UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 0791

September Term, 2014

ELIZABETH M. JACOBSON, *et vir.*

v.

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

Hotten,
Reed,
Salmon, James P.
(Retired, Specially Assigned),

JJ.

Opinion by Salmon, J.

Filed: December 17, 2015

This case involves the foreclosure of a deed of trust that encumbers 6470 Fairway Lane, Easton, MD (hereinafter "the Property"). The deed of trust secured a purchase money note that was signed by Elizabeth M. Jacobson. The deed of trust was executed by Elizabeth Jacobson (hereinafter "Mrs. Jacobson) and her husband Robert Jacobson (appellants).[1]

The appellees in this matter are John E. Driscoll, III, Robert E. Frazier, Laura D. Harris, Daniel J. Pesachowitz, and Deena L. Reynolds, all of whom are substitute trustees selected by the present servicer of the note, Wells Fargo Bank, NA. (hereinafter "Wells Fargo").

In this appeal, appellants raise two questions, which they phrase as follows:

> I. Did the lower court err on March 4, 2013 by requiring appellants to post a bond to cover retroactive amounts and future amounts allegedly due under the note and deed of trust despite the fact that no sale date had been scheduled, in contravention of Maryland Rule 14-211?
>
> II. Did the lower court err on May 20, 2014 by denying appellants' exceptions?

To answer those questions, it is necessary to set forth, in considerable detail, the factual and procedural history of this case.

I.

On October 15, 2007 Mrs. Jacobson and her husband, Robert S. Jackson, bought the Property for $529,000.00. To pay for it, Mrs. Jacobson borrowed $396,750.00 from Wells

[1]Elizabeth and Robert Jacobson were married when the note and deed of trust were signed. At the time of the foreclosure sale, they were living separate and apart. The record is not clear as to whether they are still married.

Fargo. The loan was evidenced by a note dated October 15, 2007, payable at the rate of $2,410.70 per month for thirty years. The note was secured by a deed of trust on the Property, which was executed by appellants on the same date that the note was signed. The deed of trust was promptly recorded in the land records for Talbot County, Maryland.

In 2008, Mrs. Jacobson was unable to make the payments required by the note because she lost her job. Wells Fargo, in December 2008, offered Mrs. Jacobson a loan modification, which she accepted. Subsequently, however, Mrs. Jacobson was unable to meet even the lower modified payment schedule.

In the fall of 2009, Mrs. Jacobson and Wells Fargo entered into negotiations for a second modification of the loan payment schedule under a federal program called the Home Affordable Loan Modification Program (hereinafter "HAMP"). Subsequently, Wells Fargo and Mrs. Jacobson, pursuant to the HAMP, entered into a "Trial Modification Agreement" in which the loan payments were once again reduced, but the length of time to pay off the note was extended to forty years.

On July 6, 2010, Wells Fargo cancelled the Trial Modification Agreement on the grounds that (purportedly) Mrs. Jacobson had failed to submit the required paperwork needed to finalize the loan modification. At the time the Trial Modification Agreement was cancelled, Mrs. Jacobson had made seven monthly payments, each in the amount of $1,676.00, to Wells Fargo under the Trial Modification Agreement. The seven payments, which totaled $11,718.00, were returned to Mrs. Jacobson on the date of cancellation, *i.e.*,

July 6, 2010. No further payments on the debt were made by Mrs. Jacobson in the years 2010 or 2011.

The substitute trustees, on June 1, 2012, filed an order to docket in the Circuit Court for Talbot County. This was the first step by the substitute trustees to foreclose on the deed of trust that encumbered the Property. The affidavit that was attached to the notice to docket stated that Wells Fargo was the servicer of the loan and the holder of the promissory note signed by Mrs. Jacobson, but that the loan was owned by the Federal Home Loan Mortgage Corporation (hereinafter "Freddie Mac").

Mrs. Jacobson, *pro se*, on June 22, 2012, filed a pleading entitled "Defendant's Motion to Stay and/or Dismiss Foreclosure Proceedings (pursuant to [Md.] Rule 14-211) pending determination of show cause hearing (pursuant to Maryland Rule 14-207.1)" (hereinafter "the motion to stay/dismiss"). In her motion to stay/dismiss, Mrs. Jacobson acknowledged that she had executed the promissory note that was secured by the deed of trust. She asserted, however, that Wells Fargo was not the "holder of the note" and therefore was not authorized to appoint substitute trustees or to foreclose on the deed of trust.

At about the same time that Mrs. Jacobson filed the motion to stay/dismiss, she requested, pursuant to Md. Rule 2-209, that the matter be mediated. This request for mediation resulted in an automatic stay of the foreclosure proceedings.

On September 6, 2012, Gerard P. Uehlinger, Esquire entered his appearance in the foreclosure action as counsel for the appellants. Thereafter, mediation efforts continued

until December 2012, when the mediator notified the court that mediation efforts had been unsuccessful.

The Circuit Court for Talbot County entered a standard order on January 2, 2013 stating that the substitute trustees could schedule the foreclosure sale, subject to the rights of appellants to file a Rule 14-211 motion to stay the sale and dismiss the foreclosure action. That order overlooked the fact that Mrs. Jacobson had already filed such a motion about six months earlier. Also on January 2, 2013, Mrs. Jacobson filed a counter-claim against the substitute trustees and a third-party claim against Wells Fargo.

The substitute trustees filed a timely response to the motion to stay/dismiss. In that response, they contended that in order for a motion to stay/dismiss to have merit, the movant must state a valid defense to: 1) the validity of the lien; 2) the validity of the lien instrument; or 3) the right of the plaintiff to foreclose. According to the substitute trustees, Mrs. Jacobson's motion failed to state facts that would support any of these defenses. The substitute trustees attached to their memorandum, as Exhibit 1, a copy of the note, which showed that the note signed by Mrs. Jacobson was payable to "bearer." In their response, the substitute trustees stated, accurately, that, under Md. Code (2008), Real Property Article section 7-105.1(b)(1), the holder of a note may enforce the deed of trust and that the term "holder" included the person or entity in possession of the instrument if the instrument is payable to bearer. The substitute trustees took the position that because Wells Fargo had

possession of the note it therefore had the right to appoint the substitute trustees and to order the trustees to enforce the lien on the Property.

The counter-claim/third-party claim filed by Mrs. Jacobson alleged that the substitute trustees as well as Wells Fargo filed the foreclosure action in this case "in retribution [for] Mrs. Jacobson's publicized whistleblowing against . . . Wells Fargo . . . ." According to the counter-claim/third-party claim, Mrs. Jacobson signed an affidavit that was filed in a case, pending in Federal Court, brought by the Mayor and City Council of Baltimore City (hereinafter "the City") against Wells Fargo. Mrs. Jacobson's affidavit asserted that while she was employed by Wells Fargo, the latter had been guilty of "reverse redlining" in violation of the Federal Fair Housing Act. Also, according to the counter-claim/third-party claim, the federal judge assigned to the case filed by the City relied on Mrs. Jacobson's affidavit in denying Wells Fargo's motion to dismiss that case.

The counter-claim/third-party claim further alleged that, in retaliation for Mrs. Jacobson having filed her "whistleblower" affidavit, Wells Fargo cancelled the Trial Modification Agreement and returned to Mrs. Jacobson all seven (7) of her payments totaling $11,718.00, which she had made pursuant to that Agreement. The counter-claim/third-party claim asserted that the return of the HAMP payments violated the "Servicer Participation Agreement" that Wells Fargo had executed with the United States Department of the Treasury. She further alleged that Wells Fargo had no authority to appoint substitute

trustees and that the actions of the substitute trustees and Wells Fargo forced Mrs. Jacobson into foreclosure.

The counter-claim/third-party claim contains seven counts, which were captioned as follows: interference with economic relationship (Count I), fraud/deceit (Count II), conspiracy to defraud (Count III), abuse of process (Count IV), malicious use of civil process (Count V), violation of Maryland Consumer Protection Act (Count VI) and violation of the Fair Housing Act [as set forth in] 42 U.S.C. § 3617 (Count VII).

The substitute trustees filed a motion to strike the counter-claim against it and provided several reasons for doing so, one of which was that the counter-claim was not timely filed, *i.e.*, not filed within thirty (30) days after the date for filing the defendant's answer.

Mrs. Jacobson's motion to stay/dismiss, which had been filed on June 22, 2012, came on for hearing on February 1, 2013. The issues presented were taken under advisement and on March 1, 2013, the court filed an order that read, in material part, as follows:

> ORDERED that the motion [to stay foreclosure sale] shall be and is hereby GRANTED subject to the condition that the defendant has until April 1, 2013 to comply with the following escrow arrangement or the stay will be automatically lifted without further action by the Court: the defendant [Mrs. Jacobson] shall pay into the Registry of the Court the amount of $2,023.70 per month, effective retroactively from the date she filed the motion to stay, June 22, 2012, plus 1/12 of the real estate taxes, insurance, and monthly homeowner association dues, collectively to be calculated by the plaintiffs and communicated to the defendant within two weeks from the date of receiving this order, and it is further

> ORDERED that the defendant shall pay, in addition to monthly amounts described above, a lump sum of $11,718, representing the monies returned to the defendant by the lender, into the Registry of the Court by April 1, 2013, and it is further
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> ORDERED that, during the pendency of the stay, the defendant shall be obliged to protect the subject property, 6470 Fairway Lane, Easton, Maryland; to prevent liens from attaching to the same; and, to pay all utilities as they become due, and it is further
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> ORDERED that, during the pendency of the stay, the defendant shall file proof of payment on a monthly basis with this Court, and it is further
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> ORDERED that once compliance with the aforementioned escrow arrangement has been achieved, the stay shall continue until such time as this Court schedules a hearing on the defendant's motion to dismiss and counterclaim, unless the defendant fails to make payments under said escrow arrangement, in which case the stay shall be automatically lifted without further action by the Court.

Mrs. Jacobson, on March 12, 2013, filed a motion to reconsider the court's March 4, 2013 order. She contended that it was unfair to require her to pay into the Registry of the Court previously overdue payments retroactive to the date that she filed the motion to stay. She later filed a supplemental motion to reconsider.

The substitute trustees responded to the motion to reconsider by filing a memorandum in which they maintained that the amount of the monthly payments, and the start date of those payments, was fair and equitable because Mrs. Jacobson had previously argued that her payments under the HAMP modification should have been accepted by Wells Fargo and therefore (if she were correct in that regard) she would have had to make payments in that amount anyway and would still be able to proceed with her claims. The substitute trustees

added that because Mrs. Jacobson "did not make the intervening payments from the trial modification period," it was fair to require such payments if the sale was to be stayed.

The circuit court, on May 7, 2013, denied the motion and supplemental motion to reconsider. That denial meant, in effect, that because Mrs. Jacobson had not fulfilled the conditions necessary to stay the foreclosure sale, the sale could go forward.[2]

The circuit court, on May 7, 2013, also issued a memorandum order in which the court granted the motion to dismiss the counter-claims as to the substitute trustees but allowing some of the counts to survive as to Wells Fargo, the third-party defendant. Also, in the court's order of May 7, 2013, it denied Mrs. Jacobson's motion to dismiss the foreclosure action.

On May 20, 2013, Mrs. Jacobson filed for bankruptcy protection in the United States District Court for Maryland. Her bankruptcy petition was dismissed by that court on July 1, 2013.

Next, the substitute trustees set an August 12, 2013 date for the foreclosure sale of the Property. On the date that the Property was set for sale, Mrs. Jacobson, by counsel, filed an emergency motion to stay the foreclosure sale along with an amended counter-claim and

[2]While Mrs. Jacobson did pay into the Registry of Court $11,718.00, representing the monies that had previously been returned to her by Wells Fargo and also paid into the Registry of the Court one additional payment of $2,023.70 representing a payment for April 2013, she did not make the retroactive payments, *i.e.*, the payments of $2,023.70 per month retroactive to June 22, 2012.

third-party claim. One of the reasons for the requested stay was that the substitute trustees had failed to comply with Md. Rule 14-210, which requires that prior to sale, the seller must publish a notice of sale in a newspaper of general circulation (in the county where the land is located) at least once a week for three weeks, with the first publication occurring fifteen days or more before the sale date.

The substitute trustees called off the August 12, 2013 sale but reset it for September 16, 2013. On September 12, 2013, counsel for appellants, in open court, made an oral motion to stay the sale set for September 16, 2013. The basis for the emergency motion was that neither Mr. or Mrs. Jacobson had been sent notice of the sale in accordance with Md. Rule 14-210, which, among other things, requires:

> that prior to the foreclosure sale, the individual authorized to make the sale must send notice of the time, place and terms of the sale by certified mail and by first-class mail to the borrower. The mailings must be sent not more than 30 days and not less than 10 days before the date of the sale.

At the hearing it was uncontroverted that the appellants, personally, had not been sent notice in accordance with Rule 14-210, but that Mr. Uehlinger, counsel for Mr. and Mrs. Jacobson, had received notice of the sale in a timely manner. The reason the substitute trustees gave for not sending notice to the appellants personally was that both appellants were represented by counsel and therefore it would violate Rule 4.2 of the Canons of Professional Ethics for the substitute trustees (or their lawyer) to mail a letter to a party represented by counsel. The judge told the parties that he would stay the foreclosure sale scheduled for September 16,

2013, only if the appellants put up a bond in the amount of $3,000 to cover advertising and other costs incurred by the substitute trustees. No bond was posted by appellants and the sale went forward as scheduled on September 16, 2013. The high bidder at the sale was the owner of the debt, *i.e.*, Freddie Mac. A report of sale was filed on September 30, 2013.

Mrs. Jacobson, on October 15, 2013, filed exceptions to the foreclosure sale. Mr. Jacobson filed no exceptions. Mrs. Jacobson's exceptions were based on the failure of the substitute trustees to comply with the notice provision set forth in Md. Rule 14-210 and "fraud." While the exceptions were pending, Mrs. Jacobson filed several other motions concerning the foreclosure including a second motion to dismiss the foreclosure action.

On April 8, 2014, the circuit court held a hearing concerning all pending motions. The motions were then taken under advisement. The court, on May 20, 2014, filed an order that provided, in relevant part:

> ORDERED, that Jacobson's Exceptions shall be and are hereby DENIED; and it is further
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> ORDERED, that Jacobson's Motion to Dismiss the Foreclosure Proceeding shall be and is hereby DENIED; and it is further
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> ORDERED, that the Substitute Trustees[']Motion to Strike the Motion to Dismiss the Foreclosure Proceeding shall be and is hereby GRANTED; and it is further
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> ORDERED, that Wells Fargo's Motion to Dismiss the Amended Counterclaim shall be and is hereby GRANTED as to Counts III, V, and VII; and it is further

ORDERED, that Wells Fargo's Motion to Dismiss the Amended Counterclaim shall be and is hereby DENIED as to Counts I, II, IV, and VI; and it is further

ORDERED, that the Substitute Trustees' Motion to Dismiss the Amended Counterclaim shall be and is hereby GRANTED as to Counts I-VI.

On June 3, 2014, the court filed an order ratifying the sale of the Property. Appellants filed this appeal on June 13, 2014.

II.

THE FINAL ORDER DOCTRINE

With a few exceptions, an appeal may not be filed from any judgment that is not final. Md. Rule 2-602 provides:

> (a) **Generally**. Except as provided in section (b) of this Rule, an order or other form of decision, however designated, that adjudicates fewer than all of the claims in an action (whether raised by original claim, counterclaim, cross-claim, or third-party claim), or that adjudicates less than an entire claim, or that adjudicates the rights and liabilities of fewer than all the parties to the action:
> (1) is not a final judgment;
> (2) does not terminate the action as to any of the claims or any of the parties; and
> (3) is subject to revision at any time before the entry of a judgment that adjudicates all of the claims by and against all of the parties.
> (b) **When allowed**. If the court expressly determines in a written order that there is no just reason for delay, it may direct in the order the entry of a final judgment:
> (1) as to one or more but fewer than all of the claims or parties; or
> (2) pursuant to Rule 2-501(f)(3), for some but less than all of the amount requested in a claim seeking money relief only.

Under Md. Rule 2-602(a), it is clear that no final judgment has been entered in the subject case because all counts in the third-party claim against Wells Fargo have not been resolved.

Md. Rule 8-602(e)(1) provides:

> **Entry of judgment not directed under Rule 2-602**. (1) If the appellate court determines that the order from which the appeal is taken was not a final judgment when the notice of appeal was filed but that the lower court had discretion to direct the entry of a final judgment pursuant to Rule 2-602(b), the appellate court may, as it finds appropriate, (A) dismiss the appeal, (B) remand the case for the lower court to decide whether to direct the entry of a final judgment, (C) enter a final judgment on its own initiative or (D) if a final judgment was entered by the lower court after the notice of appeal was filed, treat the notice of appeal as if filed on the same day as, but after, the entry of the judgment.

(Emphasis added.)

If there had been no third-party claim, the ratification of the foreclosure sale would have constituted an appealable final order in regard to all parties in the foreclosure action. And, if the circuit court had been asked to do so, clearly it could, pursuant to Md. Rule 8-602(b), have entered a final judgment in favor of the substitute trustees as to the foreclosure action because as to that action there was no just cause for delay. The foreclosure action had already been delayed for extensive periods of time due to Mrs. Jacobson's request for mediation, repeated requests for reconsideration of orders and her bankruptcy filing. Those delays have meant that she has been able to retain possession of

the Property for an extended period of time without making any payments on the note, and without paying real estate taxes, insurance, or homeowner fees on the Property.

We shall therefore exercise our discretion, pursuant to Md. Rule 8-602(e)(1)(C), and enter a final judgment as to the order ratifying the sale of the Property.

III.

APPELLEES' MOTION TO DISMISS THE APPEAL AS TO THE FIRST QUESTION PRESENTED

As previously mentioned, the first question presented concerns the March 4, 2013 order entered by the circuit court, which conditionally granted the stay of the foreclosure action as requested by Mrs. Jacobson but imposed several requirements that Mrs. Jacobson had to meet in order to keep the stay in effect. One of the conditions of the stay was that Mrs. Jacobson pay into the Registry of the Court $2,023.70 per month retroactive to June 12, 2012. This meant that in order to stay the foreclosure action, Mrs. Jacobson would have had to pay, *inter alia*, nine months worth of retroactive payments, or $18,213.30, plus $2,023.70 starting on April 1, 2013 and $11,718.00, which was the amount that had been sent back to Mrs. Jacobson by Wells Fargo on July 6, 2010. Mrs. Jacobson met all of the aforementioned conditions except for the requirement that she make retroactive payments back to the date of the filing of the motion to stay/dismiss. Because she did not meet all of the conditions, the stay was lifted, which meant, in legal effect, that her request for an injunction had been denied.

The substitute trustees point out, accurately, that Maryland Code (2013), Courts & Judicial Proceedings Article, section 12-303 allows an immediate appeal from the grant or the refusal to grant an injunction. The substitute trustees claim that because Mrs. Jacobson failed to file an appeal within thirty (30) days of April 1, 2013, she waived her right to appeal the denial of the injunction and could not, thereafter, file an appeal.[3] That claim has no merit. *See Brewster v. Woodhaven Building & Development, Inc., et al.*, 360 Md. 602, 620-23 (2000) (even though a party has a right to an immediate appeal, that party may forego the right and raise the same issue in a later appeal from a final order). We shall therefore decide whether the circuit court committed reversible error by, in effect, denying the motion to stay when it imposed one or more conditions to the stay that appellants claim were not allowed under Md. Rule 14-211.

IV.

THE MARCH 4, 2013 ORDER

> As the Court of Appeals stated in *Bates v. Cohn*, 417 Md. 309, 9 A.3d 846 (2010), "[b]efore a foreclosure sale takes place, the defaulting borrower may file a motion to 'stay the sale of the property and dismiss the foreclosure action.'" *Id*. at 318, 9 A.3d 846 (quoting Md. Rule 14-211(a)(1)). In other words, the borrower "may petition the court for injunctive relief, challenging 'the validity of the lien or . . . the right of the [lender] to foreclose in the

[3]Technically, the appellees worded their argument as if an injunction had been granted. Although it is not outcome determinative, we view the court's action as a denial of the injunction because, according to appellants, the conditions imposed to secure the injunction were too stringent and therefore they failed to obtain an injunction to stop the foreclosure sale.

> pending action.'" *Id*. at 318-19, 9 A.3d 846 (quoting Md. Rule 14-211(a)(3)(B)). "The grant or denial of injunctive relief in a property foreclosure action lies generally within the sound discretion of the trial court." *Anderson v. Burson*, 424 Md. at 243, 35 A.3d 452 (2011) (and cases cited therein). Accordingly, we review the circuit court's denial of a foreclosure injunction for an abuse of discretion. *Id*. We review the trial court's legal conclusions *de novo*. *Wincopia Farm, LP v. Goozman*, 188 Md. App. 519, 528, 982 A.2d 868 (2009).

Svrcek v. Rosenberg, 203 Md. App. 705, 720 (2012).

Maryland Rule 14-211(b)(2) reads, in part, as follows:

> Hearing on the Merits. If the court concludes from the record before it that the motion [to stay and dismiss]:
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> > (A) was timely filed or there is good cause for excusing non-compliance with subsection (a)(2) of this Rule,
> >
> > (B) substantially complies with the requirements of this Rule, and
> >
> > (C) states on its face a defense to the validity of the lien or the lien instrument or to the right of the plaintiff to foreclose in the pending action, the court shall set the matter for a hearing on the merits of the alleged defense. The hearing shall be scheduled for a time prior to the date of sale, if practicable, otherwise within 60 days after the originally scheduled date of sale.

Mrs. Jacobson filed her motion to stay/dismiss pursuant to Md. Rule 14-211 immediately after the notice to docket was filed by the substitute trustees. Her motion, however, was somewhat unusual in that she filed it prior to the scheduling of the foreclosure sale. In other words, she was proactive, because she anticipated that the substitute trustees, if a stay was not granted, were about ready to schedule a date for the sale of the Property. In this appeal, appellants argue that there is nothing in Md. Rule 14-211 that prohibits a

respondent in a foreclosure action from filing a motion to stay/dismiss before a foreclosure sale is scheduled. We agree with appellants as to that point.

Md. Rule 14-211(c)(d)&(e) provides:

> (c) **Temporary stay.** (1) Entry of stay; conditions. If the hearing on the merits cannot be held prior to the date of sale, the court shall enter an order that temporarily stays the sale on terms and conditions that the court finds reasonable and necessary to protect the property and the interest of the plaintiff. Conditions may include assurance that (1) the property will remain covered by adequate insurance, (2) the property will be adequately maintained, (3) property taxes, ground rent, and other charges relating to the property that become due prior to the hearing will be paid, and (4) periodic payments of principal and interest that the parties agree or that the court preliminarily finds will become due prior to the hearing are timely paid in a manner prescribed by the court. The court may require the moving party to provide reasonable security for compliance with the conditions it sets and may revoke the stay upon a finding of non-compliance.
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> (2) Hearing on conditions. The court may, on its own initiative, and shall, on request of a party, hold a hearing with respect to the setting of appropriate conditions. The hearing may be conducted by telephonic or electronic means.
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> (d) **Scheduling order.** In order to facilitate an expeditious hearing on the merits, the court may enter a scheduling order with respect to any of the matters specified in Rule 2-504 that are relevant to the action.
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> (e) **Final determination.** After the hearing on the merits, if the court finds that the moving party has established that the lien or the lien instrument is invalid or that the plaintiff has no right to foreclose in the pending action, it shall grant the motion and, unless it finds good cause to the contrary, dismiss the foreclosure action. If the court finds otherwise, it shall deny the motion.

(Emphasis added).

In regard to the stay, Mrs. Jacobson makes two arguments that contradict one another. In the first argument, appellants assert that the court had no power to enter a temporary stay

under Rule 14-211 because, as of March 4, 2013, no sale had been scheduled. Her exact argument in this regard is as follows:

> Maryland Rule 14-211 is specific that only if the hearing on the merits cannot be held prior to the date of the sale, the court shall enter an order that temporarily stays the sale "on terms and conditions that the court finds reasonable and necessary to protect the property and the interest of the plaintiff." Maryland Rule 14-211(C)(c)(1). Appellees at that point had not scheduled any sale date.

If that argument were to obtain, Mrs. Jacobson, having had no right to a stay under Rule 14-211, would have no possible reason to complain about the court granting a stay with conditions not allowed by Rule 14-211.[4]

Mrs. Jacobson's second argument and the one she devotes the most attention to, is that the conditions were invalid because Maryland Rule 14-211 only allows the court to require the payment of principle and interest from the date of the stay order to the date of the hearing on the motion to dismiss the foreclosure action. In other words, according to appellants, when imposing conditions to the stay, the court had to abide by the requirements of Md. Rule 14-211.

[4]It should be noted that in their first question presented, appellants ask us to decide only whether the conditions imposed (in order to keep the stay in effect) contravened the dictate of Md. Rule 14-211. Failure to raise a question in the "Question Presented" section of an appellant's brief, can constitute a waiver of that issue. *See Green v. North Arundel Hospital*, 126 Md. App. 394, 426 (1999). Nowhere in appellant's brief do they argue that the trial judge, under his general equitable power to grant or deny an injunction, abused his discretion in imposing the conditions about which appellants complain.

Mrs. Jacobson raises an interesting point in regard to the proper interpretation of Md. Rule 14-211. But under that Rule the stay of the foreclosure sale can only be granted for the period up until the hearing on the motion to dismiss can be held. If, after such a hearing on the merits, the court decides that the moving party has established either that the lien or the lien instrument is invalid or that the plaintiff has no right to foreclose in the pending action, the court is required to grant the motion to dismiss the foreclosure action. *See* Maryland Rule 14-211(e), quoted *supra*. On the other hand, if a court finds otherwise, it is obligated to deny the motion to dismiss and lift the stay. *Id*. This means that if, hypothetically, the circuit court had stayed the foreclosure sale until the hearing on the merits of the motion to dismiss, and imposed no requirements that Mrs. Jacobson pay anything into the Court's Registry, Mrs. Jacobson would not benefit because the motion to dismiss was denied and the Property was not sold until more than four months after the motion to dismiss was denied. After the denial, Maryland Rule 14-211 does not provide a person in Mrs. Jacobson's position with any right to a stay whatsoever. Therefore, even if the conditions were more stringent than allowed under Md. Rule 14-211, Mrs. Jacobson was not harmed. This is important because, in every appeal in a civil case, an appellant must prove not only that a judge erred but must also prove that the error caused injury. *Brown v. Daniel Realty Co.*, 409 Md. 565, 613 (2009).

V.

THE DENIAL OF THE EXCEPTIONS TO THE FORECLOSURE SALE BASED ON FAILURE TO COMPLY WITH MARYLAND RULE 14-210

In her exceptions to the foreclosure sale, Mrs. Jacobson first maintained that the sale must be set aside for failure on the part of the substitute trustees to notify the appellants, personally, of the sale pursuant to Md. Rule 14-210. In ruling on the exceptions, the presiding judge said, in regard to the failure to comply with Md. Rule 14-210 issue, the following:

> In *Bates* [*v. Cohn*, 417 Md. 309 (2010)], the Court of Appeals made it clear that, "after a foreclosure sale, the debtor's later filing of exceptions . . . may challenge only procedural irregularities at the sale or . . . the statement of indebtedness." 417 Md. at 327 (quoting *Greenbriar v. Brooks*, 387 Md. 683, 688 (2005)). The Court went on to say that procedural allegations could be irregularities such as "the advertisement of the sale was insufficient or misdescribed the property, the creditor committed a fraud by preventing someone from bidding or by chilling the bidding, challenging the price as unconscionable, etc." *Id*. (quoting *Greenbriar*, 387 Md. at 741). Applying the standard of review to the facts of this case, the paramount concern is that there be compliance with the purpose of the notice of sale, i.e., to allow the mortgagor-debtor to undertake appropriate action to protect their interests. *Ten Hills Co. v. Ten Hills Corp.*, 176 Md. 444, 449 (1939). Here, that paramount concern was satisfied by notice to counsel for mortgagor-debtor, Jacobson. It is significant that there is no claim of prejudice by service on counsel–indeed, that service on counsel was required because of the pendency of a counterclaim. This at worst was harmless error.

(Footnote omitted.)

Counsel for appellants admitted in open court at the hearing on the exceptions that his clients had actual notice of the time and place of the sale because, when counsel got

notice, he advised them of it. Therefore, the appellants could not possibly have been prejudiced by the failure of the substitute trustees to personally notify the appellants by mail in accordance with Md. Rule 14-210. This is important because in order for a sale to be set aside due to an alleged irregularity, the person who files the exception must show that any claimed irregularity caused prejudice to him or her. *Fagnani v. Fisher*, 418 Md. 371, 384 (2011). Mrs. Jacobson, who alone filed exceptions, did not show prejudice. Therefore, the circuit court did not err in denying Mrs. Jacobson's exception based on improper notice.

VI.

THE DENIAL OF THE EXCEPTIONS BASED ON WHAT APPELLANTS CALL "FRAUD"

Before discussing appellants' allegations of fraud, it is important to point out that appellants do not raise as an issue presented in this appeal, the issue of whether the circuit court erred in denying the motion to dismiss the foreclosure action. As already mentioned, both before and after the foreclosure sale, Mrs. Jacobson filed a motion to dismiss the foreclosure action and both motions were denied. Appellants, instead, contend that Mrs. Jacobson's exceptions to the sale should have been granted because she proved "fraud" on the part of appellees. By arguing that the error occurred in failing to grant their exceptions, appellants narrowed considerably the grounds available to them to secure a reversal.

In *Bates v. Cohn*, 417 Md. 309 (2010), the Court stressed that not every complaint about a foreclosure sale can be raised by filing exceptions to the sale. The *Bates* Court said:

> [T]he spectre of foreclosure is as daunting as it is disheartening, if a borrower was able to raise any sort of exception after the foreclosure sale, there undoubtedly would be a chilling effect on interested prospective purchasers coming to sales. Prospective third-party purchasers would be unable-based on most practical notions of what constitutes due diligence-to gauge against such claims the risk of an intended investment. Being a bona fide purchaser for value then would not mean as much or even offer the traditional safe harbor underlying that status.

Bates, 417 Md. at 329-30.

In *Thomas v. Nadel*, 427 Md. 441 (2012), the Court further discussed the narrow scope of issues that can be raised by filing exceptions:

> In the recent decision in *Bates v. Cohn*, this Court reiterated that a borrower challenging a foreclosure action must ordinarily assert known and ripe defenses to the conduct of the foreclosure sale in advance of the sale. After the sale, the borrower is ordinarily limited to raising procedural irregularities in the conduct of the sale, although the [*Bates*] Court left open the possibility that a borrower could assert a post-sale exception that the deed of trust was itself the product of fraud.

Id. at 442-43 (footnotes omitted)(emphasis added).

In this appeal, appellants recognize, impliedly at least, that when, as here, a debtor files exceptions to a foreclosure sale pursuant to Md. Rule 14-305(d), the debtor is generally allowed to complain only about procedural irregularities in the sale itself. This was cogently explained by the Court of Appeals in *Greenbriar v. Brooks*, 387 Md. 683 (2005) as follows:

> Challenges, by means of filing exceptions to the foreclosure sale are generally promulgated in two manners after the sale: first, exceptions filed prior to the Circuit Court's ratification of the sale generally assert procedural irregularities in the sale itself. These might include allegations such as 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,

> challenging the price as unconscionable, etc. Alternatively, or in addition, challenges to the creditor's exact statement of debt are generally submitted by filing exceptions to the post-ratification auditor's report.

Id. at 741.

Appellants maintain, however, that in *Bates v. Cohn*, *supra*, the Courts recognized that besides procedural irregularities in the sale itself, the Court "left the door open to raising questions of fraud in post-sale exceptions" and, in their brief, appellants make three allegations of what they claim to be "fraud."[5] Before analyzing, in detail, appellants' three "fraud" allegations, we note that while it is true that the *Bates*' decision "left the door open to raising questions of fraud in post-sale exceptions" hearings, the door that was opened was a narrow one because, in that regard, the *Bates* Court, 417 Md. at 327-28, simply said:

> [w]e do not rule here on whether a homeowner may raise under 14-305, as a post-sale exception, allegations that a deed of trust was the product of fraud, and, therefore, the sale was invalid and incapable of passing title. Nor do we determine whether a homeowner/borrower may assert under 14-305, as a post-sale exception, claims that a foreclosure sale was the product of the lender affirmatively and purposefully misleading the borrower in default that ultimately unsuccessful pre-sale loss mitigation or loan modification efforts would likely be successful (or protracting strategically the denial of those efforts) and therefore dissuading the borrower from seeking to assert pre-sale defenses in a timely manner.

Neither of those narrow fraud exceptions are here, even arguably, applicable.

[5]In our recent opinion, *Devan v. Bomar*, 225 Md. App. 258, 123 A.3d 686, 696-98 (2015), Judge Moylan, speaking for this Court, analyzed *Bates* and its progeny in detail, and concluded that it is far from clear that any act of fraud, that is not connected with the conduct of the foreclosure sale itself, may be a legitimate grounds for filing exceptions to the sale.

Appellants first allegation of "fraud" is that Wells Fargo failed, in various ways, to honor its obligations to Mrs. Jacobson under the HAMP. To evaluate accurately appellants' first allegation of fraud, it is useful to discuss briefly the facts in *Bates*. Sonja Bates purchased a home in 1999 and did so by borrowing approximately $148,000.00 from GMAC Mortgage, LLC ("GMAC"). The loan was guaranteed by the Federal Housing Administration. 417 Md. at 311-12. In October 2007, Bates defaulted on the loan. *Id*. at 312. She later told a GMAC representative that she was interested in a loan modification. *Id*. at 313. That representative informed Bates that she would need to complete and submit a financial "package" for GMAC's analysis. *Id*. at 314. GMAC, in turn, sent Bates a "package" containing a number of forms and instructions to be filed in order for a loan modification to be considered. *Id*. Bates completed the forms and mailed them to GMAC in mid-April 2009. *Id*. at 314-15. Further communications occurred between Bates and GMAC but ultimately GMAC denied the loan modification and on June 3, 2009 the property was sold at public auction. *Id*. at 316.

Bates, in her exceptions, argued that "GMAC" did not comply with the federal HUD/FHA pre-foreclosure loss mitigation requirements set forth in her deed of trust. *Id*. Because of this lapse on the part of GMAC, Bates contended that the "sale was [not] fairly and properly made," and therefore the circuit court should set aside the sale. *Id*. at 316-17. The circuit court rejected Bates's argument and she filed an appeal to this Court, after which the Court of Appeals, on its own initiative, issued a *writ of certiorari.* The sole question

presented to the Court of Appeals in *Bates* was "[D]id [the] trial court err as a matter of law when it held that homeowner 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*. at 318. The Court answered that question in the negative and explained that "[a] reasonable construction of this language [in a Committee Note to Md. Rule 14-211(a)(3)(B)] (and its placement within Rule 14-211) indicates that a lender's failure to comply with loss mitigation requirements goes to its right to foreclose, rather than its procedural handling of the sale." *Id*. at 329. Therefore, according to the *Bates* decision, failure to comply with loss mitigation requirements cannot be brought up by exceptions to the sale - instead such a failure must be brought up prior to the sale. *Id*. at 329-30. Exactly the same thing can be said in regard to appellants' complaint that Wells Fargo did not "honor its contractual obligations under HAMP." Therefore, contrary to appellants' argument, the principles set forth in *Bates v. Cohn* demonstrate the first allegation of "fraud" could not be raised legitimately at the exceptions stage.

The second allegation of "fraud" that appellants raise in their brief is that, purportedly, Wells Fargo had no right to appoint substitute trustees because they did not possess the original of the note. In this regard, the appellants do not contend that Mrs. Jacobson did not sign the note secured by the deed of trust on the Property. The appellants' argument is based solely on Mrs. Jacobson's proffer, made at the exceptions hearing, that she had examined the note that was in Wells Fargo's possession and had concluded that the

note produced by Wells Fargo was not the original one she signed. In the words of her brief: "there were no impressions or indentations on the reverse side of the page bearing [Mrs. Jacobson's] signature, leading [Mrs. Jacobson] to conclude that the alleged Note did not contain her original signature."

In regard to the issue of the authenticity of the note, the judge who heard the exceptions said, in his written opinion:

> In their opposition to this claim, the Substitute Trustees point out that the only basis for the claim that the note was not an original document was the bald assertion by [Mrs.] Jacobson herself that it did not appear to her to be an original. [Mrs.] Jacobson produced no expert to back up the claim. However, the Substitute Trustees hired their own expert who verified the authenticity of the note. The Court accepts the Substitute Trustees' argument in this regard.

(Emphasis added.)

In reviewing the circuit court's finding of fact, an appellate court must be mindful that the person who files exceptions to a foreclosure sale has the burden of proving that the sale was invalid. *J. Ashley Corp. v. Burson*, 131 Md. App. 576, 582 (2000). In the excerpt, just quoted, the judge concluded, in legal effect, that Mrs. Jacobson had not met her burden of showing that the note that was in Wells Fargo's possession was not the original. There clearly was a sound basis for such a finding by the judge in view of the fact that nothing contradicted the appellees' expert's opinion, except Mrs. Jacobson's non-expert bald assertion "that it did not appear to her to be an original." Having failed to meet her burden

of proving that the note was not the original, the court did not err in declining to grant Mrs. Jacobson's exceptions on that ground.

Lastly, appellants contend that the substitute trustee did not have "standing" to institute the foreclosure proceeding because, purportedly, Wells Fargo has "waived and released any interest it had in that Note." Appellants' argument in this regard is phrased by them as follows:

> The parties are now clearly defined: Freddie Mac is the owner of the Note/loan and Wells Fargo is both the Servicer and the Custodian of Document on behalf of Freddie Mac. Also it was clearly established below that Wells Fargo is not [the] owner/investor of the subject loan, and that pursuant to the Custodial Agreement [which is, according to appellants, a "tri-party" agreement among Freddie Mac, the servicer, and the custodian], Wells Fargo only holds the Note in trust for Freddie Mac because Wells Fargo has waived and released any interest it had in that Note. The inescapable conclusion is that Wells Fargo lacks standing to enforce the Note via a foreclosure action because Wells Fargo is merely the servicer and/or the document custodian of Appellants' loan.

Based on the record that we have before us, it is far from clear that appellants are correct in their characterization of the tri-party agreement. But assuming, purely for the sake of argument, that they are correct when they assert that Wells Fargo is only a trustee for Freddie Mac and has "waived and released any interest" in the promissory note, it is impossible to see how that makes any difference because it is undisputed that the note was payable to "bearer" and that Wells Fargo was the "holder" of the note inasmuch as it was the entity in possession of the instrument. As such, it had a right to enforce the deed of trust. *See* Maryland Code (2008), Real Property Article, section 7-105.1(b)(1), which was

discussed *supra* at pages 4 and 5. *See* also *Deutsche Bank National Trust Co. v. Brock*, 430 Md. 714, 729-30 (2013). Therefore, contrary to appellants' argument, Wells Fargo had "standing" to appoint the substitute trustees and to direct them to foreclose.

Moreover, even if it were true, as appellants contend, "that Wells Fargo lack[ed] standing to enforce the Note via a foreclosure," lack of standing is not the type of defense that can be made at an exceptions hearing because: 1) such a defense is required to be made prior to sale; and 2) that defense has nothing to do with whether or not the proper procedure was followed in conducting the foreclosure sale. *See Bates*, *supra*, 417 Md. at 327 and *Thomas v. Nadel*, 427 Md. at 442-43.

JUDGMENT ENTERED BY THE CIRCUIT COURT FOR TALBOT COUNTY ON JUNE 3, 2014 RATIFYING THE SALE SHALL BE ENTERED AS FINAL; JUDGMENT RATIFYING THE SALE AFFIRMED; COSTS TO BE PAID BY APPELLANTS.