act (“RESPA”) and implementing regulations.⁷ Substitute Trustees argue that loss mitigation defenses were first raised in Jones’s post-sale exceptions and were therefore waived.

Before foreclosure occurs, a defaulting borrower may file with the court a motion to stay a sale and dismiss the foreclosure action pursuant to Maryland Rule 14-211. The Rules Committee explained that among the defenses that may be included in such a motion is a claim that the lender failed to grant a loss mitigation application. Md. Rule 14-211; *Bates v. Cohn*, 417 Md. 309, 319 & n.9 (2010). “If that defense is raised, the motion must

⁷ Jones also argues that, pursuant to Chief Judge Barbera’s December 22, 2020 Administrative Order, Substitute Trustees were required to submit a Declaration of Exemption from the Moratorium setting forth facts declaring that the property is “not subject to any federal or state moratorium or stay that restricts, in any way, an action to foreclose upon a lien on a residential property.” Jones acknowledges that Substitute Trustees filed the Declaration, but claims that the Declaration was not accurate because the property was subject to a stay. As found by the circuit court and discussed *infra*, the property was not subject to a moratorium or stay.

state specific reasons why loss mitigation pursuant to a loss mitigation program should have been granted.” Rules Committee Note to Md. Rule 14-211(a)(3).

Maryland Rule 14-211 allows the loss mitigation defense “and all other grounds for the *stay* of the sale and dismissal of a motion to be included in a single motion.” *Bates*, 417 Md. at 319 fn.9 (emphasis in original) (quoting the Committee Note on Rule 14-211). “Thus, the Rule intends that such claims, regarding loss mitigation, be brought as a *defense* to stay (or prevent) the sale before it occurs.” *Id.* (emphasis in original). After the sale is completed, the defaulting borrower no longer “raises ‘defenses’ that challenge the lender’s right to foreclose; rather, he or she files ‘exceptions’ to the sale itself.” *Id.*; *see id.* at 320–21 (“[I]njunctive actions are to be filed prior to the action which they seek to forestall. The timing of this remedy is not elective.” (quoting *Greenbriar v. Brooks*, 387 Md. 683, 688 (2005), *superseded by Rule*, Md. Rule 14-305, *as recognized in Thomas v. Nadel*, 427 Md. 441, 445 (2012))). Once a property is sold at foreclosure, the defaulting borrower may file exceptions pursuant to Maryland Rule 14-305, only as to the sale. *Id.* at 319.

The issue of whether failure to comply with pre-sale loss mitigation requirements can be brought in post-sale exceptions was before the Court of Appeals in *Bates v. Cohn*, 417 Md. 309 (2010). There, a borrower, *Bates*, defaulted on her mortgage payments, and the lender initiated foreclosure proceedings. *Id.* at 312. Prior to a foreclosure sale, the lender sent *Bates* multiple notices informing her that there were options available to help prevent foreclosure. *Id.* at 312–13. *Bates* called the lender to inquire about a loan modification, and the lender asked her to provide updated financial information and requested she call back when her finances improved. *Id.* at 313. Following additional notices of default and notices

of intent to foreclose, Bates again called the lender to pursue loss mitigation options. *Id.* at 313–14. She was informed that a date for foreclosure sale had not yet been set. *Id.* at 314. Bates submitted a loan modification request and represented to the lender that her financial situation had changed, and she would send over the updated financial information. *Id.* at 315–16. Prior to receipt of the updated financial information, the lender denied Bates’s request. *Id.* at 316. Two days later, a foreclosure sale was scheduled. *Id.* Approximately two weeks after the sale was scheduled, the lender received Bates’s updated financial information, following which it issued another denial letter. *Id.* The sale took place, and the property was sold to a *bona fide* purchaser. *Id.*

Bates filed post-sale exceptions alleging that the lender did not abide by federal loss mitigation requirements. *Id.* Bates claimed that, based on the failure to comply with those requirements, the sale was not fairly and properly made. *Id.* at 316–17. The circuit court denied her exceptions and ratified the sale, finding that pre-sale loss mitigation cannot be raised at the ratification phase. *Id.* at 318. The Court of Appeals issued a writ of certiorari to answer Bates’s question: “Did the trial court err as a matter of law when it held that [Bates] is precluded from raising a lender’s substantive failure to satisfy loss mitigation requirements in the deed of trust as an exception to foreclosure sale?” *Id.*

The Court of Appeals rejected her argument that the circuit court erred. *Id.* at 324. In doing so, the Court examined the language of Rule 14-211 and its Committee Notes. *Id.* at 328–29. The Rule allows for defaulting borrowers to prevent foreclosure sales by asserting certain defenses. *Id.* Because the Committee Notes explicitly state that the failure to grant loss mitigation “may be a defense to the right of the [lender] to foreclose in the

pending action,” the Court reasoned that a “reasonable construction of the language” indicated that the failure to comply with loss mitigation requirements implicates the right to foreclose, rather than the procedural handling of a sale. *Id.* at 329 (emphasis omitted).

In contrast, Rule 14-305 governs challenges to a foreclosure sale. But, Rule 14-305 “is not an open portal through which any and all pre-sale objections may be filed as exceptions, without regard to the nature of the objection or when the operative basis underlying the objection arose and was known to the borrower.” *Id.* at 327. The Court held that a borrower “must assert known and ripe defenses to the conduct of a foreclosure sale prior to the sale, rather than in post-sale exceptions. A lender’s failure to comply with pre-sale loss mitigation requests is one such defense[.]” *Id.* at 328. Accordingly, the Court of Appeals rejected Bates’s argument and affirmed the ratification of the sale. *Id.*

Jones’s argument that the circuit court erred in overruling her post-sale exceptions for inadequate loss mitigation opportunities lacks merit for the same reasons as in *Bates*. Through her Rule 14-305 motion, Jones could contest procedural irregularities and otherwise argue that the sale was not fairly or properly made, but her loss mitigation arguments in that motion were not timely raised. As in *Bates*, Jones’s arguments regarding insufficiency of the loss mitigation options needed to be raised prior to the sale through a Rule 14-211 motion. 417 Md. App. at 320–21. Although Jones filed two Rule 14-211 Motions, which the court considered and denied, neither motion sought to stay the sale for her to pursue loss mitigation.⁸ The circuit court did not err in denying Jones’s loss-

⁸ The opinion in *Bates* left open the question whether a borrower could prevail on a post-sale exception where a lender committed “silent fraud” by encouraging a borrower to “sit

mitigation-based exceptions because the exceptions did not raise with particularity an irregularity in the foreclosure sale.⁹

II. THE COURT DID NOT ERR IN DECLINING TO SET ASIDE A SALE CONDUCTED DURING THE COVID-19 PANDEMIC.

Jones next claims that the circuit court erred in failing to set aside the sale of her property because the sale did not conform with Governor Hogan’s Executive Order regarding COVID-19 protocols. In his Executive Order, Governor Hogan mandated that government buildings and facilities with expected occupancy or attendance of more than ten people shall “post in the building or facility a copy of the MDH recommendations for social distancing,” “provide all occupants and attendees with the capability to wash their hands,” and “[a] copy of the Order shall be made available to all occupants or attendees[.]” According to Jones’s exception, the sale was conducted at the Prince George’s courthouse but did not conform to the above-mentioned requirements and was thus “illegal.” Jones relatedly claimed that, because the sale was conducted during a global pandemic, it had a “chilling effect” on the bidding price, as evidenced by the fact that the property was sold

on her rights and await the outcome of loss mitigation or loan modification efforts that would never come to pass.” 417 Md. at 325. Jones does not make any such allegation here.

⁹ Jones also claims that Substitute Trustees failed to comply with the loss mitigation procedures of RESPA. We do not reach that issue. REPSA “does not annul, alter, or affect, or exempt any person . . . from complying with, the laws of any State . . . except to the extent those laws are inconsistent with any provision[.]” 12 U.S.C. § 2616. Jones was obligated to comply with the procedural requirements for a Rule 14-211 motion, which as noted, required her to raise loss mitigation arguments prior to the foreclosure sale. She did not do so.

for \$490,000 and the Zillow estimate stated the Property was worth approximately \$586,000.¹⁰

Exceptions to a foreclosure sale must set forth the alleged irregularity with particularity. Md. Rule 14-305(e)(1). Such irregularities may include that “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, [and] challenging the price as unconscionable[.]” *Bates*, 417 Md. at 321 (quoting *Greenbriar*, 387 Md. at 741). In examining the adequacy of a sale, courts look to whether the trustees exercised “the same degree of prudence, care, diligence, and judgment, that a man of ordinary business judgment and experience would exercise, in selling his own property.” *Fagnani v. Fisher*, 418 Md. 371, 384–85 (2011) (quoting *Webster v. Archer*, 176 Md. 245, 438 (1939)). “It is well established Maryland law that inadequacy of price alone will not prevent ratification of a foreclosure sale ‘unless it is so grossly inadequate as to shock the conscience of the court.’” *Hurlock Food Processors Inv. Associates v. Mercantile-Safe Deposit and Trust Co.*, 98 Md. App, 314, 340 (1993) (quoting *Garland v. Hill*, 277 Md. 710, (1976)). “Although inadequate price alone does not ordinarily necessitate setting aside a sale, when inadequate price is coupled with other evidence of irregularity the sale may

¹⁰ Jones references in a footnote that the Report of Sale and Affidavit of Fairness of Sale and Truth of Report was filed by an attorney who had previously been suspended from practicing law for filing affidavits known to be untruthful. Jones does not identify any fraud connected with this affidavit.

be set aside[.]” *Fagnani*, 418 Md. at 393 (quoting *Pizza v. Walter*, 345 Md. 664, 677 (1997)).

Jones’s claims that the foreclosure sale took place in violation of Governor Hogan’s Executive Order do not render the sale illegal. Jones provided no basis for her assertions that there were not postings of the recommended social distances or Governor Hogan’s Order, or that attendees were not provided with places to wash their hands. She also argued generally that the Substitute Trustees “failed to exercise any degree of prudence, care, diligence and judgment” by holding the auction during the pandemic-related state of emergency. We do not agree. A foreclosure sale is not inherently illegal or irregular just because it was held during the COVID-19 outbreak.

Jones argued that fewer bidders were likely to attend “with no safety precautions announced, posted or in place” for the auction.¹¹ But without evidence produced to show that anyone was dissuaded from participating in the auction, Jones’s claims about a “chilling effect” on bidders are speculative. *See Hood v. Driscoll*, 227 Md. App. 689, 697 (2016) (affirming ratification of a foreclosure sale where “no evidence was produced that anyone was dissuaded from bidding on the property” as a result of the alleged irregularity, so the assertion that the price would otherwise have been higher was “pure speculation.”); *J. Ashley Corp. v. Burson*, 131 Md. App. 576, 586 (2000) (upholding denial of exceptions

¹¹ In fact, the advertisements for the foreclosure sale stated: “BIDDERS ARE STRONGLY ENCOURAGED TO FOLLOW CDC GUIDANCE AND WEAR A COVER OVER BOTH NOSE AND MOUTH AND PRACTICE SOCIAL DISTANCING AT THE AUCTION.” Such a notification seems to indicate that compliance with the requisite protocols would be enforced.

to a foreclosure sale where appellant failed to “present any particular or specific information showing that the ‘people’ were prepared to bid on the property, or that they would have bid more than the amount for which the property was ultimately sold.”). Jones argues that the actual sale price, which was 83 percent of her proffered Zillow value estimate, is evidence of irregularity. However, the sale price allegedly at 83 percent of market value is not so low as to shock the conscience. *See Hurlock*, 98 Md. App. at 347–48 (affirming foreclosure for where the sale yielded 35% of the asserted fair market value). The circuit court did not err in denying either of Jones’s post-sale exceptions.

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