Circuit Court for Howard County
Case No. 13-C-11-87827

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 887

September Term, 2017

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101 GENEVA LLC

v.

THOMAS D. MURPHY, SUBSTITUTE TRUSTEE, *et al.*

Fader, C. J.,
Friedman,
Kenney, James A., III
(Senior Judge, Specially Assigned),

JJ.

Opinion by Kenney, J.

Filed: March 4, 2019

*This is an unreported opinion, and it may not be cited in any paper, brief, motion, or other document filed in this Court or any other Maryland Court as either precedent within the rule of stare decisis or as persuasive authority. Md. Rule 1-104.

Appellant, 101 Geneva LLC ("101 Geneva"), challenges the judgment of the Circuit Court for Howard County awarding damages to Cambridge Financial Services, lender, and Thomas D. Murphy, substitute trustee, (collectively "Cambridge"), based on its breach of an agreement to purchase a foreclosed property in 2012. The circuit court determined that the resale of the property, in 2015, was at 101 Geneva's risk and expense and denied its motion to reconsider, vacate, and dismiss. 101 Geneva appealed, and Cambridge filed a cross-appeal. We have rephrased and consolidated the questions presented[1] as:

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[1] 101 Geneva asked the following questions:

1. Whether the foreclosure case should have been dismissed in its entirety for failure of the foreclosure trustees and their law firms to be licensed as debt collectors under the Maryland Fair Debt Collection Act?
2. Whether the resale of the property foreclosed was held too remotely for 101 Geneva to be held liable for a resale at its risk and expense?
3. Whether Cambridge acted properly and reasonably to mitigate its damages?
4. Whether the sale of the property by Cambridge after resale should be taken into account to determine that Cambridge had no damages?
5. Whether the settlement of the claim of Sidney Willson should be taken into account to reduce the damages assessed against 101 Geneva?
6. Whether the circuit court erred in determining and calculating the amount which would be owed by 101 Geneva to Cambridge should [appellant] not prevail on its other claims?

Cambridge asked the following questions:

1. Whether the circuit court erred in denying 101 Geneva's motion to dismiss based on the fact that the substitute trustees are not licensed as collection agencies under the MCALA?
2. Whether the circuit court erred in finding that 101 Geneva had no control over the delay caused by the title claim, and partially denying the Rule 14-305(g) claim on that basis?

1. Were the substitute trustees required to be licensed as debt collectors or collection agencies?

2. Did the circuit court err or abuse its discretion in determining that 101 Geneva was liable for the risk and expense of the resale?

For the reasons that follow, we answer those questions in the negative, but will remand for a possible calculation adjustment.

FACTUAL AND PROCEDURAL BACKGROUND

George Arthur Willson, II borrowed from Cambridge $880,000 secured by a deed of trust on real property in 2007. When he defaulted on the debt, Cambridge foreclosed, and 101 Geneva purchased the property for $896,000.[2] It executed a memorandum of purchase at public auction on March 5, 2012, and paid a deposit of $100,000 to the substitute trustees[3], which was deposited with the Clerk of the Court. We will refer to this as the "First Sale."

On April 5, 2012, Sidney Willson, the borrower's mother, filed a petition asserting a title interest in the property. Mrs. Willson, the former owner of the property, claimed a

3. Whether the circuit court erred in declining to deny the Rule 14-305(g) claim in its entirety on the basis that the Petition to Resell was not filed until after the title claim had been resolved?

[2] The agreement stipulated "interest . . . on the unpaid purchase money at a rate of 15.5% from the date of sale to the date the funds are received in the office of the Substitute Trustee[, and] . . . taxes assessed against the Property after the date of the Initial Sale."

[3] At the time, the substitute trustees were Mark H. Wittstadt and Gerard W. Wittstadt, Jr. The current substitute trustee, Thomas D. Murphy, was substituted by notice of substitution filed on March 2, 2017. It is not disputed that these three individuals are lawyers and members of the Maryland bar.

life estate based on the 1989 deed to her son. She also claimed entitlement[4] to one-third of the sale proceeds. We will refer to this as the "one-third proceeds claim."

In response, 101 Geneva filed, on May 29, 2012, a motion to be released from its purchase at the First Sale, arguing that Mrs. Willson's claims rendered title to the property unmarketable. During a hearing on August 3, 2012, Mrs. Willson and 101 Geneva agreed that 101 Geneva would withdraw its motion in exchange for her agreement that, *if the First Sale closed*, her one-third proceeds claim would not encumber the title, regardless of whether she received any share of the sales proceeds. In a post-hearing memorandum, Mrs. Willson agreed that, if the First Sale closed, it would be the only sale to which her title claim might apply.

After a hearing on October 23, 2012, the circuit court, noting that "the profits issue has been resolved and is moot," denied 101 Geneva's motion for release. The circuit court ratified the First Sale on November 1, 2012. On November 30, 2012, 101 Geneva notified the trustees that it would not proceed to closing, and appealed to this Court.[5] We

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[4] The provision provided, "[I]n consideration to the reservation of a life estate as enumerated above, the Grantor hereby reserves the right to receive an amount equal to one-third (1/3) of the net distributable proceeds of sale derived from conveyance of the land hereby conveyed to Grantee, to any bona fide, third-party purchaser for full fair market value, for the balance of her natural life . . . . The right to receive one-third (1/3) of the sale proceeds . . . shall constitute a charge on the land and shall be binding upon the Grantee, his successors and assigns."

[5] In that appeal, 101 Geneva presented the following questions:

> I. Did the trial court err in refusing to release appellant from a sale when provisions advertising that sale were unfavorable to the buyer in three respects: 1) requiring no abatement of interest if there is any delay between

affirmed the circuit court's judgment in an unreported opinion, *101 Geneva LLC v. Wittstadt*, No. 1960, September Term, 2012 (Md. Ct. Spec. App. Dec. 12, 2013).

Because Mrs. Willson's agreement was contingent on the closing of the First Sale, her one-third proceeds claim continued to cloud the title to the property. Over the next three years, Cambridge attempted to find a substitute purchaser for the property and to settle the title claim, but Mrs. Willson refused to extend her agreement to any purchasers other than 101 Geneva. Mrs. Willson died on October 8, 2014, and Cambridge reached an agreement with her estate to dismiss the title claim with prejudice on May 6, 2015.

On May 21, 2015, the substitute trustees filed a Petition to Resell Property at Sole Risk and Expense of Defaulting Purchaser ("Petition to Resell"), pursuant to Maryland Rule 14-305(g). 101 Geneva opposed the Petition to Resell at its risk, arguing that the substitute trustees did not seek a resale in a timely manner. After a hearing, the circuit court, on September 21, 2015, granted the Petition to Resell, in part, but reserved on whether the resale would be at 101 Geneva's risk and expense.

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sale and ratification; 2) requiring the purchaser to assume the risk of loss as soon as the sale is complete; and 3) requiring the purchaser to indemnify the sellers and release them from any environmental claims?

II. Did the trial court err in refusing to release appellant from a sale due to frustration of purpose for two different reasons: 1) where the sale had been delayed significantly, and 2) where the adjoining landowner was litigious?

III. Did the trial court err in refusing to release appellant from a sale where the title was unmarketable?

At the November 16, 2015 resale, Cambridge was the sole bidder and purchased the property for $700,000 (the "Second Sale"). The Second Sale was ratified on March 25, 2016. The Auditor's Report and Account was filed on August 12, 2016.

Cambridge reopened the risk and expense issue by filing Exceptions to the Auditor's Report and Account and Renewal of Petition to Resell ("Exceptions"). It asserted that 101 Geneva was liable for the risk and expense of the Second Sale and for the interest and property taxes on the property; that the damages totaled $710,396.73; and that the $100,000 deposit held in escrow by the Clerk of the Court should be disbursed to Cambridge in partial satisfaction of 101 Geneva's liability. 101 Geneva opposed the Exceptions, arguing that the Second Sale was too remote from the First Sale date and that Cambridge had not mitigated its damages.

On April 10, 2017, 101 Geneva filed a motion for summary judgment, which Cambridge opposed. And, Cambridge filed its own motion for summary judgment, alleging damages of $689,307.95. 101 Geneva opposed that motion, arguing that it was not responsible for damages as a result of the Second Sale and was entitled to the return of its $100,000 deposit.

At a hearing on June 1, 2017, the circuit court determined that 101 Geneva was generally liable for the risk and expense of resale. But, because it did not "believe that Cambridge [had] acted appropriately between November 30, 2012 and May 21, 2015," it pro-rated and recalculated 101 Geneva's liability:

Difference between base and resale prices:	$196,000.00
Interest ($338.03 per day) from March 5, 2012 to November 30, 2012 (301 days):	$101,747.03
Interest ($338.03 per day) from May 21, 2015 to November 16, 2015 (178 days):	$60,217.40
2012 Taxes:	$8,842.11
2015 Taxes:	$5,724.48
Actual expenses related to resale:	$4,510.00[6]
Total liability:	$377,031.81

It granted Cambridge's motion for summary judgment to that extent and denied 101 Geneva's. The court, on June 9, 2017, ordered: that 101 Geneva pay $377,031.81 to Cambridge; that the clerk of the court disburse the $100,000 deposit to Cambridge, along with the accrued interest, in partial satisfaction of 101 Geneva's liability; and that the Auditor's Report and Account be modified as per the order.

In response, 101 Geneva filed, on June 21, 2017, an Emergency Motion to Vacate and Re-enter Deficiency Order and a Motion to Reconsider and Vacate Ratifications of Sales and Order. It requested dismissal of the foreclosure action on the basis that none of the substitute trustees or their law firms were licensed as debt collectors. After a hearing, the court, on June 22, 2017, denied the emergency aspect of the motion to vacate. It denied 101 Geneva's motion to reconsider, vacate, and dismiss on June 23, 2017.

[6] We call to the court's attention on remand that the figures stated by the circuit court on June 1, 2017 do not total $377,031.81.

On July 7, 2017, 101 Geneva appealed from the June 9, 2017 and June 23, 2017 orders. Cambridge noted a cross-appeal on July 17, 2017.

DISCUSSION

I.

Debt Collector License

Standard of Review

In its motion to reconsider, vacate, and dismiss, 101 Geneva contended that, in order to institute the foreclosure, the substitute trustees were required to be licensed as debt collectors under Maryland law. We review that claim *de novo*. *See Blackstone v. Sharma*, 461 Md. 87, 110-11 (2018), *reconsideration denied*, (Oct. 3, 2018); *Anderson v. Burson*, 424 Md. 232, 243 (2011).

Contentions

101 Geneva asserts that "[t]his case is clearly an attempt to collect consumer debt" and the "sale and resulting order ratifying the sale were . . . attempts to collect consumer debt." It contends that foreclosing trustees, including the substitute trustee in this case, are required to be licensed as debt collectors, and their lack of licenses is a jurisdictional defect that requires dismissal of the foreclosure action.

In its first question on appeal, 101 Geneva cites generally the Maryland Consumer Debt Collection Act ("MCDCA"), which is codified at Md. Code Ann., Com. Law ("CL") § 14-201, *et seq*. This appears to be appellant's only reference to the MCDCA in any of its filings or in its briefs. In its June 21, 2017 motion to reconsider, vacate, and

dismiss and in the argument section of its brief, 101 Geneva cites not the MCDCA, but rather provisions of the Maryland Collection Agency Licensing Act ("MCALA"), Md. Code (1992, 2015 Rep. Vol.), Bus. Reg. ("BR") § 7-301, *et seq*.

Cambridge contends that the MCALA does not require attorneys acting as substitute trustees in a foreclosure action to be licensed as collection agencies.

Analysis

The MCALA requires that "[e]xcept as otherwise provided in this title, a person must have a license whenever the person does business as a collection agency in the State." BR § 7-301(a). A collection agency is defined, *inter alia*, as a person who engages directly or indirectly in the business of:

> (1)(i) collecting for, or soliciting from another, a consumer claim; or
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> (ii) collecting a consumer claim the person owns, if the claim was in default when the person acquired it.

BR § 7–101(c).

101 Geneva acknowledges several exceptions to the MCALA's licensing requirements in BR § 7-102(b), but asserts that these exceptions, including the exemption for lawyers[7], do not apply to the trustees in this case.

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[7] BR § 7-102(b) provides:

> This title does not apply to:
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> * * *
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> (9) a lawyer who is collecting a debt for a client, unless the lawyer has an employee who:
> (i) is not a lawyer; and

We turn first to the cases cited by 101 Geneva to support its licensing argument. Citing *Blackstone v. Sharma*, 233 Md. App. 58 (2017), it asserts that a lawsuit to collect consumer debt filed by a non-licensed debt collection agency must be dismissed, regardless of the lack of any alleged misconduct or wrongful acts by the substitute trustees, and that any judgments obtained are void. Cambridge responds that this Court's holding in *Blackstone* is "limited to properties foreclosed on by entities whose business is to purchase consumer debts that are already in default." Cambridge notes that, while not every foreclosure action is brought on behalf of purchasers of debts in default, nearly every foreclosure case is brought by attorneys acting as substitute trustees. Accepting 101 Geneva's argument in this case, it contends, would "affect nearly every property with a foreclosure in its chain of title."

Blackstone concerned the right of "a statutory trust formed under the laws of the State of Delaware" to file a foreclosure action. *Id.* at 61. We held that the licensing requirement applied to a foreign statutory trust attempting to collect a consumer debt by bringing a foreclosure action.

After the briefs in this case were filed, the Court of Appeals reversed our decision in *Blackstone*. It held that a foreign statutory trust, as owner of a delinquent mortgage loan, is not required to obtain a license as a collection agency under the MCALA. *Blackstone v. Sharma*, 461 Md. 87, 93-95 (2018), *reconsideration denied*, (Oct. 3, 2018).

(ii) is engaged primarily to solicit debts for collection or primarily makes contact with a debtor to collect or adjust a debt through a procedure identified with the operation of a collection agency[.]

The Court of Appeals examined the plain language of the MCALA and concluded that it was ambiguous whether the General Assembly intended foreign statutory trusts, acting as a special purpose vehicle in the mortgage industry, to obtain a license as a collection agency. The Court then analyzed the legislative history, subsequent legislation, and related statutes in order to determine the legislative intent of the original version of MCALA in 1977 and the departmental bill to revise MCALA in 2007. The Court held that "the 2007 departmental bill did not expand the scope of MCALA to include mortgage industry players seeking foreclosure actions." *Id.* at 95.

Blackstone did not directly relate to substitute trustees.[8] But, the Court of Appeals stated that the General Assembly did not intend to "significantly enlarge the scope of MCALA to entities outside of the collection agency industry," *id.* at 134, and "did not intend to regulate or license the mortgage industry actors." *Id.* at 135.

[8] "This Court holds that the 2007 departmental bill does not expand the scope of MCALA to the mortgage industry. Therefore, the Court need not reach the following three issues: (1) **whether instituting a foreclosure action constitutes "debt collection" under MCALA when a person or entity apart from foreign statutory trusts owns the loan**; (2) **whether the other actors, such as the trustees, substitute trustees, and the mortgage loan servicer, held the appropriate licenses**; and (3) whether the foreign statutory trusts, its trustees, substitute trustees, or mortgage loan servicers engaged in practices in violation of the Maryland Consumer Debt Collection Act, Md. Code Ann., Com. Law §§ 14-201, et seq., the Maryland Consumer Protection Act, Md. Code Ann., Com. Law §§ 13-101, et seq., or the FDCPA, 15 U.S.C. §§ 1692, et seq. Our holding today in no way undermines the consumer protections found in any of these statutes, including MCALA. Instead, this Court clarifies that foreign statutory trusts, acting as special purpose vehicles in the mortgage industry, were outside of the purview of the collection agency industry that the General Assembly intended to license when it enacted MCALA and passed the 2007 departmental bill." 461 Md. at 95 n.3 (emphasis added).

Citing *McCray v. Federal Home Loan Mortgage Corp.*, 839 F.3d 354 (4th Cir. 2016), 101 Geneva argues that, because Maryland trustees are considered debt collectors under federal law, trustees in foreclosures should be considered debt collectors in interpreting the MCALA. *McCray* concerned whether substitute trustees, who "regularly pursue foreclosure on behalf of creditors," are "debt collectors" under the federal Fair Debt Collection Practices Act ("FDCPA"), 15 U.S.C. § 1692, *et seq*. Cambridge counters that the FDCPA is analogous to the MCDCA, not the MCALA, and therefore *McCray* is not persuasive.

Like the FDCPA, the MCDCA regulates conduct by "debt collectors" and creates a private right to action. *Compare* 15 U.S.C. § 1692k *with* CL § 14-203. In contrast, the MCALA regulates the licensing of "collection agencies" and does not create a private right of action. *Compare* 15 U.S.C. § 1692k *with* BR § 7-205. Because 101 Geneva has not argued that the substitute trustees violated the FDCPA or the MCDCA, we are persuaded that *McCray* does not offer instruction or guidance in this case.

Citing *Scull v. Groover, Christie & Merritt, P.C.*, 435 Md. 112, 132 n.20 (2013), 101 Geneva also asserts, without explanation, that the role of an attorney representing a client is "fundamentally distinct" from the role of a foreclosure trustee, and therefore the exception for attorneys in BR § 7-102(b)(9) does not apply to this case. Cambridge responds that *Scull* addresses the Maryland Consumer Protection Act ("MCPA"), Md. Code Ann., Com. Law ("CL") § 13-101, *et seq*., and that the MCPA, which is "intended to provide minimum standards for the protection of consumers in the State," CL § 13-

103, exempts the "professional services of a . . . lawyer." CL § 13-104(1). In contrast, the MCALA exemption for lawyers makes no reference to a lawyer's "professional services." BR § 7-102(b)(9) is a general exemption for lawyers "collecting a debt for a client."

Based on the Court of Appeal's opinion in *Blackstone*, we are persuaded that lawyers acting as substitute trustees in a foreclosure action are not "person[s] do[ing] business as a collection agency in the State," BR § 7-301(a), and therefore, are not required to be licensed under the MCALA. And, even if the MCALA did apply, a lawyer serving as a substitute trustee would be exempt under BR § 7-102(b)(9), "unless the lawyer has an employee who: (i) is not a lawyer; and (ii) is engaged primarily to solicit debts for collection or primarily makes contact with a debtor to collect or adjust a debt through a procedure identified with the operation of a collection agency[.]" Nothing in the record indicates that the trustees in this case would not qualify for the exemption. In short, the trustees in this case were not required to be licensed as debt collectors under Maryland law.

II.

Did the Circuit Court Err or Abuse Its Discretion in Determining That 101 Geneva Was Liable For the Risk and Expense of the Resale?

Standard of Review

Cambridge filed Exceptions after the Second Sale, and both parties filed motions for summary judgment. The circuit court granted Cambridge's motion for summary judgment and denied 101 Geneva's.

The interpretation of Maryland Rule 14-305(g) and whether summary judgment should be granted are questions of law subject to *de novo* review. *Burson v. Simard*, 424 Md. 318, 324 (2012); *Livesay v. Baltimore County*, 384 Md. 1, 9 (2004).

In ruling on an exception to a foreclosure sale, and determining whether the sale should be ratified, the trial court considers "both questions of fact and law." *Maddox v. Cohn*, 199 Md. App. 63, 70 (2011), *rev'd on other grounds*, 424 Md. 379 (2012). "On appeal, we defer to the trial court's factual findings unless they are clearly erroneous, while questions of law decided by the trial court are subject to a de novo standard of review." *Id.* (cleaned up).

We review the circuit court's decision to abate the payment of interest by a foreclosure sale purchaser under the "familiar abuse of discretion standard." *AMT Homes, LLC v. Fishman*, 228 Md. App. 302, 308 (2016); *Zorzit v. 915 W. 36th St., LLC*, 197 Md. App. 91, 96-97 (2011).

Contentions

101 Geneva contends that, because it didn't file a supersedeas bond, the substitute trustees and Cambridge could have moved to resell anytime after 101 Geneva did not close on the First Sale. But, because they engaged in protracted litigation with Mrs. Willson, they should be barred from a resale at 101 Geneva's risk and expense. In its view, Cambridge delayed at its own risk and prejudiced 101 Geneva by, among other things, "running up interest and other expenses while they pursued their own interests." In other words, Cambridge was granted an excessive windfall and was put in a better

position than if 101 Geneva had closed on the property in the first place because its fair market valuation as of November 11, 2012 was determined to be $610,000.[9]

Citing *Burson v. Simard*, 424 Md. 318, 328-29 (2012), 101 Geneva contends that Cambridge had a duty to mitigate its damages and to attempt to resell the property "shortly after the first sale, on the same terms." It asserts that *Burson* states that defaulting purchasers should not be exposed to "an unreasonable amount of damages," *id.* at 331, and when a purchaser breaches a contract of sale, "the burden is upon the seller to establish that the sale was fairly made within a reasonable time after breach." *Id.* at 328.

Cambridge counters that the circuit court erred in refusing to grant its risk and expense claim in its entirety because 101 Geneva had agreed in the memorandum of purchase to pay the base sale price of $896,000, plus 15.5% interest and property taxes assessed after the First Sale date, March 5, 2012. Therefore, it was liable for interest and taxes between March 5, 2012 and September 21, 2015.[10] According to its calculations, 101 Geneva is liable for $437,748.85 in interest and $32,848.30 in property taxes and penalties. Adding those amounts to the First Sale price of $896,000, Cambridge states an

[9] 101 Geneva admits that the loss from a prompt resale would have fallen on them, but asserts that it would be substantially less than what Cambridge is asking for now.

[10] Cambridge calculates 101 Geneva's liability for interest and taxes up to September 21, 2015, the entry date of the order granting the Petition to Resell. It argues that a defaulting foreclosure purchaser's equitable title ends upon the entry of an order authorizing a resale of the property, citing *McCann v. McGinnis*, 257 Md. 499, 508 (1970) (an order of the court authorizing a resale is "a revocation of the order confirming the sale and destroys any inchoate title which the first purchaser may have acquired by the confirmation"). The circuit court used the resale date of November 16, 2015.

amount owed of $1,366,597.15. Thus, the difference between that figure and the resale price, i.e., the resale risk, would be $666,597.15.[11]

In response to 101 Geneva's contentions, Cambridge argues that it had acted to mitigate damages by attempting to resell the property and eliminate or alter Mrs. Willson's title claims. And, that it was 101 Geneva, and not Cambridge, that had control over any delay because nothing prevented it from closing on the First Sale with the agreement of Mrs. Willson. In addition, Cambridge argues that it would have sustained a substantial loss if it had resold the property subject to Mrs. Willson's title claim. Not only would that have chilled the bidding and resulted in a lower price, Cambridge would have been exposed to a potential further loss, if Mrs. Willson successfully pursued her one-third proceeds claim following the resale.

Cambridge also argues that 101 Geneva misinterprets *Burson*. According to Cambridge, a resale must be held "shortly after the first sale" only if it is being used to determine the fair market value of the property as a measurement of damages. Cambridge states that they relied on an appraisal, not the resale, to determine the value of the property.[12]

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[11] Cambridge lists three different figures for the total liability that 101 Geneva owes to them. At the June 1, 2017 hearing, the circuit court noted that Cambridge requested amounts of $710,396.73 in the Exceptions and $689,307.95 in the summary judgment motion. It regarded that difference as "irrelevant" because Cambridge was "saying that they should receive . . . everything, and all the money."

[12] According to the appraisal, the property's fair market value at the time of 101 Geneva's breach was $610,000. It sold for $700,000 at the Second Sale.

Asserting that the circuit court appears to have taken "other appropriate action" under Rule 14-305(g), Cambridge argues that its actions were inconsistent with the three limited circumstances governing abatement of interest and taxes discussed in *Donald v. Chaney*, 302 Md. 465 (1985).

Analysis

Maryland Rule 14-305(g) provides:

> If the purchaser defaults, the court, on application and after notice to the purchaser, may order a resale at the risk and expense of the purchaser or may take any other appropriate action.

"Risk" in the context of a foreclosure resale is simply the difference between the initial sale price and a lesser resale price. *See McCann v. McGinnis*, 257 Md. 499, 506 (1970). And, "[g]enerally speaking, debtors owe interest to their lenders (and taxes to the government) up until the time of the sale, at which point the purchaser takes responsibility." *AMT Homes, LLC v. Fishman*, 228 Md. App. 302, 309 (2016). "Whether or not it's fair—and reasonable people might disagree—this allocation of costs and responsibilities is well-known and frames everyone's expectations." *Id.* at 310.

The Court of Appeals has stated, "It is a general rule as to sales under decrees of this Court, that the purchaser always pays interest, according to the terms of the decree, from the day of sale, whether he gets possession or not." *Donald v. Chaney*, 302 Md. 465, 468 (1985). However, the general rule "should not be applied inflexibly" because it is "not [a rule] of absolute and unvarying application." *Id.* at 469-70 (quoting *Oldenburg*

v. Regester, 118 Md. 394 (1912)). Accordingly, "in dealing with such questions," the circuit court may be "governed by equitable considerations." *Id.* at 470.

In *Donald*, the Court of Appeals recognized three circumstances when it is within a circuit court's discretion to abate interest accruing between the foreclosure sale and the closing:

> [A] purchaser at a judicial sale will be excused from requirement to pay interest upon the unpaid balance for the period between the time fixed for settlement and the date of actual settlement only when the delay stems from neglect on the part of the trustee (*Oldenburg v. Regester*[, 118 Md. 394 (1912)]; *Merryman v. Bremmer*, [250 Md. 1 (1968)]); was caused by necessary appellate review of lower court determinations (*Leviness v. Consol. Gas Co.*, 114 Md. 573 [(1911)]) or was caused by the conduct of other persons beyond the power of the purchaser to control or ameliorate (*Raith v.* [*New Baltimore*] *Bldg. & Loan Ass'n*, [140 Md. 542 (1922)]).

302 Md. at 477.

At close of the hearing on June 1, 2017, the circuit court ruled from the bench:

> In this matter there [are] competing motions for summary judgment. And both sides are asking for everything quite frankly. 101 Geneva's motion is that they should receive summary judgment because . . . [t]here should be no [risk and] expense assigned to them regardless of the fact that they refused to go to . . . settlement. Regardless of the fact that they did nothing to abate the accumulation of interest and things of that nature . . . Cambridge is saying that they should receive everything.
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> **101 Geneva decided it wanted no part[] of this property.** And that was crystal clear. They wanted to get out of the purchase. I denied that . . . . They appealed that decision of mine on November 30[,] 2012. And on the date that they filed their appeal, they filed no bond but it was crystal clear from the proceedings that they were not going to settle. If they prevailed in their appeal, they would be released from the sale. If they failed in their appeal, there was no reason for anybody to believe that they were going to seek to go to settlement. I say that because **there was absolutely nothing**

> **preventing Cambridge from filing a petition to resell the property, even while the appeal was pending**. . . . Yet, nothing happened. . . . The petition to resell was filed May 21[,] 2015. . . . 101 Geneva wasn't trying to stop the resale. . . . But magically that property resold on November 16[,] 2015. . . . **I'm troubled by the complete lack in my view of good faith effort on the part of Cambridge to resell this property between November 30[,] 2012 and May 21[,] 2015**. There, some type of settlement agreement had been reached with Mrs. Willson's estate [on] May [6,] 2015 within a couple of weeks of the petition to resell. And the only explanation really offered was that there was this impediment, the one-third transfer impediment.
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> * * *
>
> And I think that this instance that **the sale should be at the risk and expense of 101 Geneva**. . . . **However I don't believe that Cambridge acted appropriately between November 30[,] 2012 and May 21[,] 2015** when the petition to resell was filed. I don't think it's an acceptable explanation that the same impediment that existed before they foreclosed on the property and sold the property at foreclosure sale to 101 Geneva . . . prevented them from reselling the property[.] . . . **101 Geneva didn't have control over that**. [] I understand . . . they could have gone to settlement. Well that's not the point. The point is that **Cambridge had control over the resell process**. And they chose how many days to wait. And they did it with the knowledge that **every day that they chose to wait would be another $338.03 in mortgage interest that they were going to charge 101 Geneva**. So, having found there to be risk and expense to [] 101 Geneva[,] I'm also taking appropriate action in reviewing [] that risk and expen[se.] . . . I'll sustain the exceptions to the auditor's report . . . I don't agree with the numbers. And the reason for that has to do with the **equitable consideration** that I've employed.

(Emphasis added.)

Citing *Donald v. Chaney*, the circuit court invoked "equitable consideration" in calculating the risk and expense in this case. It concluded that 101 Geneva would only be liable for interest at a rate of $338.03 per day for two periods: from March 5, 2012 (the First Sale date) to November 30, 2012 (the filing of 101 Geneva's first appeal); and from

May 21, 2015 (the filing of the Petition to Resell) to November 16, 2015 (the Second Sale date).

For the period in between from November 30, 2012 to May 21, 2015, the circuit court determined not to hold 101 Geneva liable for the risk and expense based on the lack of "good faith effort on the part of Cambridge to resell this property," which implies "neglect on the part of the trustee" under *Donald*, 302 Md. at 477. In the circuit court's view, Cambridge failed to act reasonably and in good faith by not promptly reselling the property once it became "crystal clear" that 101 Geneva "wanted to get out of the purchase." It determined that Cambridge, not 101 Geneva, had "control over the [resale] process." In other words, the period of delay for which 101 Geneva was not required to pay interest was "caused by the conduct of other persons beyond the power of the purchaser to control or ameliorate." *Donald*, 302 Md. at 477. We are not persuaded that the court's factual findings were clearly erroneous or that it was not within the court's discretion to abate interest for that period of delay. In short, based on the facts, we are persuaded that the court's actions to balance the equities in this case was appropriate under Maryland Rule 14-305(g).

We do not find persuasive 101 Geneva's argument, based on *Burson*, that it should not be liable for *anything* because Cambridge failed to mitigate damages. In *Burson*, the Court of Appeals held that "[a]bsent special circumstances, a defaulting purchaser at a foreclosure sale of property is liable, under Rule 14-305(g), for only the one resale resulting from his or her default." 424 Md. at 322. The "unreasonable amount of

damages" referred to in *Burson* arose when an initial defaulting purchaser was found liable for both the risk and expense of the first and the second resale. *Id.* at 321, 331. *Burson* held that a defaulting purchaser is only liable for their own actions and that extending liability to more than one resale would be unreasonable and outside the initial purchaser's contractual expectations. Here, the circuit court found 101 Geneva liable for risk and expense during only the periods of time when Cambridge had not been acting inappropriately.

Other Questions Posed

In addition, 101 Geneva contends that: (1) the settlement of Mrs. Willson's claim by the title insurance company should have been taken into account to decrease the monetary judgment; (2) Cambridge suffered no damages because it resold the property for $1,100,000 on October 27, 2016; and (3) the court miscalculated the property taxes for 2012 and for 2015.

First, there was a settlement reached, on March 25, 2015, among Mrs. Willson's estate, Cambridge, and Chicago Title Insurance Company. In exchange for $160,000, the estate and Cambridge agreed to mutual releases. That settlement was between the estate and Cambridge for the purposes of clearing title; it had no effect on the debt to Cambridge or 101 Geneva's liability.

Second, 101 Geneva contends that, because Cambridge purchased the property for $700,000 at the Second Sale on November 16, 2015 and then resold it less than a year later for $1,100,000, it was not "fair" to charge it with risk and expense of the Second

Sale. In *McKenna v. Sachse*, 225 Md. 595, 599-600 (1961), the Court of Appeals explained:

> In the absence of fraud or breach of actual trust, it is . . . well established that since the confirmation of a foreclosure sale is the final determination by the court that the mortgaged property was sold at a fair price, the defense of inadequacy of price can not be raised in subsequent proceedings, and for the purpose of a deficiency decree the price obtained at the sale is conclusive on the question of the market value of the property. . . . It follows that the mortgagee-purchaser is not required to account to the mortgagor for a profit made upon a resale of the property.

The circuit court was not required to take into account the subsequent sale by Cambridge in its risk and expense analysis.

Third, 101 Geneva contends that, although the circuit court decided to apportion the property taxes pro-rata, as it did for the interest, abating 101 Geneva's liability for the period from November 30, 2012 to May 21, 2015, it miscalculated and apportioned the entire sum of the property taxes for the years 2012 and 2015 (which the circuit court states as $8,842.11 and $5,724.48, respectively). Cambridge agrees that the tax liability was miscalculated. It asks that we adjust the award by modifying the June 9, 2017 order; 101 Geneva asks that we remand the case back to the auditor to recalculate the award.

Based on the record, we believe that the circuit court intended to pro-rate the interest and the property taxes apportioned to 101 Geneva's liability for the periods: from March 5, 2012 to November 30, 2012; and from May 21, 2015 to November 16, 2015. We will remand to the circuit court for possible recalculation of 101 Geneva's tax liability and modification of the order determining 101 Geneva's liability to Cambridge.

JUDGMENT OF THE CIRCUIT COURT FOR HOWARD COUNTY IS VACATED AND THE CASE IS REMANDED FOR FURTHER PROCEEDINGS IN ACCORDANCE WITH THIS OPINION. COSTS TO BE PAID 2/3 BY APPELLANT AND 1/3 BY APPELLEE.