Circuit Court for Anne Arundel County
Case No. 02-C-11-163621

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1108

September Term, 2017

BETTE J. BARSH, ET AL.

v.

THOMAS P. DORE ET AL,
SUBSTITUTE TRUSTEES

Wright,
Beachley,
Zarnoch, Robert A.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Wright, J.

Filed: October 19, 2018

In August 2007, Bette Barsh and Joseph Descoteaux, appellants, financed the purchase of a house located in Annapolis, Maryland, with a loan secured by a Deed of Trust. Prosperity Mortgage ("Prosperity"), the lender, transferred the Note to Wells Fargo Bank, N.A. ("Wells Fargo"), with an allonge[1]. HSBC Bank USA, NA ("HSBC"), was trustee for the Note. In May 2009, appellants defaulted on the loan.

Appellees, Thomas Dore, Mark Devan, Gerard Miles, Jr., Shannan Menapace, and Erin Gloth (the "Substitute Trustees"), initiated foreclosure proceedings against appellants by filing an Order to Docket in the Circuit Court for Anne Arundel County in August 2011. The original Order to Docket did not contain an allonge; an Amended Order to Docket, filed in 2013, contained an allonge, dated August 9, 2007. Appellants filed a motion to dismiss the foreclosure, which the circuit court denied.

In January 2017, the property was sold to HSBC, acting as Trustee for Wells Fargo Asset Securities Corporation, Mortgage Asset-Backed Pass-Through Certificates Series 2007-AR8 (the "Trust"), and was ratified in July 2017. Appellants timely noted this appeal where they present several questions, which we have consolidated:[2]

[1] An "allonge" is generally a slip of paper sometimes attached to a promissory note or other negotiable instrument for the purpose of receiving further indorsements when the original paper is filled with indorsements; the allonge is considered to be part of the note. Allonge, Black's Law Dictionary (10th ed. 2014); *see also* Md. Code (1973, 2013 Repl. Vol.), § 3-204(a) of the Commercial Law Article ("Com."); *Anderson v. Burson*, 424 Md. 232, 240 n.10 (2011); *Deutsche Bank Nat. Trust Co. v. Brock*, 430 Md. 714, 719 n.3 (2013).

[2] Did the lower court err by failing to dismiss this foreclosure action because:

Did the circuit court err in denying appellants' motion for stay of sale and dismissal of the foreclosure action?

For the reasons to follow, we shall affirm.

I. BACKGROUND

a. Events Leading to Foreclosure

Appellants executed a Fixed/Adjustable Rate Note on a home in Annapolis, Maryland, on August 9, 2007. That same day, Mr. Descoteaux signed the promissory note (the "Note"), and Ms. Barsh joined to sign the Deed of Trust in favor of Prosperity. Wells Fargo serviced the mortgage and collected the mortgage payments.

b. Securitization: A Primer

Although Prosperity originated the loan, the loan transferred to Wells Fargo through a process known as securitization. On the path towards securitization, appellants' Note was transferred and indorsed.

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a. The August 16, 2011 Declaration of Substitute Trustees was executed by Kristen K. Haskins, who is or was an employee of Covahey, Boozer, Doan and Dore?; and

b. The August 9, 2007 Note filed with the August 24, 2011 Order to Docket did not contain an allonge, but the Note filed with the February 21, 2013 Amended Order to Docket did contain an allonge?; and

c. The Note contained in the Order to Docket did not contain the required [e]ndorsements from Wells Fargo Bank as the Sponsor to the Depositor Wells Fargo Asset Securities Corporation to the [SPV] Trust?; and

d. Appellants established in the lower court that the law firm which employed the Substitute Trustees herein manufactured at Wells Fargo's request the undated allonge, and sent it to Wells Fargo to be executed by a known robo-signer at Wells Fargo?

Securitization begins when a mortgage originator sells a mortgage and its note to a buyer, who is typically a subsidiary of an investment bank. Christopher L. Peterson, Foreclosure, Subprime Mortgage Lending, and the Mortgage Electronic Registration System, 78 U. Cin. L. Rev. 1359, 1367 (2010). The investment bank bundles together the mortgages it purchased into a "special purpose vehicle," usually in the form of a trust, and sells the income rights to other investors. *Id.* Pooling and Service Agreements ("PSA") establish two entities that maintain the trust: a trustee, who manages the loan assets, and a servicer, who communicates with and collects monthly payments from the mortgagors. *See Anderson v. Burson*, 424 Md. 232, 237 (2011).

Mortgage-securitization investors use the Mortgage Electronic Registration System ("MERS"), a private land-title registration system created by mortgage banking companies, to expedite the securitization process. *Id.* at 237-38. MERS increases the efficiency and profitability of mortgage markets by skirting the traditional land-title recording process in localities, which can be costly and time consuming, and replacing it with the industry's own electronic tracking system. *Id.* at 238. To do so, the mortgage broker names MERS as a nominal mortgagee in the mortgage. *Id.* Then, the subsequent transfers of the mortgage are recorded electronically and entirely on MERS while the original mortgage, recorded in the public land title records, remains unchanged. *Id.* MERS's industry-appreciated virtues have made it a near ubiquitous aspect of contemporary residential mortgages; two-thirds of all newly originated residential loans in the United States name MERS as the nominal mortgagee. *Id.*

While MERS enables investment banks to rush millions of mortgages through the securitization process at a rapid rate, the volume and profitability has come at a cost. Mortgage transferors frequently lose or misplace mortgage documents and fail to indorse mortgage notes, shortcomings that transferees are willing to overlook lest they be slowed down by traditional negotiable instrument formalities. *Id.* *See also* Gretchen Morgenson, If Lenders Say 'The Dog Ate Your Mortgage,' N.Y. Times, October 24, 2009, https://www.nytimes.com/2009/10/25/business/economy/25gret.html.

Appellants' Note

To be securitized as described above, the Note was transferred and indorsed. The Note listed the lender as Prosperity but noted that monthly payments would be made to Wells Fargo. The Note contained two indorsements:

> Without Recourse Pay To The Order Of
> Wells Fargo Bank, N.A.
> By: Joan M. Mills, Vice President
>
> Pay To The Order Of
> Wells Fargo Bank, N.A.
> Without Recourse
> Prosperity Mortgage Company
> Joan M. Mills, Vice President

An allonge attached to the note and dated August 9, 2007, read:

> For good and valuable consideration, Wells Fargo Bank, N.A. hereby assigns all of its rights, title and interest in said Note to HSBC Bank USA, National Association as Trustee for Wells Fargo Asset Securities Corporation, Mortgage Asset-Backed Pass-Through Certificates Series 2007-AR8 and as a result of said transfer, Wells Fargo Bank, N.A. has no further interest in said Note. This allonge shall be annexed to the original Note (or a copy of the Note with a Lost Note Affidavit if the original cannot be located) referenced above for purposes of transferring the same.

Pay to the Order of
HSBC Bank USA, National Association as Trustee for Wells Fargo Asset Securities Corporation, Mortgage Asset-Backed Pass-Through Certificates Series 2007-AR8

The allonge was signed by Herman John Kennerty, and identified him as the Vice President of Loan Documentation for Wells Fargo. Through this process, Prosperity transferred the Note to Wells Fargo, which in turn transferred the Note to HSBC in November 2007. HSBC securitized appellants' Note, along with several others, into the Wells Fargo Asset Securities Corporation, the Trust. The Wells Fargo PSA named HSBC as Trustee and Wells Fargo as Master Servicer, so the Note was transferred to HSBC as Trustee.

c. Appellants' Challenge the Substitute Trustees' Right to Enforce Note During Evidentiary Hearings

A mere two years after first purchasing the home, the appellants defaulted on their mortgage payments in or about February 2009. Mr. Descoteaux moved to Texas and indicated that he no longer wished to be involved with the foreclosure proceedings. The Substitute Trustees commenced foreclosure proceedings in the Circuit Court for Anne Arundel County in October 2010. The Substitute Trustees filed an order to docket, which included a Note with the allonge, but that foreclosure was voluntarily dismissed.

Erin Gloth, a Substitute Trustee and attorney-in-fact for Wells Fargo, filed a Declaration of Substitution of Trustees and initiated a second foreclosure action in the circuit court in August 2011, which is the basis for this appeal. The Order to Docket the Substitute Trustees filed did not include an allonge.

The parties sought to mediate the foreclosure but were unsuccessful. Appellants filed a motion to dismiss the foreclosure action and a request for evidentiary hearing in May 2012. The Substitute Trustees opposed the motion to dismiss in June 2012 and filed an amended Order to Docket on February 21, 2013, which included an allonge that had been omitted from the original Order to Docket filed on August 24, 2011. Appellants also filed a "Motion to Transfer Funds into the Court Registry" for insurance proceeds, which is not at issue here. After several postponements, a total of two evidentiary hearings took place on October 28, 2013, and January 27, 2014.

At the October 28, 2013 hearing, the circuit court heard testimony from Douglas Rian and Bettie Jean Barsh. Mr. Rian, a Professional Compliance Examiner, testified that the allonge created in 2010 was not in compliance with the PSA in the Wells Fargo documents. Appellants objected to Mr. Rian's explanation, and the court sustained the objection. Mr. Rian then testified that the PSA had a cutoff date of November 1, 2007, and a closing date of November 29, 2007. The court sustained appellants' objections to Mr. Rian's additional testimony about the PSA.

Ms. Barsh, one of the appellants, testified about the events leading up to the foreclosure. She testified that Mr. Descoteaux had moved to Texas because the house "has mold in it and it [made] him sick." She explained that Mr. Descoteaux knew he would be sued, and that he was unable to rent an apartment because the house "was in no condition to rent or sell."

On January 27, 2014, the circuit court resumed the direct examination of Ms. Barsh. She testified that she and Mr. Descoteaux sent their mortgage payments to Wells

Fargo at the time of their default. On cross-examination, Ms. Barsh testified that she and Mr. Descoteaux made a total of 29 loan modification requests to Wells Fargo to bring the mortgage payments current - none of those requests were successful.

The circuit court next heard testimony from Cindy Shannabrook, a Loan Verification Analyst for Wells Fargo. She testified that Prosperity was a joint venture with Wells Fargo and that Joan Mills was authorized by Prosperity to assign the Note from Prosperity to Wells Fargo via an indorsement. According to Ms. Shannabrook, Wells Fargo had been servicing the loan since August 9, 2007. Ms. Shannabrook stated that the loan was immediately transferred to Wells Fargo on August 9, 2007. At trial, counsel presented the original promissory note to the court. Ms. Shannabrook verified that a Mortgage Loan Purchase Agreement reflects when a mortgage was transferred into the trust, and that appellants' loan made it into the trust.

On February 18, 2014, the circuit court denied the Motions to Dismiss and found that the Substitute Trustees had adequately proven the legal transfers from Prosperity to the Trust, that Wells Fargo and the Trust were remedying an "accidental oversight" when they created a new allonge and filed it with an Amended Order to Docket and that, even without the allonge, the Note was enforceable by the Trust because the Trust was in possession of the Note which was indorsed in blank.

Appellants filed a Motion to Revise the circuit court's February 2014 Order. Ms. Barsh filed for bankruptcy twice. After the dismissal of her second bankruptcy, the home was sold to HSBC. The sale was ratified by the circuit court on July 12, 2017.

Throughout the trial, appellants challenged the Substitute Trustees' right to enforce the Note, claiming that the Substitute Trustees fraudulently created an ex-post facto allonge,[3] and that an appearance of impropriety was evident because the Substitute Trustees were appointed by an employee of Covahey, Boozer, Doan, and Dore, P.A., which appellants alleged conspired against them with an alleged robo-signer.[4]

II. STANDARD OF REVIEW

The denial of a motion to stay a foreclosure sale and dismiss the action under Md. Rule 14-211 "lies generally within the sound discretion of the trial court." *Anderson*, 424 Md. at 243 (citing *Wincopia Farm, LP v. Goozman*, 188 Md. App. 519, 528 (2009)). We review the circuit court's legal conclusions *de novo*. *Wincopia Farm*, 188 Md. App. at 528.

III. DISCUSSION

a. The Appointment of the Substitute Trustees Was Valid

Appellants argue that the Declaration appointing the Substitute Trustees was fraudulent because the Declaration was executed by Kristen Haskins, an attorney-in-fact

[3] The basis for this claim is that after appellants' motion to compel disclosure of a redacted document was granted by the circuit court, disclosure revealed the contents of a communication between Wells Fargo and Covahey, Boozer, Doan, and Dore, P.A. The record reflects that on July 21, 2010, Wells Fargo received a communication from the firm stating "allonge sent for execution." On July 22, 2010, Wells Fargo stated "allonge completed/sent to attorney."

[4] "Robo-signing" is a term that "most often refers to the process of mass-producing affidavits for foreclosures without having knowledge of or verifying the facts[.]" Anita Lynn Lapidus, What Really Happened: Ibanez and the Case for Using the Actual Transfer Documents, 41 Stetson L. Rev. 817, 818 (2012).

for Wells Fargo, which was the attorney-in-fact for the trust. In other words, appellants argue, without citing legal authority, that the Substitute Trustees lacked the standing to enforce the foreclosure of their home.

The Substitute Trustees respond that the appellants' allegations of fraud were "overblown and exaggerated," and that the record reflects the valid indorsements of the Note.

We have long held that fraud must be alleged with particularity. *See Buckingham v. Fisher*, 223 Md. App. 82, 91 (2015). This "particularity" requirement:

> ordinarily means that a plaintiff must identify who made what false statement, when, and in what manner (*i.e.*, orally, in writing, etc.); why the statement is false; and why a finder of fact would have reason to conclude that the defendant acted with scienter (*i.e.*, that the defendant either knew that the statement was false or acted with reckless disregard for its truth) and with the intention to persuade others to rely on the false statement.

Id. (Citations omitted). Further, "vague allegations fail to meet the standard of particularity." *Id.* (Citations omitted). These allegations cannot be vague and merely conclusory. In this case, appellants do not plead with specificity any facts suggesting that Ms. Haskins's signing of the Declaration of Substitute Trustees was fraudulent aside from her connection to Covahey, Boozer, Doan, and Dore, P.A. *See Tavakoli-Nouri v. State*, 139 Md. App. 716, 725 (2001). In discussing this issue, there is a question of whether or not the Substitute Trustees had standing and whether they could legally be considered holders of the Note and its allonge.

Appellants claim as to the standing issue is meritless. The record reflects that the appellees filed a copy of the Declaration of Substitute Trustees and an Order to Docket

on August 24, 2011. In support of this Order to Docket, the Substitute Trustees submitted a "copy of the Deed of Trust Note and Affidavit pursuant to . . . [Md. Rule] 14-207(b)(3)" and a copy of the Declaration of Substitution of Trustees, pursuant to [Md. Rule] 14-207(b)(4). According to that Declaration, Wells Fargo, acting as attorney-in-fact for HSBC, acting as Trustee for Wells Fargo Asset Securities Corporation, the Trust, named Dore, et al., as Substitute Trustees.

This appointment of trustees to enforce a lien on appellants' property originated in the Note. The Note provides that Prosperity as Lender could transfer the Note, and establishes that payments should be made to Wells Fargo. The allonge attached to the Note provided that the present holder of the Note was Wells Fargo. The Note links ownership of the Note to the allonge. *See Anderson v. O'Sullivan*, 224 Md. App. 501, 513 (2015) (holding that the appointment of substitute trustees was appropriate where the deed of trust specifically incorporated the covenants and provisions of the note.).

A deed of trust cannot be transferred like a mortgage, but the Note may be, and carries the security provided by a deed of trust. *See Anderson*, 424 Md. at 245. Thus, once this Note was transferred to Wells Fargo, the Deed of Trust that secured appellants' property was also transferred. *See Deutsche Bank Nat. Trust Co. v. Brock*, 430 Md. 714, 728 (2013) (citation omitted) ("[O]nce the note is transferred, 'the right to enforce the deed of trust follow[s].'").

Accordingly, HSBC, through its servicing agent and attorney-in-fact, Wells Fargo, had the authority to appoint Dore, et. al., as Substitute Trustees to enforce the Deed of Trust and institute the foreclosure action. The appellants have provided no authority

supporting its argument that the Declaration and appointment of the Substitute Trustees was fraudulent. Appellants also have provided no authority suggesting that Ms. Haskins' employment by the same law firm that employs the Substitute Trustees is disqualifying. The circuit court did not abuse its discretion in finding the same.

b. The Substitute Trustees Had the Authority to Enforce the Note

In the circuit court, appellants argued that the allonge was invalid on its face because the Substitute Trustees failed to attach an allonge to the original order to docket in 2011, but then attached a dated allonge to the amended order to docket in 2013. To bolster this claim, appellants spilled much ink to the effect that Wells Fargo conspired against them with a "known robo-signer" to "manufacture" an ex-post facto allonge. The appellants also aver that the August 9, 2007 Note did not contain the required indorsements from Wells Fargo Bank to the Trust.

The Substitute Trustees respond that the circuit court correctly found that the Substitute Trustees, acting as agents of the trust, were in possession of the original Note with a valid blank indorsement from Wells Fargo, bringing the case under the holding outlined in *Deutsche Bank*. We agree.

In making their claims about the ex-post facto allonge, appellants cite no legal authority, and we can find no authority in Maryland suggesting fraud in this act. Thus, the only issue left before us is that of whether the Substitute Trustees were the holders of the Note and had the authority to enforce it.

Ownership and holdership of notes are common issues raised in defense against foreclosure actions, and two cases limit the scope of our review. *See*, *e.g.*, *Deutsche Bank*, 430 Md. at 727; *Anderson*, 424 Md. at 249.

Anderson dictates that under certain conditions, a nonholder has the right to enforce a note through foreclosure. The Andersons (the borrowers), challenged the substitute trustees' right to enforce the note. *Id.* at 239. Similar to the instant case, the substitute trustees did not have the note when they filed the original order to docket. *Id.* at 236. The note at issue was payable to Wilmington and transferred three times. *Id.* at 239. The Court summarized the transfer history as follows:

> First, the initial lender, Wilmington, transferred the Note to Morgan Stanley Mortgage Capital Holding, Inc. (Morgan Stanley I), who in turn transferred the Note to Morgan Stanley ABS Capital I Inc. (Morgan Stanley II). Morgan Stanley II securitized the Anderson Note, along with a multitude of others, into the Morgan Stanley Home Equity Loan Trust 2007-2 (Morgan Stanley Trust). The Morgan Stanley Trust pooling and servicing agreement (PSA) named Deutsche as trustee (and Saxon as servicer), and so the note was transferred to Deutsche as trustee.

Id.

At the second hearing in a series of three evidentiary hearings, the substitute trustees produced the original unindorsed note and stated that they "d[id] not have an allonge[.]" *Id.* at 239-40. However, at the third evidentiary hearing, the substitute trustees produced an unindorsed, undated, and unattached allonge signed by Wilmington (the original lender) transferring the note to Deutsche. *Id.* at 240. The Court of Appeals was presented with the issue of whether the nonholder of an unindorsed note in possession of that note could institute a foreclosure action. *Id.* at 242.

The Court noted that the "reputed transferee in possession of an unindorsed mortgage note has the burden to establish its right under that note [.]" *Id.* at 245. The Court explained that [Com. Law § 3-101, et seq.] governs promissory notes secured by deeds of trusts, and that "the corresponding note may be transferred, and carries with it the security provided by the deed of trust." *Id.* at 246 (citation omitted).

Com. Law § 3-301 defines who is entitled to enforce a negotiable instrument: "(i) the holder of the instrument, (ii) a nonholder in possession of the instrument who has the rights of a holder [*i.e.*, a transferee] or (iii) a person not in possession of the instrument who is entitled to enforce pursuant to § 3-309 . . . ." *Id.* at 247. Because the note at issue was unindorsed, Deutsche, though in possession of the note, was not a holder. *Id.* The Court disregarded the allonge, concluding it was "anachronistically impossible" because "by the time Wilmington reputedly made the allonge to Deutsche, Wilmington had no rights in the Note to transfer." *Id.* at 247-48.

The Court concluded that Deutsche was entitled to enforce the note as "a nonholder in possession of the [note] who has the rights of a holder" as long as it could "'account for [its] possession of the unindorsed instrument by proving the transaction through which the transferee acquired it." *Id.* at 248-49 (citing Com. Law § 3-301(ii)). Deutsche, therefore, had the burden to prove each of the three transfers of the note that led to its possession. *Anderson*, 424 Md. at 249. "Once the transferee establishes a successful transfer from a holder, he or she acquires the enforcement rights of that holder." *Id.* at 249 (citing Com. Law § 3-203 cmt. 2). The Court ultimately concluded

that the note's transfer history was established, and that the substitute trustees acquired the right to enforce the note and institute the foreclosure action. *Id.* at 252.

The Court revisited its holding in *Anderson* and the enforceability of a note two years later in *Deutsche Bank*. There, the borrower challenged the enforceability of the note, claiming that regardless of which entity is the holder of the note, only the owner of the note could enforce it. 430 Md. at 730. The Court again examined Com. Law § 3-301 noting that a "'holder'is '[t]he person in possession of a negotiable instrument that is payable either to bearer or to an identified person that is the person in possession.'" *Id.* at 729 (citing Com. Law § 1-201(b)(21)(i)). "A promise or order is payable to bearer if it states that: (a) it is payable to bearer or to cash; (b) indicates that an individual or entity in possession of the promise or order is entitled to payment; (c) does not state a payee; or, (d) otherwise indicates that it is not payable to an identified person." *Id.* (citing Com. Law § 3-109(a)). The Court held that because there was no gap in indorsements for a note indorsed in blank, the entity in possession of the note was the holder of the note and was entitled to enforce it. *Id.* at 732.

Here, the note is indorsed by Prosperity to Wells Fargo and then indorsed by Wells Fargo in blank. There is no gap in the title of this Note. As the entity in possession of the Note, HSBC appointed the Substitute Trustees to enforce the Note, granting holdership in them. This aligns completely with both the holdings in *Anderson* and *Deutsche Bank*.

It follows that the Substitute Trustees, through Wells Fargo, as servicing agent for HSBC, are entitled to enforce the Note as a matter of law. The fact that the Substitute

Trustees filed an Amended Order to Docket containing an allonge dated August 9, 2007, is inconsequential, as this allonge, as the circuit court suggested, merely confirms that the transfer happened. We discern no case law indicating that this act, alone, amounts to fraud. The circuit court did not abuse its discretion in making a similar finding.

IV. CONCLUSION

On the record before us, the Substitute Trustees had the authority to enforce the appellants' Note. The Note's transfer history was clear and preserved in the record. We find no error on the part of the circuit court and affirm its decision.

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