Circuit Court for Anne Arundel County
Case No.: C-02-CV-16-000872

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1025

September Term, 2018

SALOMON TEJADA

v.

CARRIE WARD, *et al*.

Beachley,
Gould,
Adkins, Sally D.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Adkins, Sally D., J.

Filed: December 30, 2019

In February of 2018, Appellant Solomon Tejada's property in Arnold, Maryland was sold at a foreclosure sale after Tejada defaulted on the mortgage. The loan's secured party appointed Appellees as substitute trustees, who then initiated the foreclosure proceedings. Tejada moved to dismiss the foreclosure sale, arguing that the retroactive application of a 2010 revision to Maryland Code (1974, 2015 Repl. Vol.), § 7-105 of the Real Property ("RP") Article to his 2005 Deed of Trust violated the Contracts Clause of the United States Constitution.[1] We are asked whether the circuit court erred in denying this motion. Because the 2010 revision does not need to be applied in order for the substitute trustees to validly exercise the power of sale in the Deed, we affirm the circuit court.

BACKGROUND FACTS

On September 2, 2005, Tejada signed a promissory note for a loan of $261,280.00 from Acoustic Home Loans, LLC, secured by a Deed of Trust on 405 Elmwood Court, Arnold, MD (the "Property"). The Deed of Trust included a power of sale, and two other provisions relevant to this appeal:

> **[22.] Borrower, in accordance with Title 14, Chapter 200 of the Maryland Rules of Procedure, does hereby declare and assent to the passage of a decree to sell the Property in one or more parcels by the equity court having jurisdiction for the sale of the Property, and consents to the granting to any trustee appointed by the assent to decree of all the rights, powers and remedies granted to the Trustee in this Security Instrument together with any and all rights, powers and remedies granted by the decree. Neither the assent to**

[1] Unless otherwise provided, all statutory references are to the Real Property Article of the Maryland Code.

> **decree nor the power of sale granted in this Section 22 shall be exhausted in the event the proceeding is dismissed before the payment in full of all sums secured by this Security Instrument.** (Emphasis in original).
>
> **24. Substitute Trustee.** Lender, at its option, may from time to time remove Trustee and appoint a successor trustee to any Trustee appointed hereunder by an instrument recorded in the city or county in which this Security Instrument is recorded. Without conveyance of the Property, the successor trustee shall succeed to all the title, power and duties conferred upon Trustee herein and by Applicable Law.

The original trustee listed on the deed of trust was "Chicago Title."

A little over a decade later, Tejada defaulted on the loan, and the secured party appointed Carrie M. Ward and eleven other individuals as substitute trustees (collectively, the Appellees).[2] Ward initiated a foreclosure action against the Property on March 7, 2016, by filing an Order to Docket in the Circuit Court for Anne Arundel County. On February 14, 2018, Tejada filed a Motion to Dismiss and an Emergency Motion to Stay the foreclosure sale pending a hearing. One week later, on February 21, the Property was sold at a foreclosure auction to the secured lender for $314,500.00.

The court held a hearing on Tejada's motion on May 2, 2018. Tejada argued that when the Deed of Trust was signed in 2005, § 7-105 required the Deed name a "natural person" to exercise the power of sale provision. Since the original trustee was a corporate entity, Tejada contended that the power of sale was void for all time. He further asserted

[2] The other Substitute Trustees are Howard N. Bierman, Jacob Geesing, Pratima Lele, Joshua Coleman, Richard R. Goldsmith, Jr., Ludeen McCartney-Green, Jason Kutcher, Elizabeth C. Jones, Nicholas Derdock, Andrew J. Brenner, and Angela M. Dawkins.

that retroactively applying the 2010 revision to § 7-105 violated the Contracts Clause of the United States Constitution. The court denied the motion, ruling that it was untimely, did not comply with procedural requirements, and that retroactive application of the 2010 revision was appropriate. The sale was ratified on June 26, 2018. Tejada filed an appeal on July 25, 2018.

DISCUSSION

Tejada presents one question for our review:

> Did the Circuit Court err in denying Appellant's Motion to Dismiss based on its conclusion that the power of sale was not void because the 2010 revision to Maryland, Real property Article § 7-105 permitted the bank to substitute the corporate trustee?

A real property owner is "possessed of three means of challenging a foreclosure: obtaining a pre-sale injunction . . . filing post-sale exceptions to the ratification of the sale . . . and the filing of post-sale ratification exceptions to the auditor's statement of account . . . ." *Wells Fargo Home Mortg., Inc. v. Neal*, 398 Md. 705, 726 (2007). The pre-sale Motion to Dismiss here is a request for injunctive relief. "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. 232, 243 (2011). Therefore, we review the denial of the motion for abuse of discretion. We review the trial court's legal conclusions without deference. *See Spaw, LLC v. City of Annapolis*, 452 Md. 314, 338 (2017).

The heart of Tejada's appeal is one assertion built upon another. First, he contends the power of sale in the Deed of Trust—the mechanism through which the Property was

foreclosed—was void for all time because at its inception § 7-105 only allowed for a natural person to be named as trustee, and his Deed named a corporate entity. Second, he claims that the retroactive application of the 2010 revision of § 7-105 violates the Contracts Clause of the United States Constitution. We are not persuaded by either of these arguments.

Compliance with Rule 14-211

Before reaching the merits, we turn to Maryland Rule 14-211. The circuit court found that Tejada's motion "did not comply with the Rules—or the requirements of 14-211." Maryland Rule 14-211—Stay of the Sale; Dismissal of Action (the "Rule")—governs motions to dismiss foreclosure sales. Motions must be timely filed, and meet procedural requirements laid out in the Rule.

The Rule requires that motions to dismiss be filed no later than fifteen days after the filing of the Final Loss Mitigation Affidavit ("FLMA"). Md. Rule 14-211(a)(2). "If the motion was not filed within the time set for in subsection (a)(2) of this Rule," it must "state with particularity the reasons why the motion was not filed timely." Md. Rule 14-211(a)(3)(F). If the motion is not timely and does not state the reasons why it was not filed timely, the circuit court *shall* (with or without a hearing) deny the motion. Md. Rule 14-211(b)(1)(A).

Ward filed the FLMA on October 31, 2017. Tejada's motion was filed three-and-a-half months later, on February 14, 2018. His motion neither stated why it was not filed timely, nor did it comply with the requirement that it be filed under oath or supported by affidavit. Md. Rule 14-211(a)(3)(A).

In *Svrcek v. Rosenberg*, 203 Md. App. 705, 721 (2012), we held that the circuit court did not abuse its discretion in denying an untimely motion to dismiss a foreclosure proceeding. There, the mortgagor argued he had good cause for non-compliance with Rule 14-211 because the Order to Docket did not note a deadline. We were not convinced and noted that, although a court may extend the time for filing a motion or excuse non-compliance for good cause, the circuit court did not find good cause. *Id.*

Here, Tejada did not even make a good cause argument for non-compliance. The court found his filings did not include either an explanation or an affidavit that would support the Motion to Dismiss. Therefore, we hold the circuit court did not err in finding Tejada's motion untimely and not in compliance with Rule 14-211. Although this lateness is sufficient grounds to affirm the circuit court, Tejada also loses on the substantive grounds that he raises.

Power of Sale

Tejada argues that the power of sale in his Deed was void from the moment it was signed in 2005 because the original trustee named in the deed was a corporate entity.

In 2005, § 7-105—Sale upon default—stated "[a] provision may be inserted in a mortgage or deed of trust authorizing **any natural person** named in the instrument . . . to sell the property . . . ." RP § 7-105(a) (2005).

Tejada primarily relies on language in *Whitworth v. Algonquin Associates, Inc.*, 75 Md. App. 479, 483 (1988), as the basis for his assertion: "Maryland case law [was] clear that if the power to sell is given to a corporation and to no other party, it is void." This

reliance on *Whitworth* is misplaced. In *Whitworth*, the power of sale in a mortgage was granted to, "the Mortgagee [a corporation], its successors and assigns . . . ." *Id.* at 481. The power of sale was properly assigned by the corporation to its attorney pursuant to authority given in the instrument, and the attorney exercised the power of sale. We held there that when a natural person is acting as an assignee of the mortgagee—as agreed on in the mortgage—she need not be specially named in the power of sale to have the authority to act. *Id.* at 486. In *Whitworth*, the power of sale, although originally given to a corporation, was fully valid in the hands of an assignee. *Id*.

Tejada's reliance on *Queen City Perpetual Bldg. Ass'n of Cumberland v. Price*, 53 Md. 397 (1880) also misses the mark. In *Whitworth* we analyzed *Queen City* and observed that the power of sale there was void because the mortgage granted it to a corporation, but not to an assignment or substitute.[3] *Id.* at 485. With the power of sale unenforceable by the corporation, and not transferable to an assignee or substitute, it was effectively void.

That is not the case here. Here, Tejada agreed to sections 22 and 24 in the Deed of Trust. Section 24—Substitute Trustee—allows that the lender may "appoint a successor trustee to any Trustee," and "the successor trustee shall succeed to all the title, power and duties conferred upon Trustee herein and by Applicable Law." Although the original Trustee was a corporate entity, the agreement clearly allowed the lender to substitute a

[3] The exact language in the mortgage in *Queen City* granted a power of sale to the mortgagee "or its attorney." *Queen City Perpetual Bldg. Ass'n of Cumberland v. Price*, 53 Md. 397, 399 (1880). That is not an assignment or a substitute because the attorney would still be acting as the corporate entity rather than in her capacity as a natural person.

natural person as the Trustee if and when it chose. Thus, the power of sale was not void. To utilize the power, the lender just needed to substitute a natural person as Trustee, which the lender did. This situation is analogous to *Whitworth*, in which the authority to assign the power of sale was expressly stated in the mortgage.

We dealt with a very similar argument in *Svrcek*, in which the mortgagor (Svrcek) argued that the retroactive application of § 7-105 (2010) to his Deed of Trust violated the Maryland Constitution because it infringed upon his vested property rights. *Svrcek*, 203 Md. App. at 733. Svrcek contended that "the failure to name an individual as trustee rendered the entire instrument void. . . ." *Id.* at 735. Tejada, like Svrcek, signed the deed of trust in 2005, before the 2010 revision. Tejada's deed, like Svrcek's, contained a clause allowing for the appointment of substitute trustees. In *Svrcek*, we concluded that the power of sale was valid because the instrument permitted the appointment of an individual as a substitute trustee.[4] *Id.* at 737. The Court of Appeals' decision in *Dollar Investment Co. of Md., Inc. v. Paton*, 236 Md. 94, 97 (1964) supported that conclusion:

> The receiver, who held the entire beneficial interest in the deeds of trust, filed his petition for the substitution of trustees to sell and we, therefore, hold that the chancellor had ample authority to make the substitution and the appellant's exceptions were properly overruled.

[4] The exact language from *Svrcek v. Rosenberg*, 203 Md. App. 705, 737 (2012), is "the power of sale can be revived by the subsequent appointment of an individual as a substitute trustee." We believe "utilized" is a more accurate term than "revived" in that context. Revived implies the power of sale is dead (or void) until the appointment of an individual. Because the mortgage included the ability to assign the power of sale to an individual (as substitute trustee), the power of sale was never dead, but rather unenforceable until assignment to a natural person.

Here, *Svrcek* and *Dollar Investment* support our conclusion that the power of sale was never void because the Deed of Trust included a clause allowing for substitute trustees.

Contracts Clause

We now come to whether the retroactive application of § 7-105 violates the Contracts Clause of the United States Constitution. We examined almost this exact issue in *Svrcek*, but there the mortgagor asserted that the statute violated the Maryland Constitution by abrogating his vested rights in his property. We did not agree.

In 2010, to avoid having deeds of trust that either omit the name of a trustee or name a corporate entity from being declared void, "the General Assembly passed legislation, effective June 1, 2010, that established that, if a mortgage or deed of trust allows, a trustee or individual authorized to exercise a power of sale may be appointed or substituted," and if no trustee was named, foreclosure may occur once one is appointed. *Svrcek*, 203 Md. App. at 731-32.

At the time Tejada signed his Deed, § 7-105(a) (2005) provided:

> *Power of sale or assent to decree for sale.* A provision may be inserted in a mortgage or deed of trust authorizing any **natural person** named in the instrument, including the secured party, to sell the property or declaring the borrower's assent to the passing of a decree for the sale of the property, on default in a condition on which the mortgage or deed of trust provides that a sale may be made.

(Emphasis added.) In 2010, the statute was revised to provide, in part:

> (2) A power of sale or assent to decree authorized in a mortgage or deed of trust may be exercised only by an individual.

> (3) The individual selling the property under a power of sale need not be named in the mortgage or deed of trust.
>
> (4) An error or omission in a mortgage or deed of trust concerning the designation of the trustee or the individual authorized to exercise a power of sale does not invalidate the instrument or the ability of the mortgagee or beneficiary of the deed of trust to appoint an individual to exercise the power of sale.
>
> (5) If a mortgage or deed of trust allows for the appointment or substitution of a trustee or an individual authorized to exercise a power of sale, the holder of the mortgage or deed of trust may make the appointments or substitutions from time to time.

RP § 7-105(b) (2010). An editor's note adds that "Section 2, chs. 322 and 323, Acts 2010, provides that 'this Act shall be construed to apply retroactively and shall be applied to and interpreted to affect any mortgage or deed of trust on record or recorded on or after June 1, 2010.'"

Tejada admits that the General Assembly meant for the 2010 revision to § 7-105 to be applied retroactively, and it permits the Substitute Trustees to exercise the power of sale. He claims, however, that this retroactive application violates the Contracts Clause of the United States Constitution because it changes the terms of his Deed by "reviving" a "void" power of sale. In his words, "[b]y changing the law as it pertains to the naming of a trustee in a deed of trust, the Legislature has changed the terms of the contract (i.e. the Deed of Trust) between Tejada and the Lender. This violates the "Contracts Clause" of the U.S. Constitution." To support this assertion, he points to the familiar doctrine that "parties are presumed to know the law when entering into contracts, and thus, all applicable or relevant laws must be read into the agreement of the parties just as if expressly provided by them,

except where a contrary intention is evident." *Lema v. Bank of Am., N.A.*, 375 Md. 625, 645 (2003) (cleaned up).

Article 1, section 10 of the U.S. Constitution provides: "No State shall . . . pass any . . . Law impairing the Obligations of Contracts . . . ." U.S. CONST. art. I, § 1. The first part of an inquiry when confronted with a Contracts Clause claim is whether the state law has substantially impaired a contractual relationship:

> [T]he first inquiry must be whether the state law has, in fact, operated as a substantial impairment of a contractual relationship. The severity of the impairment measures the height of the hurdle the state legislation must clear. Minimal alteration of contractual obligations may end the inquiry at its first stage. Severe impairment, on the other hand, will push the inquiry to a careful examination of the nature and purpose of the state legislation.

Allied Structural Steel Co. v. Spannaus, 438 U.S. 234, 244-45 (1978).

As discussed above, the power of sale here was never void—it was just unenforceable by the corporate entity for a period. But when the lender named the substitute trustees, as agreed on in the Deed, those substitute trustees—natural persons—acquired the right to exercise the power. Thus, they were able to properly foreclose on the Property unassisted by the 2010 revision. Therefore, the revision did not impair in any respect the contractual relationship secured by the Deed of Trust.

Tejada bargained for—and agreed to—the lender's ability to name substitute trustees. Nowhere in the record or in arguments can we find an assertion by Tejada that he knowingly bargained for a void power of sale. Although he argues that the void power of sale is one of his rights, as we said in *Svrcek*, "[c]ourts do not regard rights as

constitutionally protected which are contrary to the equity and justice of the case." *Svrcek*, 203 Md. App. at 736. Therefore, we hold that the circuit court did not err when it dismissed Tejada's motion to dismiss.

JUDGMENT OF THE CIRCUIT COURT FOR ANNE ARUNDEL COUNTY AFFIRMED. COSTS TO BE PAID BY APPELLANT.