

UNREPORTED
IN THE COURT OF SPECIAL APPEALS
OF MARYLAND

No. 0693

September Term, 2014

GARY OSEROFF

v.

KRISTINE D. BROWN, *et al.*
SUBSTITUTE TRUSTEES

Zarnoch,
Leahy,
Rodowsky, Lawrence F.
(Retired, Specially Assigned),

JJ.

Opinion by Leahy, J.

Filed: August 25, 2015

* 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.

This is an appeal from a foreclosure action brought by Deutsche Bank National Trust Company and substitute trustees Kristine D. Brown, William M. Savage, Gregory N. Britto, Jessica L. Harrington, and John S. Burson, (collectively “Deutsche Bank,” “Trustees,” or “Appellees”) against Esther Levy, C/O Alan Levy, successor personal representative in the Circuit Court for Anne Arundel County, on a residence located in Annapolis, Maryland. More than a year after ratification of the sale of the property, Appellees moved for possession. Appellant Mr. Gary Oseroff, who was a tenant in the home located on the property at the time, moved to intervene with the hope of preventing Appellees from taking possession. However, prior to the physical placement of Mr. Oseroff’s motion into the case file, the court granted Appellees’ motion for possession. After receiving Mr. Oseroff’s motion, the court then issued an order staying its prior order granting possession to allow Mr. Oseroff to submit proof that he was a bona fide tenant. The same day that the court stayed its order, Mr. Oseroff filed his appeal to this Court.

Mr. Oseroff presents two questions for our review, neither of which we answer:

- “As the Motion for Judgement Awarding Possession was granted against Esther Levy, Et Al, defendant on May 23, 2014 and Appellant was granted the Motion to Intervene as a Bona Fide Tenant on July 8, 2014, does the Appellee or the Appellant have rights to possession of the property?”
- “When an Attorney under the penalty of perjury does perjure themselves to obtain a judgment, should the judgment stand?”

Because the circuit court did not make any findings as to Mr. Oseroff’s right to possession before Appellant filed this appeal, we hold that justice is best served by

allowing further proceedings in circuit court to resolve disputed factual issues. We therefore neither affirm nor reverse the circuit court.

I.

On October 5, 2006, Esther Levy obtained a loan in an amount of \$299,200.00 from FDB Mortgage, Inc., refinancing mortgages on her property with an unpaid principal totaling approximately \$155,000. The loan was evidenced by a note and secured by a deed of trust recorded against real property in the city of Annapolis in Anne Arundel County, Maryland (the “Property”). The note was subsequently endorsed in blank and transferred to Deutsche Bank National Trust Company as Trustee for HarborView Mortgage Loan Trust 2007-7. Ms. Levy defaulted on the loan on May 2, 2011, and Trustees sent a notice of intent to foreclose to her address on October 11, 2011 pursuant to Maryland Code (1974, 2010 Repl. Vol., 2014 Supp.), Real Property Article (“RP”), § 7-105.1(c). On April 16, 2012, Trustees filed an order to docket foreclosure, as required by RP § 7-105.1(e). After mailing notice of the foreclosure to the Ms. Levy and the occupants of the property and after certifying that the procedural prerequisites to sale had been satisfied, Trustees sold the property at auction to the current note holder, Deutsche Bank National Trust Company as Trustee for HarborView Mortgage Loan Trust 2007-7, on August 21, 2012. The sale was ratified by the court on November 30, 2012 (entered December 4, 2012), and the auditor’s report and account of sale was ratified and confirmed as final on February 4, 2013. Ms. Levy did not participate in the foreclosure proceedings.

Two months after the foreclosure was ratified, Deutsche Bank mailed a notice pursuant to the Protecting Tenants at Foreclosure Act of 2009 (“PTFA”). *See* Pub. L. No. 111-22, Div. A, tit. VII, §§ 701-04, 123 Stat. 1632, 1660-62, *as amended by* Protecting Tenants at Foreclosure Extension and Clarification Act, Pub. L. No. 111-203, tit. XIV, § 1484, 124 Stat. 1376, 2204 (2010). The notice requested that any bona fide tenant¹ forward a copy of the lease, proof of rental payments, and the names of the occupants of the property. It stated that the tenant may have additional rights, including the right to remain in the property for 90 days from the receipt of the notice.

On March 26, 2014, having not heard from the occupant of the Annapolis property, Deutsche Bank filed a motion for judgment awarding possession and certified that notice had been given pursuant to the PTFA. Concurrent with its motion, Deutsche Bank sent notice of the motion to the occupant and informed the occupant that any response to the motion must be filed within thirty days, as required by Maryland Rule 2-321. On April 16, 2014, Mr. Oseroff filed a motion to intervene as a defendant and asserted that he was a bona fide tenant in possession of the property.

¹ RP § 7-105.6(b)(1) states that a lease or tenancy of property is bona fide if:

- (i) The mortgagor or grantor or the child, spouse, or parent of the mortgagor or grantor under the contract is not the tenant;
- (ii) The lease or tenancy was the result of an arm's length transaction; and
- (iii) The lease or tenancy requires the receipt of rent that is not substantially less than fair market rent for the property or the unit's rent is reduced or subsidized due to a federal, State, or local subsidy.

For some unknown reason, Mr. Oseroff’s motion to intervene was not placed into the case file in a timely manner. Unaware of Mr. Oseroff’s motion, the court proceeded to grant possession of the property to Deutsche Bank in an order signed on May 23, 2014 (entered May 28, 2014). The court then issued an order, *sua sponte*, on June 9, 2014 (entered June 12, 2014), staying its order granting possession of the property for 15 days to allow Mr. Oseroff to file documentation supporting his assertion that he was a bona fide tenant. However, unaware that the court stayed its prior order on the same day, Mr. Oseroff filed a notice of appeal to this Court, on June 9, 2014.

Subsequent to filing the instant appeal, Mr. Oseroff later filed a copy of the lease as proof of his bona fide tenancy on the property on June 23, 2014.² The lease stated “RESIDENT agrees to pay in advance \$1,600 per month on the 15th day of each month. This agreement shall commence on March 15, 2012 and continue . . . until March 15, 2014 as a leasehold. Thereafter it shall renew for an additional two (2) year period unless home is purchased or thirty (30) days[?] notice of non renewal is given prior to ending of initial term of tenancy.” Mr. Oseroff asserted that the lease automatically renewed in March 2014. Mr. Oseroff also included various real estate documents purporting to show that he was in negotiations with Deutsche Bank to purchase the property during the time that Deutsche Bank sought Mr. Oseroff’s eviction. On June 23, 2014, Mr. Oseroff filed an answer to Deutsche Bank’s motion for judgment of possession. In his answer, he

² The record contains documents filed by the parties subsequent to the filing of the notice of appeal. The parties, in their briefing, refer to the above documents despite the fact that they entered the record after the appeal was noted.

affirmed the authenticity of the lease and denied Deutsche Bank’s assertions that it was unaware of the current occupant of the property.

On July 8, 2014 (entered July 10, 2014), the court granted Mr. Oseroff’s motion to intervene. Mr. Oseroff then filed a motion to stay judgment of possession on July 22, 2014, in which he again alleged that he was a bona fide tenant who should be allowed to maintain possession of the property until his lease terminated. Deutsche Bank responded on August 12, 2014, asserting that the circuit court could no longer grant Mr. Oseroff relief because he had noticed an appeal. Deutsche Bank also argued that Mr. Oseroff did provide proof of his bona fide tenancy and requested that the court impose a bond. Mr. Oseroff denied Deutsche Bank’s allegations in a response dated August 19, 2014, and again requested a judgment of possession in his favor.

The circuit court, likely recognizing that an appeal had been noticed, did not rule on the parties’ respective motions.

II.

Mr. Oseroff asks this Court to find that he was a bona fide tenant and to find, pursuant to his bona fide status, that he should be allowed to retain possession.³ He also

³ RP § 7-105.6(b)(2) allows a bona fide tenant, under most circumstances, to retain possession of the property for the duration of his or her lease.

In the case of a foreclosure on any residential property, an immediate successor in interest who has acquired legal title to the property under the foreclosure shall assume the interest subject to:

(Continued . . .)

asks this Court to find that Deutsche Bank committed perjury. Deutsche Bank counters that Mr. Oseroff did not properly oppose Deutsche Bank’s motion for judgment of possession and that Mr. Oseroff did not provide timely proof of his tenancy. Deutsche Bank requests that we affirm the circuit court’s judgment awarding it possession of the property. Deutsche Bank argues that, because Mr. Oseroff did not provide proof of his tenancy when he received a notice in 2013 from Deutsche Bank requesting such proof, he should not now be able to contest possession of the property.

We, as an appellate court, “are not a fact-finding court.” *Lipitz v. Hurwitz*, 435 Md. 273, 294 (2013). “Indeed, “we are mindful of the respective roles of the [appellate]

(. . . continued)

(i) The provision by the successor in interest of a notice to vacate to any bona fide tenant at least 90 days before the effective date of the notice; and

(ii) The rights of any bona fide tenant as of the date of transfer of legal title under the foreclosure:

1. Except as provided in paragraph (3) of this subsection, under a bona fide lease entered into before the transfer of legal title, to occupy the premises until the end of the remaining term of the lease; or

2. Without a lease or with a lease terminable at will under State law, subject to the receipt by the tenant of the notice required under item (i) of this paragraph.

However, if the purchaser of the property will occupy the property as the purchaser's primary residence, the purchaser may take possession of the property after giving the tenant a 90-day notice to vacate. *See* RP § 7-105.6(b)(3) (“Subject to the receipt by the tenant of the notice to vacate under paragraph (2)(i) of this subsection, a successor in interest may terminate a lease effective on the date of the sale of the residential property to a purchaser who will occupy the property as the purchaser's primary residence.”).

court and the [trier of fact]; it is the [trier of fact's] task, not the court's, to measure the weight of the evidence and to judge the credibility of witnesses.” *State v. Manion*, 442 Md. 419, 431 (2015) (quoting *Dawson v. State*, 329 Md. 275, 281 (1993)), *reconsideration denied* (Apr. 17, 2015). Further, as expressed in Maryland Rule 8-131(a), an appellate court ordinarily will not decide a question that has not been tried and decided by the trial court. *Collins v. State*, 164 Md. App. 582, 602 (2005) (citation omitted), *cert. denied*, 390 Md. 501 (2006).

Here, the circuit court did not make any findings as to the bona fides of Mr. Oseroff’s lease or as to the legitimacy of his tenancy, nor did it find that Mr. Oseroff failed to properly answer Deutsche Bank’s motion for possession. The circuit court merely requested proof of the lease before allowing Mr. Oseroff to intervene in the case. Moreover, that request came on June 9, 2014, the same day that Mr. Oseroff noticed his appeal, which precluded the court from deciding issues that would have affected the subject matter of the appeal. *Cnty. Comm'rs of Carroll Cnty. v. Carroll Craft Retail, Inc.*, 384 Md. 23, 45 (2004) (citing *Jackson v. State*, 358 Md. 612, 620 (2000)); *see Jackson*, 358 Md. at 620 (stating that the trial court may not exercise its jurisdiction in a manner that, “in effect, precludes or hampers the appellate court from acting on the matter before it”) (citing *In re Emileigh F.*, 355 Md. 198 (1999); *State v. Peterson*, 315 Md. 73 (1989)).

Mr. Oseroff did not have the opportunity to attempt to prove his bona fide status and the court did not have the opportunity to make a finding of fact, because Mr. Oseroff noticed his appeal, unbeknownst to him, on the same day that the court reconsidered its order. It

is not the duty of this Court to make a finding as to Mr. Oseroff’s status as a bona fide tenant.

Maryland Rule 8-604(d)(1) permits this court to remand to the circuit court for further proceedings “[i]f the Court concludes that the substantial merits of a case will not be determined by affirming, reversing or modifying the judgment, or that justice will be served by permitting further proceedings.” We remand to the circuit court to allow it to make factual findings on the issues presented by the parties, including Mr. Oseroff’s status as a bona fide tenant and whether judgment of possession is warranted for Deutsche Bank or whether Mr. Oseroff will be permitted to remain on the property for the duration of the lease.

**JUDGMENT OF THE CIRCUIT
COURT FOR ANNE ARUNDEL
COUNTY NEITHER AFFIRMED
NOR REVERSED; CASE
REMANDED FOR FURTHER
PROCEEDINGS.**

**COSTS TO BE SPLIT BETWEEN
THE PARTIES.**