Circuit Court for Montgomery County
Case No. 413085V

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1053

September Term, 2017

JASWINDER KAUR, ET AL.

v.

KRISTINE D. BROWN, ET AL.
SUBSTITUTE TRUSTEES

Kehoe,
Reed,
Shaw Geter,

JJ.

Opinion by Kehoe, J.

Filed: February 6, 2019

This appeal arises out of a foreclosure action initiated in the Circuit Court for Montgomery County by Kristen D. Brown, William M. Savage, Gregory N. Britto, Lila Z. Stitely, R. Kip Stone, and Jordy B. Hirschfield (the "substitute trustees"), against appellants, Jaswinder Kaur and Parminder Singh.

In their brief, appellants present one issue: "[d]id the circuit court err ratifying the foreclosure sale, when the required deed of trust was not signed by appellants?" However, the dispositive issue before us is whether the circuit court abused its discretion by denying appellants' motion to alter or amend the judgment. Because we conclude that the court did not, we will affirm the judgment.

1. Background

More than a decade ago, Ms. Kaur obtained a mortgage loan from World Savings Bank, FSB, a predecessor-in-interest to Wells Fargo Bank, N.A. for $217,000. As security for repayment of the loan, on January 26, 2006, she executed a deed of trust encumbering a non-owner-occupied townhome located at 13115 Thackery Place, Germantown, Maryland. (Mr. Singh, the co-owner of the property, joined in the deed of trust.) She defaulted on the loan. In December 2015, the substitute trustees were appointed, and they filed an Order to Docket Foreclosure and Final Loss Mitigation Affidavit in the Circuit Court for Montgomery County.

After the foreclosure action was filed, Ms. Kaur filed two bankruptcy petitions in the United States Bankruptcy Court for the District of Maryland. The first, filed in April 2016,

was apparently dismissed.[1] We are concerned with the second petition, filed in November 2016 and dismissed by the court on December 21, 2016, for appellants' failure to complete the required filings, thereby lifting the automatic stay. Before the court dismissed the petition, however, Wells Fargo filed, on December 9, 2016, a motion for relief of stay pursuant to 11 U.S.C. § 362(d)(4) as a safeguard against any further bankruptcy petitions that appellants might file.[2] The bankruptcy court granted the § 362(d)(4) motion on February 13, 2017, and also granted an equitable servitude in favor of Wells Fargo.

On February 15, that is, two days after the bankruptcy court granted Wells Fargo's § 362(d)(4) motion, the substitute trustees sold the property at auction. Appellants did not file exceptions to the sale, and, the circuit court entered an order of ratification on July 25, 2017.

[1] There is nothing in the parties' briefs or the record regarding the history of the April 2016 petition. Additionally, appellants filed for bankruptcy on two previous occasions: on October 6, 2010 (case no. 10-32923); and on March 3, 2015 (case no. 15-13036). It is not clear whether these bankruptcy petitions were related to this or any other foreclosure action.

[2] In essence, 11 U.S.C. § 362(d)(4) permits the bankruptcy court to enter an order in a bankruptcy proceeding that acts prospectively to lift any automatic stay that would otherwise result of from the filing of subsequent bankruptcy petitions within two years of the date of the order. As a predicate, the court must find that the filing of the pending petition was part of a scheme to delay, hinder, or defraud creditors involving either (a) a transfer of an interest in the secured property without the consent of the secured creditor and the bankruptcy court, or (b) multiple bankruptcy filings affecting the property. To be effective, a copy of the order must be filed in the land lien records of the jurisdiction in which the property is located.

Two days later, appellants filed their first, and only, challenge to the foreclosure procedure in what they styled as a "Motion to Avoid Judgment." As we will explain, this motion should properly be treated as a motion to alter or amend the court's judgment. Appellants' sole contention in the motion was that the judgment ratifying the sale should be vacated because the sale was conducted in violation of the automatic stay imposed when the bankruptcy action was filed. This motion was denied on August 17, 2017, and four days later, appellants filed a timely appeal.[3]

2. The Standard of Review

Our first step is to straighten out some confusion as to the appropriate standard of review. According to appellants, we are examining whether the circuit court erred when it ratified the sale. If this were the case—and it isn't—we would review the court's legal conclusions *de novo* and its factual findings for clear error. *See, e.g., Fagnani v. Fisher*, 418 Md. 371 (2001). In fact, we are reviewing the court's denial of appellants' motion to

[3] While this appeal was pending, either or both appellants filed three additional bankruptcy actions. The first (Case No. 18-10033) was filed on January 2, 2018, and this Court stayed proceedings. When the bankruptcy court dismissed that petition on February 20, we allowed the appeal to proceed. A second bankruptcy petition was filed on October 2, 2018, (Case No. 18-228767), and so on October 16 we again stayed proceedings. On December 4, 2018, the Bankruptcy Court entered an Order Confirming Absence of Automatic Stay pursuant to 11 U.S.C. § 362(d) "to allow the parties to return to state court and finalize litigation concerning the subject property." *See* note 2, *supra.* On September 28, 2018, appellant's spouse, Parminder Singh filed yet another petition (Case No. 18-26715). The bankruptcy court entered an order on January 30, 2019 confirming that "no bankruptcy filing by [appellant] or her spouse until February 16, 2019 would act as a stay to the completion of the foreclosure sale" that is the subject of this appeal.

avoid judgment, which, as we have stated, was filed two days after the circuit court ratified the foreclosure sale. Courts "treat a paper filed by a party according to its substance, and not by its label." *Corapcioglu v. Roosevelt*, 170 Md. App. 572, 590-591 (2006). Because it was filed within ten days of the court's entry of judgment, appellants' "motion to avoid judgment" was in substance a motion to alter or amend the judgment to Md. Rule 2-534. *See White v. Prince George's County*, 163 Md. App. 129, 139 (2005) ("[A] motion to revise a court's judgment, however labeled, filed within ten days after the entry of judgment will be treated as a Rule 2–534 motion[.]" (citation omitted)).

Rule 2-534 authorizes a court to "to receive additional evidence, . . . amend its findings or its statement of reasons for the decision, . . . set forth additional findings or reasons, . . . enter new findings or new reasons, . . . amend the judgment, or. . . enter a new judgment." This relief is discretionary. *Jones v. Rosenberg*, 178 Md. App. 54, 72 (2008). An appellate court will disturb a trial court's exercise of that discretion only if the reviewing court is convinced the trial court's decision was "manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons." *Goodman v. Commercial Credit Corp.*, 364 Md. 483, 492 (2001). As we will explain, the circuit court did not abuse its discretion when it denied appellants' motion to revise the judgment because the argument presented to the circuit court was meritless. (Equally unpersuasive are the various arguments presented for the first time to this Court.) But first, we must make a detour.

3. The Substitute Trustees' Motion for the Court to Take Judicial Notice

At oral argument, and for the first time, appellants contended that the judgment ratifying the foreclosure sale was void because the signature page of the deed of trust was not recorded in the land records. In response to this contention, counsel for the substitute trustees represented to us that the issue of the enforceability of the deed of trust had been resolved in Wells Fargo's favor in a separate action between the parties, *Wells Fargo Bank, N.A. v. Jaswinder Kaur*, et al., Circuit Court for Montgomery County Case No. 343134V (the "Wells Fargo Action"). None of this information was in the record of the present case. In light of this, we suggested that the substitute trustees file a motion requesting us to take judicial notice of pertinent portions of the court record in the Wells Fargo Action. The substitute trustees did so, and specifically asked us to take judicial notice of the docket entries, the court's order entering judgment, and the notice of judgment. These records show that the circuit court in the Wells Fargo Action found that appellants had signed the deed of trust but that "due to error or inadvertence," the signature page had been omitted when the rest of the deed of trust was recorded in the land records. In addition to declaratory relief, the court imposed an equitable lien against the Thackery Place property and ordered that the equitable lien "shall be on the terms set forth and described" in the deed of trust executed by appellants in 2006.

After considering the motion, and appellants' response thereto, we grant the motion. *See* Md. Rule 8-501(f). Doing so in this case will enable us to assure ourselves that our resolution of this appeal will be consistent with "'what is right and equitable under the law

and directed by reason and conscience to a just result.'" *Schneider v. Hawkins*, 179 Md. 21, 25 (1940) (quoting *Langnes v. Green*, 282 U.S. 531, 541 (1931)).

4. Analysis

Appellants' contentions are moving targets.

First, before the circuit court, appellants maintained that the substitute trustees violated the automatic stay provision of 11 U.S.C. § 362(a) by advertising the sale on three occasions between January 30, 2017 and February 13, 2017, and then conducting the sale of the property on February 15, 2017. This argument is completely unpersuasive—the bankruptcy court dismissed Ms. Kaur's action on December 21, 2016, thereby lifting the automatic stay (the bankruptcy court's order explicitly stated that the "automatic stay imposed by 11 U.S.C. § 362(a) is terminated.") Additionally, appellants waived this contention by failing to file a pre-sale motion to stay the sale or dismiss the action pursuant to Md. Rule 14-211. *See, e.g.*, *Bates v. Cohn*, 417 Md. 309, 328 (2010).

Second, in their brief, appellants asserted that their signatures on the deed of trust were forged. Therefore, they contend, the judgment ratifying the foreclosure is a voidable judgment. This argument was not presented to the circuit court at any time, and so is not preserved for appellate review. *See* Md. Rule 8-131(a). Moreover, an allegation that a parties' signature is forged on an instrument is a defense against the substitute trustees' ability to maintain the foreclosure action. Therefore, appellants were required to present the contention to the circuit court in a pre-sale, Rule 14-211 motion. By failing to do so,

they waived the argument. *Bates v. Cohn*, 417 Md. at 328. Finally, questions as to the validity of the appellants' signatures were resolved against them in the Wells Fargo Action.

Third, at oral argument, appellants contended that the judgment ratifying the foreclosure sale was void because the signature page of the deed of trust was not recorded in the land records. This issue was resolved in the Wells Fargo Action. Additionally, like appellants' second argument, this contention was not presented to the circuit court, and it fails for the same reasons. Also, appellants waived the contention by failing to present it in their opening brief. *See* Md. Rule 8-504(a)(6); *Ochoa v. Dep't of Pub. Safety & Corr. Servs.*, 430 Md. 315, 328 (2013).

Finally, in their response to the substitute trustees' motion to take judicial notice, appellants raised two additional substantive contentions, *viz.*, (1) the deed of trust lacked an affidavit of consideration; and (2) the appropriate procedural path for the substitute trustees "would have been a judicial foreclosure pursuant to the [judgment in the Wells Fargo Action, and] not a statutory foreclosure on" the deed of trust executed by the parties. These contentions were not presented to the circuit court and are not properly before us. *See* Rule 8-131(a); *Bates v. Cohn*, 417 Md. at 328.[4]

[4] In any event, these arguments are without merit. A legally inadequate or missing affidavit of consideration is one of the "formal requisites" of an instrument that is waived unless challenged in a judicial action within six months of the date of recordation. *See* Real Property Article § 4-109(b) and (c). The deed of trust was recorded in 2006; appellants first raised the affidavit of consideration issue in 2018.

The Motions to Intervene and to Dismiss

We must address one final matter.

On September 20, 2018, that is after oral argument in this case, Shao Yin Lai and Yan Yun Lai, the substitute purchasers, filed a motion to intervene and a motion to dismiss this appeal. Asserting that they are bona fide purchasers, the substitute purchasers maintain that appellants were required to post a *supersedeas* bond under Maryland Rules 8-422 and 8-423 in order to stay proceedings before the circuit court. They assert that appellants failed to do so and that the substitute trustees conveyed the Thackery Place property to them, thereby rendering this appeal moot. Appellants disagree, contending that the substitute trustees had notice of any defects in the foreclosure sale.

We grant the substitute purchasers' motion to intervene. We deny the motion to dismiss without prejudice because, based upon the information in the record, it is unclear whether the purchaser at auction, Brightstar Capital, LLC., was affiliated with Wells Fargo. If Brightstar Capital was an affiliate of the lender, then appellants were not required to file a *supersedeas* bond in order to stay proceedings in the circuit court.[5] *See*, *e.g.*, *Mirjafari v.*

The distinction that appellants seek to draw between a foreclosure action proceeding under a power of sale and one by judicial decree is equally unavailing because the judgment in the Wells Faro Action specifically provided that the equitable lien "shall be on the same terms" as the deed of trust executed by appellants in 2006. That instrument includes a power of sale.

[5] The circuit court signed an order designating Shao Yin Lai and Yan Yun Lai as substitutes purchasers on September 7, 2018. On September 11, appellants filed an interlocutory

Cohn, 412 Md. 475, 485 (2010). If our judgment is reversed by the Court of Appeals, then the Lais are free to file another motion to dismiss, which should include information clarifying Brightstar's relationship, if any, to Wells Fargo.

THE JUDGMENT OF THE CIRCUIT COURT FOR MONTGOMERY COUNTY IS AFFIRMED. APPELLANTS TO PAY COSTS.

appeal of that order, and, that same day, the substitute trustees conveyed the property to the Lais.