Circuit Court for Worcester County
Case No. 23-C-16-000188

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 709

September Term, 2018

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MARIA MASCIANA

v.

KEITH THOMPSON

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Arthur,
Leahy,
Kenney, James A., III
(Senior Judge, Specially Assigned),

JJ.

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Opinion by Arthur, J.

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Filed: October 9, 2019

This appeal arises out of tax sale foreclosure proceedings in the Circuit Court for Worcester County. Within 30 days after the entry of a judgment foreclosing the right of redemption, a former owner moved to set aside the judgment. The circuit court denied the motion. The court reasoned that the tax sale foreclosure statute prohibited the court from reopening the judgment except on the grounds of lack of jurisdiction or fraud. The court concluded that the former owner failed to establish either of those grounds.

As explained in this opinion, the circuit court was vested with broad power to revise the unenrolled judgment even without a determination of fraud or lack of jurisdiction. We shall vacate the judgment so that the court may exercise its discretion to decide whether to set aside the judgment under the circumstances of the case.

## FACTUAL AND PROCEDURAL BACKGROUND

### A. The Initial Tax Sale Foreclosure Proceedings

In 2003, Maria Masciana and her husband, Perry Masciana, acquired a commercial retail property known as 1445 Snow Hill Road in Stockton, Maryland. Eventually, they failed to pay property taxes associated with the property. In 2014, the County purchased the property at a public action for $1,228.06. The County subsequently assigned the certificate of sale to Keith Thompson.

On March 9, 2016, Mr. Thompson filed a complaint in the Circuit Court for Worcester County, seeking to foreclose all rights of redemption in the property. The complaint reproduced the property description from the certificate of sale, but it also listed the address as "1445 Stockton Road," which is the address of a residence located a short distance away from the Mascianas' property. After attempting to post notice at the

property, the sheriff alerted the court that the notice included an incorrect address.

The Mascianas, representing themselves, filed an answer in which they took issue with "inconsistencies" with the property address. They asked the court to "permit more time" for them to "correct this matter with the treasurer's office to make sure the taxes are going to be paid for the correct address."

The clerk issued a new notice, which still included a reference to the incorrect address. The new notice warned the Mascianas that the failure to file a timely answer might result in a judgment of foreclosure.

The Mascianas responded by filing a supplemental answer, in which they asserted that the notice continued to identify the address as "1445 Stockton Road" and that they did not own the property with that address. They asked for "a hearing to sort out these issues." The court then set the case for a hearing.

### B. Automatic Stay of the Proceedings by Reason of Bankruptcy

In September of 2016, Mr. Masciana filed a bankruptcy petition in the United States Bankruptcy Court for the District of Maryland. He notified the Circuit Court for Worcester County that the tax sale foreclosure case was "automatically stayed" under 11 U.S.C. § 362(a). The circuit court stayed its proceedings and, as a result, canceled the scheduled hearing.

On March 10, 2017, the bankruptcy court entered a "Consent Order for Conditional Relief from Automatic Stay." The order stated that Mr. Thompson, Mr. Masciana, and Mrs. Masciana had jointly agreed to modify the automatic stay. Their agreement envisioned that the Mascianas would redeem the property at the end of 2017.

The consent order purported to define the "amount required to be paid by the [Mascianas] to redeem" the property. It stated that they would need to pay Mr. Thompson a total of $8,303.57 in attorneys' fees and costs that he had incurred thus far, "plus any additional attorneys' fees and costs incurred after" February 28, 2017. It further stated that the Mascianas would need to pay Worcester County a total of $3,051.35 in taxes, fees, and interest, plus the additional taxes and interest that accrued after February 28, 2017. It directed the Mascianas to make monthly payments of $322.27 to Mr. Thompson's attorney, followed by a "balloon payment in full of any balance due . . . by December 31, 2017, including, but not limited to, any additional accruing taxes, accruing interest, fees or costs required to be paid either to Worcester County . . . or to [Mr. Thompson] to redeem" the property "in full."

The order specified that, in the event of any default, the Mascianas would have no more than 10 days to cure their default. After that 10-day period, Mr. Thompson would be entitled to file an affidavit of default, which would terminate the stay without further action of the bankruptcy court. Upon the lifting of the stay, Mr. Thompson would be "permitted to exercise any and all legal rights" as holder of the certificate of sale, "including the right to proceed with the litigation" in the Circuit Court for Worcester County.

In accordance with the payment plan, the Mascianas made 10 monthly payments to Mr. Thompson's attorney, totaling $3,222.70.

### C. Termination of the Stay

At the beginning of 2018, Mr. Thompson's attorney wrote to the Mascianas,

asserting that Mr. Thompson had incurred additional attorneys' fees of $2,762.50. The letter did not disclose the services that had resulted in the additional fees. According to the attorney, the Mascianas needed to pay $7,843.37 to Mr. Thompson ($2,762.50 plus the balance of $5,080.87 due under the consent order), as well as any amounts owed to Worcester County. The Mascianas did not pay the amount requested.

A few weeks later, Mr. Thompson filed an affidavit in the bankruptcy court, affirming that the Mascianas had not made the balloon payment and that the period for curing their default had expired. At the same time, a new attorney entered an appearance for Mr. Thompson in the circuit court. His new attorney filed a motion asking the court to lift the stay of the foreclosure proceedings. The Mascianas did not file a response.

On February 7, 2018, a representative of the Worcester County Office of the Treasurer sent "Redemption Instructions" to the Mascianas. The letter instructed them that they needed to "pay any legal fees or costs incurred directly to" Mr. Thompson's attorney and "obtain a release" before paying any amounts to the County. Afterwards, according to the letter, the Mascianas could redeem the property by paying a total of $3,773.16 for taxes, fees, and interest before the end of February 2018.

On February 21, 2018, the circuit court granted Mr. Thompson's motion to lift the stay of the foreclosure proceedings.

### D. Circumstances Surrounding the Entry of Judgment

On March 2, 2018, Mr. Thompson filed a proposed judgment foreclosing rights of redemption in the property. The document stated that no defendant had "appeared and answered" in the case. In fact, the Mascianas had filed a timely answer, which included a

request for a hearing.

One hour after filing the proposed judgment, Mr. Thompson's attorney sent an email in response to Mrs. Masciana's request for a statement of "the amount needed to pay attorney fees and costs." The statement listed "[c]harges" by four different attorneys who had represented Mr. Thompson throughout the proceedings, for a total of "[a]mount [d]ue" of $9,769.73.[1] The attorney told Mrs. Masciana that, "[o]nce" she paid that amount, he would "notify the Worcester County Treasurer[,]" and "then" she could pay "all taxes due[.]" "Then[,]" he said, "the tax sale foreclosure case w[ould] be dismissed."

Mrs. Masciana did not reply until two weeks later, on March 16, 2018. She wrote: "What day is good for you to meet second week of April for payment?" Mr. Thompson's attorney did not send a response.

Meanwhile, on March 14, 2018, the circuit court had issued an order, on its own initiative, stating that it would take no action in the case until Mr. Thompson provided evidence that he had posted notice at the property. Five days later, on March 19, 2018, Mr. Thompson filed an affidavit in which one of his former attorneys affirmed that he had posted notice at the property in 2016.

Immediately after the filing of the affidavit, the court signed the proposed judgment of foreclosure. The court entered the judgment on March 21, 2018.

[1] The statement did not describe the services that resulted in the additional fees. The amounts allocated to the Mr. Thompson's three previous attorneys did not match the amounts of attorneys' fees listed in the consent order. The statement included $1,200 of fees to Mr. Thompson's fourth attorney, but the total amount due appeared to have increased by $1,926.36 from the demand made two months earlier.

### D. Denial of Motion to Set Aside the Unenrolled Judgment

Sixteen days later, Mrs. Masciana, through counsel, moved to reopen the judgment "pursuant to Md. Code Ann. § 14-845 of the Tax Property Article." She asked the court to "[s]et aside the [j]udgment foreclosing the right of redemption" and to "[d]etermine the amount of disputed attorney's fees and costs required to redeem the property." "Alternatively," she asked the court to order Mr. Thompson to refund the $3,220.27 that she and her husband had paid "while attempting to redeem the property."

Mrs. Masciana filed her motion under affidavit. She asserted that, when her husband failed to make the balloon payment at the end of 2017, he "contested" the amount owed. After the circuit court lifted its stay of the foreclosure proceedings, she asserted, she "immediately contacted the Worcester County Treasurer's office to pay the taxes owed." Representatives from the Treasurer's office advised her that she needed to obtain a release from Mr. Thompson before they would allow her to pay those taxes. She was "attempt[ing] to schedule a meeting" with Mr. Thompson's attorney "to settle the dispute" when the court entered the judgment. Overall, she claimed that Mr. Thompson "misled" the Mascianas during the proceedings.

The court granted Mrs. Masciana's request for a hearing. At the hearing, Mrs. Masciana proffered that she was ready, willing, and able to pay the undisputed amounts required to be paid to Mr. Thompson and to Worcester County in order to redeem the property.

Nevertheless, she disputed that she had an obligation to pay the additional attorneys' fees demanded by Mr. Thompson. Through counsel, she conceded that, in

order to redeem the property, she would be required to pay at least $5,080.87 "plus reasonable fees and costs accumulated after th[e] consent order." She asked the court to determine the amount of those reasonable fees and costs, and then to set the amount required to redeem the property.

Mrs. Masciana further affirmed that she had enough money to pay the taxes, interest, and fees owed to Worcester County. She explained that the Mascianas had made periodic payments to the bankruptcy trustee, with the expectation that those funds would be paid to Worcester County to redeem the property. She introduced a statement showing that the bankruptcy trustee was holding $2,975.11. According to her attorney, the bankruptcy trustee would not release the funds without a court order. Her attorney represented that he was holding in trust the remaining amounts to be paid to Worcester County (approximately $800), because the clerk of the circuit court would not permit him to deposit the balance in the court's registry without a court order.

Opposing the motion, Mr. Thompson primarily relied on § 14-845(a) of the Tax Property Article, which states that the court "may not reopen a judgment rendered in a tax sale foreclosure proceeding except on the ground of lack of jurisdiction or fraud in the conduct of the proceedings to foreclose." He contended that this statute superseded other general enactments that might allow the court to revise the judgment on grounds other than lack of jurisdiction or fraud. He argued that Mrs. Masciana had failed to establish either of those two grounds for reopening the judgment.

Ruling from the bench, the court[2] acknowledged that "there are some things that maybe seem inequitable in the way things proceeded for [the Mascianas] regarding this piece of property." The court reasoned, however, that its role was "not to decide what is fair," but was "limited" to deciding "whether or not there was a lack of jurisdiction . . . or whether or not fraud occurred." The court observed that Mrs. Masciana had not challenged the court's jurisdiction. On the evidence presented, the court did not find any fraud in the conduct of the proceedings. Therefore, the court denied her motion.

After the hearing, the court entered an order denying Mrs. Masciana's motion to set aside the judgment. The court reserved its ruling on her request for "alternative relief relating to the return of $3,220.27" that the Mascianas had paid to Mr. Thompson.

Mrs. Masciana noted a timely appeal to this Court. She also moved for reconsideration of the denial of her motion to set aside the judgment. The court declined to reconsider its ruling, and stayed any further proceedings regarding her request for alternative relief until the resolution of the appeal.[3]

[2] The judge at the hearing was not the same judge who had signed the judgment.

[3] We conclude that the order denying Mrs. Masciana's request to reinstate her right of redemption was final and appealable even though the court did not rule on her alternative request for monetary relief. "[T]ax sale foreclosure proceedings are unique in many ways" and do not always involve the same concept of "finality" that applies to ordinary civil cases. *Scheve v. McPherson*, 44 Md. App. 398, 403 (1979). By statute, a "judgment foreclosing the right of redemption . . . is final and conclusive on the defendants." Md. Code (1986, 2012 Repl. Vol., 2018 Supp.), § 14-844 of the Tax Property Article. Accordingly, the "final appealable order in a tax sale proceeding is the decree foreclosing the right of redemption." *Quillens v. Moore*, 399 Md. 97, 116 (2007). Likewise, the denial of a "request to reinstate [the] right of redemption is an appealable order." *Seidel v. Panella*, 81 Md. App. 124, 129 (1989). The unresolved request for

## QUESTIONS PRESENTED

In this appeal, Mrs. Masciana presents three questions, but those questions do not directly correspond to the arguments in her brief. First, she asks:

> 1. Did the circuit court err in denying the Appellant's Motion to Vacate the Judgment foreclosing the right of redemption when the Appellant filed a timely answer and request for a hearing, but no hearing occurred before the circuit court issued that Judgment?

Despite asking that question, the remainder of her appellate brief does not address whether the court should have vacated the judgment because she had requested a hearing before the judgment. An appellate brief must include "[a]rgument in support of the party's position on each issue." Md. Rule 8-504(a)(6). Because Mrs. Masciana did not argue this issue, we will not consider it. *See Chesek v. Jones*, 406 Md. 446, 455 n.7 (2008); *Hartford Accident & Indem. Co. v. Scarlett Harbor Assocs. Ltd. P'ship*, 109 Md. App. 217, 288 n.18 (1996), *aff'd*, 346 Md. 122 (1997).

The next question presented is:

> 2. Did the circuit court err in ruling that the Appellant's failure to pay the real estate taxes directly to Worcester County could preclude her from redeeming the property when the Worcester County Treasurers Office refused to accept payment for those taxes unless the Appellant first paid the Appellee reimbursement for unapproved attorneys fees and unapproved extraordinary expenses?

The hearing transcript shows that the court did not make such a ruling. The court first made a legal conclusion that the tax sale statute prohibited the court from reopening the judgment except on the ground of lack of jurisdiction or fraud. The court then

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monetary relief is, therefore, "collateral . . . to the issued presented in this appeal." *Kona Props., LLC v. W.D.B. Corp., Inc.*, 224 Md. App. 517, 541 n.23 (2015).

determined that Mrs. Masciana had not established either of those two grounds. The ruling was limited to those determinations.

The final question presented is:

> 3. Did the circuit court commit an error of law in ruling that the Tax-Property Article must limit the court's discretion to an evidentiary finding of fraud or lack of jurisdiction before it could set aside an unenrolled judgment foreclosing the Appellant's right of redemption to determine the necessary amount to redeem the property?

The answer to this question is: Yes. Because Mrs. Masciana had filed the motion within 30 days of the entry of judgment, the court retained broad discretionary power to set aside the judgment on grounds other than fraud or lack of jurisdiction. The court did not exercise that discretion. The appropriate remedy, therefore, is to remand the case for the court to reevaluate the motion under the correct standard.

In light of that determination, we will address two additional matters. Mrs. Masciana seeks an outright reversal of the judgment, contending that, even under a more stringent standard, the court should have set aside the judgment based on "constructive fraud." We see no error in the circuit court's conclusion that the evidence presented did not amount to clear and convincing proof of constructive fraud.

For his part, Mr. Thompson contends that the judgment should be affirmed on grounds not relied upon by the circuit court. Relying on *Canaj, Inc. v. Baker & Division Phase III, LLC*, 391 Md. 374 (2006), he argues that the court should not have even entertained Mrs. Masciana's motion to vacate the judgment because she had not paid all taxes and fees before or at the same time as she filed her motion. The court did not decide that issue, but we shall consider it as a potential alternative ground for affirming

the judgment. We conclude that, under the circumstances of this case, the holding of *Canaj v. Baker* does not preclude the court from exercising its discretion to vacate the judgment.

## DISCUSSION

### I. Standard for Evaluating the Motion to Vacate the Unenrolled Judgment Foreclosing the Right of Redemption

In the circuit court, the parties disagreed over the standard that should apply to the motion to vacate the judgment foreclosing the right of redemption. Mrs. Masciana argued that, because she filed her motion within 30 days of the entry of judgment, the court could exercise its general power to revise an unenrolled judgment. Mr. Thompson, however, persuaded the court that any judgment in a tax sale foreclosure case could not be reopened except on the grounds of fraud or lack of jurisdiction.

The circuit court's general revisory powers are established in both the Maryland Rules and the Maryland Code. Maryland Rule 2-535(a) provides: "[o]n motion of any party filed within 30 days after entry of judgment, the court may exercise revisory power and control over the judgment."[4] Section 6-408 of the Courts and Judicial Proceedings Article of the Maryland Code provides: "[f]or a period of 30 days after the entry of a judgment, or thereafter pursuant to motion filed within that period, the court has revisory

[4] Furthermore, "if the action was tried before the court," the court "may take any action that it could have taken under Rule 2-534." Md. Rule 2-535(a). Under that rule, the court "may open the judgment to receive additional evidence, may amend its findings or its statement of reasons for the decision, may set forth additional findings or reasons, may enter new findings or new reasons, may amend the judgment, or may enter a new judgment." Md. Rule 2-534.

power and control over the judgment."

These two provisions are intended to "be read together, complementing or supplementing each other." *Maryland Bd. of Nursing v. Nechay*, 347 Md. 396, 408 (1997). As interpreted by the Court of Appeals, these two provisions "'dictate that for a period of thirty days from the entry of a law or equity judgment a circuit court shall have "unrestricted discretion" to revise it.'" *Id.* (quoting *Platt v. Platt*, 302 Md. 9, 13 (1984) (quoting *Maryland Lumber v. Savoy Constr. Co.*, 286 Md. 98, 102 (1979))).[5] The Court has said that this discretion "must be exercised liberally, lest technicality triumph over justice[,]" and that "a reasonable doubt that justice had not been done is an appropriate basis for the exercise of that discretion." *Maryland Bd. of Nursing v. Nechay*, 347 Md. at 408 (citations and quotation marks omitted).

By contrast, the grounds for reopening a judgment under the tax sale statute are narrow: "A court in the State may not reopen a judgment rendered in a tax sale foreclosure proceeding except on the ground of lack of jurisdiction or fraud in the conduct of the proceedings to foreclose." Md. Code (1986, 2012 Repl. Vol., 2018 Supp.), § 14-845(a) of the Tax Property Article ("TP"). Through this enactment, "'the legislature has declared that the public interest in marketable titles to property purchased at tax sales outweighs considerations of individual hardship in every case, except upon a

[5] Although the Court of Appeals has often said that a court has "unrestricted" discretion to revise an unenrolled judgment, the Court has clarified that, "because the exercise of the trial court's discretion is subject to appellate review, it is not truly unrestricted but simply broad." *Dixon v. Ford Motor Co.*, 433 Md. 137, 157 (2013) (citing *Southern Mgmt. Corp. v. Taha*, 378 Md. 461, 495 (2003)).

showing of lack of jurisdiction or fraud in the conduct of the foreclosure.'" *Royal Plaza Cmty. Ass'n, Inc. v. Bonds*, 389 Md. 187, 192 (2005) (quoting *Thomas v. Kolker*, 195 Md. 470, 475 (1950)).

This Court previously held that a judgment foreclosing the right of redemption, once entered, was "impervious to challenge except for lack of jurisdiction or fraud." *Perryman v. Suburban Dev. Corp.* ("*Perryman I*"), 33 Md. App. 589, 597 (1976), *rev'd*, 281 Md. 168 (1977). At the time of *Perryman I*, the governing tax sale statute stated, as it does today, that the court could not reopen a judgment of foreclosure "'except on the ground of lack of jurisdiction or fraud in the conduct of the proceedings to foreclose.'" *Id.* (quoting Md. Code (1957), Art. 81, § 113). The Maryland Rules, as they do today, authorized the court to exercise revisory power and control over any judgment on a motion filed within 30 days of the entry of judgment. *Perryman I*, 33 Md. App. at 595 (citing former Maryland Rule 625(a)). Perceiving an "obvious and inevitable collision," this Court concluded that the general rule "yields inexorably" to the special statutory scheme. *Perryman I*, 33 Md. App. at 597. The Court applied the "well-settled principle that specific terms covering given subject matter prevail over general language of the same or another statute which might otherwise prove controlling." *Id.* at 598.

The Court of Appeals granted certiorari "to consider the apparent conflict between" the Rule, "which gives the circuit court a thirty-day revisory power over its pre-enrolled judgments" and the statutory provisions, "which declare that tax sale foreclosure decrees shall, except for fraud or lack of jurisdiction, be conclusive." *Suburban Dev. Corp. v. Perryman* ("*Perryman II*"), 281 Md. 168, 168 (1977) (per curiam). The Court

did not resolve that conflict, however, because it concluded that appeal should be dismissed on procedural grounds. *Id.* In a footnote, the Court explained: "[i]n directing dismissal of this appeal we are not to be understood as either approving or disapproving the Court of Special Appeals' conclusion that the revisory powers granted a circuit court by Maryland Rule 625 do not extend to cases involving foreclosure of the right of redemption." *Id.* at 168 n.1. The Court added: "should the question arise again its resolution should be considered in light of our ruling in *Owen v. Freeman*, . . . which was decided subsequent to the ruling of the Court of Special Appeals in this case." *Id.*

In that intervening opinion, the Court of Appeals had said that former Rule 625(a) "applies to all final judgments" and that "no judgment is specifically excluded from the operation" of that Rule. *Owen v. Freeman*, 279 Md. 241, 245 (1977). Shortly after that decision, the General Assembly codified the circuit court's general revisory power as § 6-408 of the Courts and Judicial Proceedings Article. *See* 1977 Md. Laws ch. 271, § 1.

In *Scheve v. McPherson*, 44 Md. App. 398, 415 (1979), this Court addressed the apparent "inconsistency" between the 1977 statute, authorizing courts to revise any unenrolled judgment, and the previously enacted statute restricting the court's power to reopen the judgment in a tax sale foreclosure case. The Court noted that, "where two statutes, both relevant, are inconsistent, . . . the more recently enacted [statute] should prevail." *Id.* The Court emphasized that, when the General Assembly enacted § 6-408 of the Courts and Judicial Proceedings Article, it presumably knew of prior "decisions interpreting the breadth" of the court's revisory power. *Id.* The Court concluded that "the 1977 enactment was intended to prevail" over the prior statute, and therefore that

circuit courts "possess the power to strike or revise any judgment or decree entered by them upon motion filed within 30 days[,]" including "a decree of foreclosure" entered in a tax sale case. *Id.* at 415-16.

A few years later, the Court of Appeals reached the same conclusion, but for "reasons other than those expressed by the Court of Special Appeals in *Scheve*." *Haskell v. Carey*, 294 Md. 550, 556 (1982). The Court acknowledged that the statutory language "provid[ing] that a final judgment of foreclosure of the right of redemption should not be revised except on grounds of lack of jurisdiction or fraud . . . appears to be clear and unambiguous." *Id.* The Court nevertheless reasoned that, if this language "were construed to be applicable to unenrolled judgments, then it would conflict with the provision in § 6-408 of the Courts Article that authorizes a trial court to exercise broad discretionary power over unenrolled judgments." *Id.* at 557-58. The Court applied the principle of construction that "when two statutes, enacted at different times, cover similar subject matter, but make no reference to each other, they should be construed, if at all feasible, so as to give as full effect to each other as possible." *Id.* at 558. To "give[] effect" to both statutes, the Court determined that the restriction on reopening judgments in tax sale foreclosure proceedings "is applicable to enrolled judgments of foreclosure of the right of redemption, but is inapplicable to such unenrolled judgments." *Id.* at 559-60.

Thus, notwithstanding § 14-845 of the Tax-Property Article, "[t]he court ha[s] general revisory power for thirty days" after the entry of a judgment foreclosing the right of redemption. *Smith v. Lawler*, 93 Md. App. 540, 551 (1992). If a party moves to vacate the judgment within 30 days after its entry of the judgment, the court "may reopen

the judgment by means of its general revisory power." *Seidel v. Panella*, 81 Md. App. 124, 131 (1989). "A finding under § 14-845 of the Tax-Property Article (fraud or lack of jurisdiction) is not required." *Id.* (citing *Haskell v. Carey*, 294 Md. at 558-60).

On appeal, Mr. Thompson no longer contends that the tax sale statute forbids the court from exercising its discretion to set aside an unenrolled judgment. Instead, he argues that the issue of whether the court should exercise that revisory power is unpreserved. He insists that, because Mrs. Masciana's written motion cited § 14-845 of the Tax Property Article, she should be precluded from relying on Rule 2-535. To adopt this argument would be to "elevate form over substance in the context of the record of this case." *Faulk v. Ewing*, 371 Md. 284, 305 (2002).

It is true that the first sentence of Mrs. Masciana's "Motion to Set Aside Judgment" said that the motion was made "pursuant to Md. Code Ann. § 14-845 of the Tax Property Article[.]" At the ensuing hearing, however, her counsel made it clear that she was asking the court to "proceed[] under that statute, as well as under Maryland Rule 2-535[.]" Her counsel correctly observed that Rule 2-535 does not "have to be mentioned in the motion itself" in order for the motion to be treated as a revisory motion. *See Gluckstern v. Sutton*, 319 Md. 634, 650-51 (1990) (treating a memorandum as "a motion under Rule 2-535(a)" where "the substance of the memorandum was clearly a request . . . to revise" the judgment); *Pickett v. Noba, Inc.*, 122 Md. App. 566, 571 (1998) (treating a "'Motion to Remove and Not Enforce Lien' . . . as a motion to revise under Md. Rule 2-535").

In response, counsel for Mr. Thompson made no suggestion that the court's

authority was limited to the statute cited in the written motion. Rather, his counsel responded on the merits of the issue of statutory interpretation. His counsel argued that the tax sale statute supersedes the provisions establishing the general revisory power. The court agreed, reasoning that § 14-845 of the Tax-Property Article "is clearly on point and controlling as it relates to reopening judgments." The court was "not persuaded that Maryland Rule 2-535 of Courts and Judicial Proceedings 6-408 control in review of this issue." The court concluded, therefore, that the judgment could be reopened "only" if "there was a lack of jurisdiction, . . . or if there was a fraud in the conduct of the proceedings to foreclose."

The issue of statutory interpretation that Mrs. Masciana raises on appeal is identical to the one raised in and decided by the circuit court at the hearing. Thus, the issue is properly preserved for review. *See* Md. Rule 8-131(a).

To reiterate, a showing of either fraud or lack of jurisdiction was "not a prerequisite for reopening the judgment," and the court was free to "exercise its broad revisory power." *Seidel v. Panella*, 81 Md. App. at 132. "The court did not act, however, in a discretionary capacity, although it could have done so." *Scheve v. McPherson*, 44 Md. App. at 416. It is not our role to speculate as to how the court might have decided the motion under its general revisory power. *Id.* We shall "remand the case back to the circuit court . . . for a further proceeding in which the court should determine whether to set aside the decree pursuant to its general revisory power." *Id.*

## II. Constructive Fraud in the Foreclosure Proceedings

In addition to asking the court to exercise its revisory power, Mrs. Masciana made

a fallback argument that the court should reopen on the judgment on the ground of fraud. The court perceived no such fraud, and we uphold that decision.

The Court of Appeals had defined constructive fraud as a "breach of a legal or equitable duty which, irrespective of the moral guilt of the fraud feasor, the law declares fraudulent because of its *tendency to deceive others*, to violate public or private confidence, or to injure public interests." *Canaj, Inc. v. Baker & Division Phase III, LLC*, 391 Md. 374, 421-22 (2006) (emphasis in original) (citation and quotation marks omitted). "Constructive fraud, as it might be relied on by an owner of property being sold for taxes, would normally relate to notice and things of that nature that would hinder the delinquent taxpayer from exercising his right to redeem, i.e., pay the delinquent taxes." *Id.* at 422. "Most, if not all, of the cases in which such fraud has been found" are cases in which "the former owner has been prejudiced in some way" as a result of "the failure to give proper and legally required notice of the proceedings, or of some critical stage of the proceedings." *Scheve v. McPherson*, 44 Md. App. 398, 405 (1979) (citation and quotation marks omitted).

Because constructive fraud is "a most serious charge," it is "not lightly found by the courts and requires clear and convincing proof to establish." *Scheve v. McPherson*, 44 Md. App. at 406-07 (citations and quotation marks omitted). "A key element in th[e] definition is the breach of a legal or equitable duty." *Id.* at 406. Yet "[e]ven noncompliance with a legal duty need not necessarily amount to constructive fraud." *Id.* at 407. Similarly, the "[f]ailure to comply with every part of the statute does not, in and of itself, . . . constitute constructive fraud, especially when it does not relate to notice or

to the owner's ability to redeem." *Canaj v. Baker*, 391 Md. at 423. Like actual fraud, constructive fraud includes an "inherent requirement that the person or entity defrauded must have been in some way deceived or misled by the actions of the person or entity alleged to have committed the fraud." *Id.* at 421.

In *Scheve v. McPherson*, 44 Md. App. 404-08, this Court held that a trial court erred as a matter of law in finding constructive fraud in foreclosure proceedings. There, two days before the deadline for answering the complaint, the defendants expressed an intention to redeem the property. *Id.* at 400. On the next day, the plaintiffs' attorney mailed a statement of costs and wrote that, if the defendants paid those costs, the plaintiffs would join a petition for redemption. *Id.* Thirteen days later, having received no response, the plaintiffs' attorney advanced the foreclosure process by filing an affidavit of service. *Id.* Six days later, the court signed a judgment foreclosing rights of redemption. *Id.*

On those facts, this Court rejected the trial court's finding of constructive fraud "based entirely upon its perception" that the plaintiffs' attorney made "an 'open-ended offer' which 'lulled' [the defendants] into thinking that they could 'come up with th[e] funds just about any time unless further notified by [the plaintiffs' attorney].'" *Scheve v. McPherson*, 44 Md. App. at 404-05. This Court reasoned that the plaintiffs' attorney "was certainly under no obligation to allow any extension of time," and "had every right to expect that if [the defendants] truly desired to redeem at that late date, they would do so expeditiously." *Id.* at 408. "At best, his obligation was to wait but a reasonable time." *Id.* His adversary "had no right to assume that [he] would wait forever, to his clients'

detriment, while [the defendants] made up their minds whether they desired to redeem their property." *Id.*

Mrs. Masciana seeks to rely on the *Scheve* Court's observation that, had the plaintiffs' attorney "rushed in to court the next day" after sending the statement of costs, "as he otherwise had a right to do, an element of unfairness and inequity would certainly have been present." *Scheve v. McPherson*, 44 Md. App. at 407. She argues that fraud occurred here because Mr. Thompson submitted a proposed judgment on "the same day he emailed the statement of costs to her."[6] Because she did not articulate that theory of fraud to the circuit court, the issue is not properly presented for appellate review. *See Scott v. Seek Lane Venture, Inc.*, 91 Md. App. 668, 688 (1992).

Even if she had raised the argument previously, it would be unavailing. The filing of the proposed judgment on March 2, 2018, was not the act that precipitated the entry of judgment. The court did nothing until March 14, 2018, when it issued an order stating that no action would be taken in the case until there was "evidence in file that Posting of Property was made" in compliance with Rule 14-503. Two days later, on March 16, 2018, Mrs. Masciana emailed Mr. Thompson's attorney and asked to set up a meeting in the "second week of April for payment." Under the circumstances, Mr. Thompson's attorney "was certainly under no obligation to allow any extension of time" (*Scheve v. McPherson*, 44 Md. App. at 408), let alone a four-week extension to the detriment of his client. Mr. Thompson's attorney breached no obligation when, on March 19, 2018, he

[6] Mr. Thompson's attorney emailed the statement of costs to Mrs. Masciana one hour after filing the proposed judgment with the court.

filed an Affidavit of Posting, affirming that notice had been posted at the property. The filing of that affidavit prompted the court to sign the proposed judgment, which was entered two days later. By that point, a reasonable time had already passed since the attorney had sent the statement of costs. *See id*.

In the circuit court, Mrs. Masciana argued that she was defrauded through the requests for additional attorneys' fees above the amounts stated in the consent order. She argues that the tax sale statute required Mr. Thompson to seek court approval for any extraordinary fees above the amounts authorized by the tax sale statute.

TP § 14-828 sets forth the payments required to redeem a property sold in a tax sale. It provides, in relevant part: "If the property is redeemed, the person redeeming shall pay the collector[,] . . . in the manner and by the terms required by the collector, any expenses or fees for which the plaintiff or the holder of a certificate of sale is entitled to reimbursement." TP § 14-828(a)(4). A plaintiff or certificate holder is entitled, on redemption, to be reimbursed only for those expenses and fees specifically included in the statute. *See* TP § 14-843(a)(1)-(2). If an action to foreclose the right of redemption has been filed, the plaintiff or certificate holder may be reimbursed for attorneys' fees in the amount of $1,300, or $1,500 if an affidavit of compliance has been filed in the action, and those amounts are "deemed reasonable for both the preparation and filing of the action." TP § 14-843(a)(4)(i). "[I]n exceptional circumstances," the plaintiff or certificate holder may be reimbursed for "other reasonable attorney's fees incurred and specifically requested by the plaintiff or holder of a certificate of sale and approved by the court, on a case by case basis." TP § 14-843(a)(4)(iii).

Mrs. Masciana argues that the tax sale statute required Mr. Thompson to obtain court approval for reimbursement of any attorneys' fees and expenses above those already deemed reasonable by statute. She also notes that Mr. Thompson never amended his affidavit under Rule 14-502(c), through which he verified that the amount required to redeem the property complied with the statute.

Mrs. Masciana's argument discounts the fact that the Mascianas had agreed to the entry of a consent order stating that the "amount required to be paid by the [Mascianas] to redeem" the property included "$8,303.57" to Mr. Thompson "plus any additional attorneys' fees and costs incurred after 2/28/2017." Mrs. Masciana seeks to downplay the consent order by insisting that it was "not a contract." To the contrary, consent orders or judgments "are hybrids, having attributes of both contracts and judicial decrees." *Long v. State*, 371 Md. 72, 82 (2002). A "'consent decree no doubt embodies an agreement of the parties and thus in some respects is contractual in nature.'" *Id.* (quoting *Rufo v. Inmates of Suffolk County Jail*, 502 U.S. 367, 378 (1992)). Mrs. Masciana also notes that she did not personally sign the order, but the order clearly states that it was entered with her consent, as a co-debtor in the bankruptcy case, and that she received a copy of it. The absence of a signature is ordinarily not required to make a binding contract, except when the terms of the contract make the signatures a condition precedent to the formation of the contract. *See, e.g.*, *All State Home Mortg., Inc. v. Daniel*, 187 Md. App. 166, 181 (2009).

In any event, Mrs. Masciana appears to concede that the agreement was binding, at least to some extent, as she admits that redemption would require her to pay at least

$8,303.57 to Mr. Thompson. When Mr. Thompson's third attorney wrote to the Mascianas on January 2, 2018, he expressly relied on the parties' prior agreement, rather than the statute, as the basis for seeking additional attorneys' fees. The letter stated that, "[b]y the terms of the Consent Order, Mr. Masciana was required to" pay the remaining balance due on the $8,303.57 of attorneys' fees and other costs, and "also require[d] that Mr. Masciana pay any additional attorneys' fees incurred by [Mr. Thompson] after February 28, 2017." Two months later, at Mrs. Masciana's request, Mr. Thompson's fourth attorney provided an updated statement of attorney fees and costs that Mr. Thompson claimed to have incurred.

These communications had no "tendency to deceive." *Scheve v. McPherson*, 44 Md. App. at 406. The requests for additional fees that Mr. Thompson believed that he should receive under the consent order did not prevent Mrs. Masciana, in the weeks that followed, from alerting the court if she disputed the amount owed. In an action to foreclose the right of redemption, if "there is any dispute regarding redemption, the person redeeming may apply to the court before which the action is pending to fix the amount necessary for redemption." TP § 14-829(a). Thus, "there were procedures wherein [she] could have . . . challenge[d] the amount" of reimbursable expenses owed, but she "did not take advantage of [those] procedures" before the judgment was entered. *Quillens v. Moore*, 399 Md. 97, 123 n.13 (2007). Her testimony indicates that the reasons for the inaction were that she hoped that Mr. Thompson would allow "more time" to pay, and she believed that, because she had answered the complaint, a judge would not sign the judgment until she had her "day in court."

As the circuit court noted, the consent order "contemplated, not specifically in number, but contemplated" that the Mascianas would reimburse Mr. Thompson for additional fees. Under the circumstances, a mere request for additional fees in a disputed amount does not constitute constructive fraud. We agree with the court's observation that, "in the timeline of when things should have occurred, when Mr. Thompson, through his attorney, asked for a decree of foreclosure on the right of redemption, that would have been the time to raise those issues" so that the court could resolve the issue before it signed the judgment.

On the evidence presented, the court correctly determined that Mrs. Masciana did not meet her burden to establish clear and convincing proof of "fraud in the conduct of the proceedings to foreclose" (TP § 14-845(a)) as a ground to reopening the judgment.

## III. Condition Precedent to Challenging the Judgment

Mr. Thompson contends that this Court should affirm the judgment because Mrs. Masciana failed to pay the delinquent property taxes either before or simultaneously with her motion to vacate the judgment foreclosing her right of redemption. His argument relies on *Canaj, Inc. v. Baker & Division Phase III, LLC*, 391 Md. 374 (2006).

In that case, a purchaser obtained a series of judgments foreclosing the former owner's right of redemption in certain properties. *Canaj v. Baker*, 391 Md. at 379-80. More than 30 days after the entry of the last foreclosure judgment, the former owner moved to set aside the judgments, arguing that the underlying tax sales were void. *Id.* at 378-80 & n.2. The Court of Appeals concluded that the former owner was "not entitled to prevail in its challenges" because it had "failed to satisfy [a] condition precedent to its

rights to seek a vacation of the foreclosure judgments." *Id*. at 396.

Although the former owner "acknowledged that it was responsible" for well over one hundred thousand dollars in unpaid property taxes, it never "directly proffered that it was ready, willing and able to pay the amounts, or to pay undisputed amounts, and, more importantly, it ha[d] not paid any of the delinquent taxes and charges due." *Canaj v. Baker*, 391 Md. at 386-87. The Court observed that, "[b]y attacking the sale procedure in a post-judgment motion to vacate, instead of paying the taxes and charges which it would have been required to [pay] in order to redeem prior to judgment, the taxpayer appear[ed] to be seeking to have the title of the property revert back to the delinquent taxpayer without having to ever redeem by paying the overdue and due taxes." *Id.* at 387-88. Although the former owner "ha[d] not paid taxes, interest, penalties and expenses of the sales," the former owner "d[id] not in th[e] appeal challenge the assertion that [those] charges [we]re, in fact, due." *Id.* at 396. Further, the former owner "ha[d] not contested . . . in th[e] appeal, the amounts" owed. *Id.*

The Court endorsed its prior holdings "that where it is admitted (or proven) that there are delinquent taxes due, in order to challenge the holding or ratification of the tax sale or to seek to vacate a judgment of the foreclosure of the equity of redemption, the taxpayer must first pay to the Collector or the certificate holder the total sum of the taxes, interest, penalties and expenses of the sale that are due." *Canaj v. Baker*, 391 Md. at 391. According to the Court, the "reason" for this "general rule . . . that in order to challenge a tax sale, the payment of taxes in arrears is a condition precedent" is that a "delinquent taxpayer will never redeem" if the "delinquent taxpayer can find a way to overturn a tax

sale without paying the delinquent taxes." *Id.* at 385 n.6. The Court held that, "in order to challenge the foreclosure of the equity of redemption in a tax sale, the taxes and other relevant charges acknowledged to be due, either prior to the challenge or simultaneously with it, must, as a condition precedent, be paid." *Id.* at 396.[7]

By its terms, *Canaj v. Baker* does not address the circumstances of the present case. Here, the former owner is not seeking to regain title without ever paying the property taxes and other charges owed. Rather, she is attempting to pay the undisputed amounts owed, but her efforts have been frustrated by a dispute over the remaining amounts.

The record does not support Mr. Thompson's assertion that "[n]othing prevented" Mrs. Masciana "from paying the taxes" to the County Treasurer. The "Redemption Instructions" sent to the Mascianas by the Office of the Treasurer for Worcester County specifically instructed them that they needed to "pay any legal fees of costs incurred directly to [Mr. Thompson's attorney]; and . . . **obtain a release** before . . . submitting the redemption of real estate taxes to Worcester County." (Emphasis in original).[8] Mr.

[7] Mr. Thompson also cites *Quillens v. Moore*, 399 Md. 97 (2007), where the Court explained that, under *Canaj v. Baker*, "a property owner must tender all of the deficient real property taxes before he can challenge the validity of a tax sale." *Id.* at 125. Because the owner had not done so, he could not seek to set aside the judgments. *Id.*

[8] Currently, TP § 14-828(a)(4) states that a person redeeming property must pay the reimbursable expenses "in the manner and by the terms required by the collector." It appears that the Worcester County Office of the Treasurer requires the person redeeming the property to obtain a release regarding the reimbursable expenses before it will accept payment for taxes and related charges. A prior version of this statute required the person redeeming the property to pay those reimbursable expenses to the collector "unless the party redeeming furnishes the collector a release or acknowledgment executed by the

Thompson's attorney then told her that, "once [she] pa[id] th[e] amount" of $9,769.73 to him, he would "notify the Worcester County Treasurer" and "then" she could "pay the Treasurer all taxes due."

It is inaccurate to say, as Mr. Thompson does, that this statement "simply provided" Mrs. Masciana with the "amount that she had agreed to pay" through the consent order. Under the consent order, she agreed to pay $5,080.87, "plus any additional attorneys' fees and costs incurred" after February 28, 2017. Although this provision was not expressly limited to "reasonable" attorneys' fees, courts are required to read that term into any agreement to pay attorneys' fees. *See, e.g.*, *Monmouth Meadows Homeowners Ass'n, Inc. v. Hamilton*, 416 Md. 325, 333 (2010). A bare request for a particular amount may be sufficient to inform an adversary of an amount claimed to be due, but the amount actually owed is still subject to reasonable dispute.

At the same time that Mrs. Masciana moved to set aside the judgment, she asked the court to "[d]etermine the amount of disputed attorney's fees and costs required to redeem the property." By making that request, she "effectively invoked the right conferred on an owner under § 14-829 to have the court 'fix the amount necessary for redemption.'" *Dawson v. Prince George's County*, 324 Md. 481, 488 (1991). When "there is any dispute regarding redemption, the collector shall accept no money for redemption unless and until a certified copy of the order of court fixing the amount

plaintiff or holder of the certificate of sale that all actual expenses or fees under § 14-843 of this subtitle have been paid to the plaintiff or holder of the certificate of sale[." Md. Code (1986, 2007 Repl. Vol.), § 14-828(a)(4) of the Tax Property Article.

necessary for redemption is filed with the collector." TP § 14-829(c). Thus, "in disputed cases, an owner [cannot] consummate a redemption, by way of payment under protest of the full amount claimed, prior to the court's determination of the amount to be paid, because the collector may not then take the money." *Dawson v. Prince George's County*, 324 Md. at 489.

In this case, it would be unreasonable to read *Canaj v. Baker* to require the movant to pay all disputed amounts before seeking to revive the right of redemption. Here, the collector declined to accept payment of the undisputed amounts of taxes owed, without a release from Mr. Thompson of his claim for the full amount. Literal compliance with *Canaj v. Baker* would have required Mrs. Masciana to pay him the entire amount that he requested in exchange for a release. But doing so would have risked undermining her ability to dispute the amount of fees owed to Mr. Thompson.

In the circuit court, Mrs. Masciana presented evidence that she was prepared to pay all undisputed amounts. She asked the court to issue an order that would permit her payment of those undisputed amounts and to resolve the dispute over the remaining amounts. In short, she was attempting to satisfy the condition, but she needed the court's help to do so. Granting the relief that she requested would have facilitated, rather than violated, her obligation to "do equity." *Canaj v. Baker*, 391 Md. at 390 (quoting *Preske v. Carroll*, 178 Md. 543, 550 (1940)) (further citation and quotation marks omitted).

## CONCLUSION

The order denying Mrs. Masciana's motion to set aside the judgment is hereby vacated. On remand, the court should evaluate her motion under its discretionary power

to set aside unenrolled judgments. In the exercise of that discretion, the court should consider all relevant circumstances surrounding the entry of judgment.

If the court vacates the judgment, it should facilitate a prompt tender of the undisputed amounts and proceed to resolve the dispute over the remaining amounts. Ordinarily, the party requesting attorneys' fees "'has the burden of providing the court with the necessary information to determine the reasonableness of its request.'" *Monmouth Meadows Homeowners Ass'n, Inc. v. Hamilton*, 416 Md. 325, 332 (2010) (quoting *Myers v. Kayhoe*, 391 Md. 188, 207 (2006)).

If the court does not vacate the judgment, it should resolve the request for return of the amounts she paid toward redemption of the property. The decision should take into account that: the consent order states that the monthly payments paid to Mr. Thompson were payments "to redeem the Certificate of Tax Sale;" and, under the tax sale statute, a plaintiff or certificate holder is not entitled to be reimbursed for attorneys' fees and other expenses unless the property is actually redeemed. *See Heartwood 88, Inc. v. Montgomery County*, 156 Md. App. 333, 366-67 (2004).

**JUDGMENT OF THE CIRCUIT COURT FOR WORCESTER COUNTY VACATED. CASE REMANDED FOR FURTHER PROCEEDINGS CONSISTENT WITH THIS OPINION. COSTS TO BE PAID 50% BY APPELLANT AND 50% BY APPELLEE.**