Circuit Court for Kent County
Case No. 14-C-16-010731

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

Consolidated Cases

No. 2490
September Term, 2016

SHIRLEY HIRSHAUER

v.

AQ HOLDINGS, LLC

No. 1221
September Term, 2017

SHIRLEY HIRSHAUER

v.

AQ HOLDINGS, LLC, *et. al.*

Leahy,
Shaw Geter,
Salmon, James P.
(Senior Judge, Specially Assigned),
JJ.

Opinion by Shaw Geter, J.

Filed: December 7, 2018

The property dispute at the center of these cases began in 2006 and has generated several different state court actions in Maryland, as well as in U.S. Bankruptcy Courts in Maryland and Florida. Here, Appellant, Shirley Hirshauer, presents two separate appeals, which we have consolidated for judicial economy. First, she appeals the dismissal and grant of summary judgment by the Circuit Court for Queen Anne County of her counterclaim against Appellees, AQ Holdings, LLC ("AQ Holdings"); Brooke Schumm, Esq., attorney for AQ Holdings; and the Honorable Thomas G. Ross ("Judge Ross") in an action to sell or, in the alternative, partition property purchased at a judicial sale. Second, Hirshauer appeals the court's final order directing a court-appointed trustee to sell jointly-owned property in lieu of partition. Hirshauer presents a number of questions for review, which we have condensed, renumbered, and rephrased for clarity:

Appeal No. 2490:[1]

1. Was the court's judgment on the Counterclaim an abuse of discretion in light of Hirshauer's bankruptcy judgment?
2. Did the court err in dismissing or, in the alternative, granting summary judgment on the Counterclaim?

Appeal No. 1221:[2]

[1] Appellant's original questions in Appeal No. 2490 were: 1. Whether the State Court has a right to grant relief from a Bankruptcy stay which is a matter committed exclusively to the Bankruptcy court. 2. Whether the Counter-claim is not barred by res judicata, collateral estoppel and the doctrine prohibiting collateral attack on judgment. 3. Whether the trial court erred in granting the motion to dismiss and motion for summary judgment.

[2] Appellant's original questions in Appeal No. 1221 were: 1. Did Judge Sweeney err acting without jurisdiction. 2. Did Judge Sweeney err not acknowledging the writs and sale of the farm are void. 3. Did Judge Sweeney err not taking judicial notice that Judge

3. Did the court have jurisdiction to hear these cases?

4. Did the court err in holding trial on the scheduled date?

5. Did the court err in finding sale in of lieu of partition of the Property was appropriate?

STATEMENT OF FACTS

A. Events leading to the Counterclaim.

In September 2004, Terry Brumwell, Alice Hall, and Elizabeth O'Shea (collectively, the "Clemons"), along with other family members, filed a complaint against

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Ross, of the QA, was disqualified, by law and Judicial Cannons, and therefore all Ross' actions are void. 4. Did Judge Sweeney err holding the trial in March 2017 without jurisdiction, when Hirshauer's doctors note showed she was unable to proceed and the fact that Hirshauer was under the influence of Tramadol, a narcotic. 5. Did Judge Sweeney err ordering a sale in lieu of partition of the farm when a sale would harm Hirshauer, Sweeney stated the farm can be partitioned. 6. Did Judge Sweeney err holding a trial when the plaintiff was not present, and then allowing the plaintiff's attorney to be the fact based witness. 7. Did Judge Sweeney err holding a trial and then not allowing Hirshauer to defend herself because her defense is under appeal, No. 2490-2016. 8. Did Judge Sweeney err by ignoring Hirshauer's motion to declare the ex parte writs of execution are void. 9. Did Judge Sweeney err ordering a sale of the farm, per MD Rules 14-107 and 12-401(b). 10. Did Judge Sweeney err in his memorandum claiming to be able to predict the future and what is in Hirshauer's mind. 11. Did Judge Sweeney err acting as though AQ and Hirshauer own the farm when there was no substantial evidence submitted to him to prove that the ex parte order of August 15, 2006 was valid and when Hirshauer presented facts from the QA record that ex parte order is void by law. 12. Did Judge Sweeney err by ignoring Judge Corrigan's final judgment on appeal which Schumm and his clients were appellants. 13. Did Judge Sweeney err by not acknowledging all actions in the recorded judgment cases, are void as there is no jurisdiction. 14. Did Judge Sweeney err by not acknowledging the actions in QA in December 2011 are void by the doctrine of res judicata and Hirshauer's bankruptcy discharge injunction. 15. Did Judge Sweeney err not acknowledging the levies were litigated to a final judgment in Hirshauer's bankruptcy, Adv Pro No 08-00036, 08-00178 and appealed, which were all ruled in Hirshauer's favor. We address many of the questions presented by appeal No. 1221 in Section II of this opinion because determination of such questions is essential to answering the second question presented in Appeal No. 2490.

Shirley Hirshauer alleging wrongful death in the Circuit Court for Anne Arundel County (the "Wrongful Death Action"). The Clemons' grandmother, Geraldine Gray, died of compressional asphyxia after being pinned between her mattress and a bed railing while living in a senior living home owned by Hirshauer. Approximately a week after the suit was filed, for no consideration, Hirshauer conveyed a forty-seven acre property, located in Queen Anne's County at 1211 Busic Church Road, Marydel, Maryland (the "Property"), to her three sons, James Gerben, Jr., Randy Gerben, and Jason Gerben (collectively, the "Gerbens"), as joint tenants. The Property's deed was recorded in December, 2004.

A default judgment was entered in the Wrongful Death Action in favor of the Clemons on July 14, 2006 in the amount of $1.2 million. Wanda Clemons, as the representative of her mother's estate, was awarded $400,000 and each of Ms. Gray's children, including the Clemons, were awarded $100,000, individually. Two days later, the Clemons, represented by Schumm, filed a complaint in the Circuit Court for Queen Anne's County alleging fraudulent conveyance of the Property, naming Hirshauer and the Gerbens as defendants (the "Fraudulent Conveyance Action"). The Clemons sought "to void and recover" Hirshauer's transfer to the Gerbens. The Clemons then recorded their respective judgments from the Wrongful Death Action in the Circuit Court for Queen Anne's County in early August 2006. Shortly thereafter, they filed requests for writs of execution seeking to immediately levy the Property to satisfy the judgments (the "Levy Actions"). The writs were issued on August 15, 2006 and January 8, 2007. However, upon receiving notice of the Fraudulent Conveyance Action, the Circuit Court for Queen Anne's County stayed the writs and consolidated the cases.

A bench trial was held before Judge Ross on March 16, 2007, and the matter was held sub curia. Judge Ross issued a memorandum opinion and judgment on July 27, 2007, in which he concluded that "the evidence clearly established that the transfer was fraudulent." He then voided Hirshauer's transfer of the Property to the Gerbens **(**the "Fraudulent Conveyance Judgment"). Judge Ross found Hirshauer "to be an astute business woman[,] whose testimony was far less than credible," who "intended to transfer the [P]roperty with the intent to defraud, delay, and hinder the [Clemons], her judgment creditors in collection of the debt," and that "the conveyance occurred after Hirshauer had notice she was being sued in [the Wrongful Death Action]."

On June 19, 2007, after the bench trial, but before Judge Ross issued his memorandum opinion and judgment, the Clemons initiated involuntary bankruptcy proceedings against Hirshauer in the United States Bankruptcy Court of the Middle District of Florida (the "Bankruptcy Court"). After receiving a suggestion of the bankruptcy filing on September 19, 2007, the circuit court issued an order the following day, which stayed any writs of execution or collection proceedings related to the Property as to Hirshauer. The Bankruptcy Court subsequently found Hirshauer had not fraudulently conveyed the Property to the Gerbens.

Four years later, in October 2011, the Clemons filed a motion requesting an extension of time to sell the Property or, alternatively, an order to instruct the Sheriff to immediately schedule a sale of the Property. They asserted that Hirshauer received a discharge in bankruptcy on July 6, 2011, which ended the automatic stay. The Clemons' motion was granted on December 26, 2011 in an order (the "December 26, 2011 Order")

where Judge Ross "conclude[ed] that the discharge in bankruptcy of [] Hirshauer neither discharge[d] her *in rem* liability nor, in any way, affect[ed] the personal liability of third parties." He further found "the judgment liens remain[ed] effective, and that the bankruptcy proceedings ha[d] no *res judicata* effect with respect to the liens." Judge Ross also ruled that the Fraudulent Conveyance Judgment was not void due to res judicata because the judgment liens "were merely stayed, first by order of [the circuit court], and then by the bankruptcy proceedings[;]" therefore it was unnecessary to vacate any order emanating from Hirshauer's bankruptcy proceeding.[3]

On January 9, 2012, Hirshauer and the Gerbens filed a motion to reconsider the December 26, 2016 Order, which was denied. Hirshauer and the Gerbens then appealed the judgment to this Court (the "Appeal of the Fraudulent Conveyance Action"). Pursuant to Maryland Rule 8-602(a)(3), this Court dismissed the appeal as untimely, except as to the circuit court's denial of the motion for reconsideration. We then affirmed the denial of the motion to reconsider.

James Gerben, Jr., on March 27, 2013, filed for Chapter 13 bankruptcy. Accordingly, Judge Ross stayed proceedings related to his one-third interest in the Property. However, on July 10, 2013, Judge Ross vacated the stay as to the respective interests of Randy Gerben and Jason Gerben. Thereafter, the Clemons, through Schumm as counsel, sought a sheriff's sale of Randy Gerben and Jason Gerben's interests in the

[3] In Hirshauer's involuntary bankruptcy proceedings, the bankruptcy judge found Hirshauer had not fraudulently conveyed the Property to the Gerbens. Hirshauer argued this ruling required Judge Ross to find the Property was not fraudulently conveyed and, instead, was owned by the Gerbens.

Property. A sheriff's sale was held on October 29, 2013 and AQ Holdings purchased the Property.

Following the sheriff's sale, Hirshauer filed ten documents in the Fraudulent Conveyance Action in opposition to the ratification of the sale of the Property to AQ Holdings:

a. Defendants [sic] Motion Requesting the Honorable Judge Ross Recuse Himself from these Cases;
b. Defendants [sic] Opposition to Queen Anne County's Circuit Court Approval of the Sheriff's Sale of [the Property] Held on 10/29/13;
c. Line to Honorable Judge Ross Concerning 120 day Levies Expired;
d. Defendants [sic] Response to Plaintiff's Response Motion to Various Papers Filed by [] Hirshauer and James Gerben Relating to Sheriff's Sale;
e. Defendants [sic] Response to Plaintiff's Late Filing for Notification and the Court's Approval of Notice without Notice to Defendants;
f. Defendant's Line Requesting this Honorable Court Not to Ratify the Sale of [the Property] as the Sale was not Performed per MD Rules 14-202(b)(1) and 14-205(c);
g. Defendant's Request that this Honorable Court Invite the Attorney General of Maryland to Intervene Pursuant to 28 U.S.C. §2403(b) as to the Question of the Constitutionality of MD's Prejudgment Attachment Procedures and to Void the Writs of Execution Due to Lack of Jurisdiction of a Florida Resident and All the Issues in this Motion Including Exhibit A and Void the Reissuing of the Notice of Ratification;
h. Line Requesting the Honorable Court to Recognize Plaintiff's Conceded Maryland Judgment Remains Viable as to Gerben[s] Only if [] Hirshauer was Not a Necessary Party;
i. Motion not to Ratify the Sale of [the Property];
j. Interlocutory Appeal Due to Constitutional Issues – 5th and 14th Amendments and Lack of Jurisdiction of This Honorable Court and Time to Ratify has Passed by Maryland law.

Judge Ross ratified the sheriff's sale of the Property to AQ Holdings on February 20, 2014 (the "Ratification"), overruling Hirshauer's opposition. Randy and Jason Gerben's two-third interest in the Property was conveyed by sheriff's deed to AQ Holdings. Hirshauer

and the Gerbens appealed the Ratification to this Court. Their appeal was dismissed pursuant to Maryland Rule 8-602(a)(1).[4]

AQ Holdings filed the present action in the Circuit Court for Queen Anne's County on February 3, 2016, seeking a sale or, in the alternative, a partition of the Property held in common by AQ Holdings and Hirshauer. The case was transferred to the Circuit Court for Kent County.

Hirshauer filed a counterclaim (the "Counterclaim") naming as defendants Judge Ross, Schumm, and AQ Holdings. The Counterclaim alleged the Gerbens were the rightful owners of the Property; civil conspiracy involving Schumm and Judge Ross to deny Hirshauer and the Gerbens due process and recognition of the ruling of the Bankruptcy Court; the Gerbens' deed could not be avoided due to the final ruling of the Bankruptcy Court that found Hirshauer had not fraudulently conveyed the Property to the Gerbens; the writs issued to the Clemons were void because the circuit court lacked jurisdiction in the Fraudulent Conveyance Action; and Judge Ross, Schumm, and this Court violated the automatic stay imposed by the bankruptcy filings of Hirshauer and the Gerbens. In response, Judge Ross, Schumm, and AQ Holdings each filed a motion to dismiss or, in the alternative, for summary judgment.

A hearing on the dispositive motions was held on January 18, 2017, wherein Hirshauer contended that neither partition nor sale was appropriate. She argued the writs

[4] Md. Rule 8-602(a)(1) provides that this Court may dismiss an appeal on a motion or by our own initiative in a variety of circumstances, such as a party's failure to properly appeal the case or file an adequate brief or record, or if the case has become moot. *See Hirshauer v. Hall,* No. 2657, September Term 2013.

could not legally be used to levy the Property as the Fraudulent Conveyance Judgment was "void because Judge Ross [was] acting . . . without jurisdiction;" the Fraudulent Conveyance Judgment violated the doctrine of res judicata;[5] Judge Ross, Schumm, and this Court violated the automatic stay imposed by the Bankruptcy Court;[6] and the writs were in the name of Hirshauer and those writs could not levy property owned by the Gerbens.[7]

At the conclusion of the hearing, the court dismissed the Counterclaim, finding the Counterclaim "fail[ed] to state a viable claim on which relief can be granted." The court further ruled the Counterclaim "is barred . . . as to all Defendants by res judicata, collateral estoppel and the law of collateral [attacks] on judgments" because "[Hirshauer] has either litigated the issues raised or had the opportunity to do so."

B. Trial on the issue of partition of the Property.

On March 16, 2017, trial was held regarding AQ Holdings' action to partition or sell the Property. At the outset, Hirshauer, appearing *pro se*, requested a continuance on either of two grounds. First, she indicated that her defense to the partition action was on

[5] Hirshauer stated, "The reason I'm bringing this action is because Judge Ross is continuing to say I'm a fraud when I have a final judgment from [the Bankruptcy Court] saying I'm not a fraud."

[6] Hirshauer claimed that Schumm and Judge Ross violated the automatic stay during the Fraudulent Conveyance Action imposed by Hirshauer's bankruptcy filing. She further claimed that this Court violated the automatic stay imposed by James Gerben, Jr.'s bankruptcy filing when we decided the Appeal of the Fraudulent Conveyance Action.

[7] Hirshauer's position was "joint tenan[cy] was never broken" because, in order to do so, "[one] ha[d] to give an order saying its [] Hirshauer's property. Then [one] ha[d] to draw up a new deed with [] Hirshauer's name on it . . . then [one] can levy . . . on [Hirshauer's] property" using the writ in Hirshauer's name.

appeal, i.e. the claims made within the Counterclaim, and the court should continue trial until this Court decided the appeal.

Second, Hirshauer informed the court that she was under the effects of Tramadol, a narcotic prescribed for pain. Hirshauer requested the court reschedule the trial because she "[couldn't] think. [She] [couldn't] remember things. [She was] foggy. [She didn't] want to get out of bed like somebody took [her] batteries out. So [she was] not mentally capable of . . . defending [her]self or presenting to [the court] intelligently." Hirshauer presented an unsigned doctor's note, which stated:

> Shirley Hirshauer is a patient in our office. She is currently under medical treatment. She is to be evaluated in 4 to 6 weeks. I advise that the patient does not go to court at this time until patient is back to her baseline of health. She is currently not feeling well and needs to rest and take medications as prescribed. Please excuse her from court on Thursday, March 16th. Thank you for your understanding.

Hirshauer told the court she was supposed to have had medical shots administered to her by her doctor that day in Florida and added she was to continue to receive those shots for a period of four to six weeks. AQ Holdings objected to the continuance, in part, because AQ Holdings had scheduled a witness to appear for trial that day. The court denied Hirshauer's continuance request.

AQ Holdings called as one of its witnesses a land surveyor, William Nuttle, who identified a survey of the Property showing its landscape to be agricultural, wetlands, and forestation. The survey was subsequently admitted into evidence as well as land records from the State Department of Assessments and Taxation ("SDAT") showing the record owner, acreage calculation, real estate account number, and map of the Property.

According to the SDAT records, the owners of the Property were AQ Holdings and James Gerben, which prompted the court to inquire whether Hirshauer in fact owned the Property. The parties then stipulated that Hirshauer owned the Property for purposes of the partition action and the court agreed to subsequently address the issue.

Hirshauer testified in the proceeding and contended partition, rather than sale of the Property, was a more appropriate resolution. According to her, the cremated ashes of her father and brother had been spread upon a portion of the Property[8] and the Gerbens continued to use the Property for social gatherings.

Following the presentation of the evidence, the court gave a conditional ruling in favor of partition of the Property by sale. The court requested Schumm file a statement of proposed findings of fact for the court's consideration regarding how Hirshauer came to own the Property. Hirshauer was instructed to respond to the statement within thirty days. On March 31, 2017, Schumm filed with the court an affidavit as instructed. Hirshauer did not respond to the contents of the affidavit.[9]

The court filed its memorandum opinion ruling in favor of AQ Holdings on August 9, 2017, and concluded that "[a] sale of the [P]roperty and a division of the proceeds on balance would . . . lead to less loss and injury to all parties than pursuing the difficult road of partition under the unique circumstances of this case." The court found the Property to be "irregular[,] full of wetlands and subject to flooding" and "could with difficulty be

[8] However, just prior to this statement, Hirshauer stated, "my dad is buried."

[9] Instead of responding to the contents of the affidavit, Hirshauer twice moved to dismiss the case with prejudice due to Schumm's purported failure to file the affidavit timely.

partitioned on a one-third/two-third basis." However, the court explained, "given the continued obstruction that Hirshauer has engaged in where AQ Holdings[']s interests are concerned one can predict that the partition process . . . would be onerous, expensive, and lead to years of continued litigation before any finality is obtained."[10] The court found AQ Holdings would likely suffer "loss or injury" due to Hirshauer's probable course of action, i.e. the process outlined in Maryland Rule 12-401(c),[11] "since the costs of the partitioning

[10] The court explained:

> Given that Hirshauer would likely not agree to a less arduous partition process the process set out in Rule 12-401 for the appointment of commissioners would be required. It can be expected from the actions taken so far that the selection process itself would lead to disputes about who is appointed and one could expect that the ultimate written report would be contested by Hirshauer at every turn and using any vehicle available to her.

[11] Md. Rule 12-401(c) states:

> (1) Appointment of Commissioners. When the court orders a partition, unless all parties expressly waive the appointment of commissioners, the court shall appoint not less than three nor more than five disinterested persons to serve as commissioners for the purpose of valuing and dividing the property. On request of the court, each party shall suggest disinterested persons willing to serve as commissioners. The order appointing the commissioners shall set the date on or before which the commissioners' report shall be filed. The commissioners shall make oath before a person authorized to administer an oath that they will faithfully perform the duties of their commission. If the appointment of commissioners is waived by the parties, the court shall value and divide the property.
>
> (2) Report of Commissioners. Within the time prescribed by the order of appointment, the commissioners shall file a written report. At the time the report is filed the commissioners shall serve on each party pursuant to Rule 1-321 a copy of the report together with a notice of the times within which exceptions to the report may be filed.
>
> (3) Exceptions to Report. Within ten days after filing of the report, a party may file exceptions with the clerk. Within that period or within three days after service of the first exceptions, whichever is later, any other party may file exceptions. Exceptions shall be in writing and shall set forth the asserted error with particularity. Any matter not specifically set

process will be substantial and eat into any ultimate value that may be found for the [P]roperty."[12]

In its determination, the court "factored in [] Hirshauer's claims" that partition was more appropriate. The court considered the "sentimental value to [Hirshauer] of maintaining the [P]roperty as a piece of land that has been in her family . . . as well as the very vague suggestion that ashes may have been scattered on the [P]roperty." However, the court concluded that these claims were "pretextual and conjured to prevent ultimate resolution of the contentious litigation," noting that, "according to the testimony[, the Property] has laid vacant except it has been used on occasion by [] Hirshauer's relatives for sporadic gatherings of a social nature."

DISCUSSION

I. Whether the court's judgment on the Counterclaim was an abuse of discretion in light of Hirshauer's bankruptcy judgment.

Hirshauer contends the circuit court abused its discretion and failed to apply "long standing bankruptcy law" by dismissing the Counterclaim in violation of the stay imposed by her bankruptcy. According to her, the court did not have the right to grant relief. She

> forth in exceptions is waived unless the court finds that justice requires otherwise. The court may decide the exceptions without a hearing, unless a request for a hearing is filed with exceptions or by an opposing party within five days after service of the exceptions.

[12] The court noted that it had the power under Md. Rule 12-401(c) to allocate the costs of the partitioning process among the parties. However, the court found "it can be expected that it may indeed be difficult to alleviate the damage done by [] Hirshauer's likely actions," compounded with the "fact that [] Hirshauer's permanent residence is in Florida makes allocation and collection of costs even more problematic."

further alleges the bankruptcy court had previously determined there was no fraudulent conveyance and thus, the circuit court lacked jurisdiction to decide how the property should be partitioned.

It is well established that the filing of a petition of bankruptcy triggers an automatic stay to all legal proceedings "to recover a claim against the debtor that arose before the commencement of the [bankruptcy case]." 11 U.S.C. § 362(a)(1). The purpose of the automatic stay is

> to give the debtor a "breathing spell" from his/her creditors, to allow time to formulate a repayment or reorganization plan, and to prevent a chaotic and uncontrolled scramble for the debtor's assets in a multitude of uncoordinated proceedings in different courts, by ensuring that all claims against the debtor, other than those exempted from the stay, will be brought in single forum.

Klass v. Klass, 377 Md. 13, 22 (2003). The stay, however, terminates when the case is closed. 11 U.S.C. § 362(c)(1).

Hirshauer's involuntary bankruptcy proceedings were initiated in June, 2007 and ended on July 6, 2011. The action to sell or partition the Property began in 2016 and the court's dismissal of the Counterclaim and grant of summary judgment occurred on September 12, 2017. As such, the court's actions did not violate the bankruptcy stay.

Hirshauer's argument that the court was without jurisdiction to hear the partition case because the Bankruptcy Court had previously held there was no fraudulent conveyance of the Property is without merit. She contends the matter was exclusively within the Bankruptcy Court's purview. We disagree and hold this issue was previously determined in the Appeal of the Fraudulent Conveyance. There, we held "[t]he circuit court properly denied Ms. Hirshauer and the Gerbens' motion to reconsider" because the judgment liens

obtained by the Clemons before the initiation of Hirshauer's involuntary bankruptcy proceedings "were merely stayed, first by order of [the] court, and then by the bankruptcy proceedings." "[T]he discharge of [] Hirshauer in bankruptcy neither discharge[d] her *in rem* liability nor, in any way, affect[ed] the personal or *in rem* liability of third parties" and "the judgment liens remain[ed] effective . . . the bankruptcy proceedings ha[d] no *res judicata* effect with respect to the liens." Here, Hirshauer attempts to disguise her former arguments by framing them within the context of the partition action. We hold the court's action in determining whether partition or sale was appropriate was fully within its jurisdictional powers as previously determined by this Court.

II. Whether the court erred in dismissing or, in the alternative, granting summary judgment against the Counterclaim.

1. The court did not err in dismissing the Counterclaim as it related to Judge Ross.

When reviewing a trial court's decision to dismiss "[w]e examine whether the complaint, assuming all well-pleaded facts and reasonable inferences drawn therefrom in a light most favorable to the pleader, states a legally sufficient cause of action." *Reichs Ford Road Joint Venture v. State Roads Com'n of the State Highway Admin.*, 388 Md. 500, 509 (2005). We will affirm a dismissal "only if the alleged facts and permissible inferences . . . would, if proven, nonetheless fail to afford relief to the plaintiff." *Ricketts v. Rickets*, 393 Md. 479, 492 (2006). We review *de novo* a court's granting of a motion to dismiss. *Advance Telecom Process LLC v. DSFederal, Inc.*, 224 Md. App. 164, 173 (2015).

In the case at bar, the Counterclaim alleged Judge Ross' actions while presiding over the Fraudulent Conveyance Action aggrieved Hirshauer. She claimed Judge Ross

acted without jurisdiction in the Fraudulent Conveyance Action; committed a civil conspiracy in ordering the issuance of the writs; wrongly consulted with an attorney regarding whether writs of execution should be issued; illegally stayed the enforcement of the writs of execution issued in the Levy Actions; violated the automatic stay and discharge imposed by Hirshauer's bankruptcy; failed to follow service of process requirements under Maryland law; "convicted Hirshauer of her fraud charge with out [sic] due process"; and wrongly ordered and held a sheriff's sale to sell the Property.

Normally acts performed by a judge within the course of his or her judicial duties are entitled to judicial immunity "regardless of the nature of the tort and even where the suit against the judge alleged that he acted in bad faith, maliciously, or corruptly." *Parker v. State*, 337 Md. 271, 284–85 (1995). As the United States Supreme Court stated in *Bradley v. Fisher*, judicial immunity applies to judicial acts "however erroneous the act may have been, and however injurious in its consequences it may have proved to the plaintiff." 13 Wall. 335, 347 (1872). Such immunity is necessary for the proper functioning of our judicial system because "absolute immunity is needed to forestall endless collateral attacks on judgments through civil actions against the judges themselves." *Parker*, 337 Md. at 287 (citing *Bradley*, 13 Wall. at 348).

The determination of "[w]hether a function qualifies for absolute immunity is made objectively and not subjectively." *D'Aoust v. Diamond*, 424 Md. 549, 599 (2012). Where the act "is a function normally performed by a judge" and the parties "dealt with the judge in his judicial capacity," judicial immunity will apply. *Id.* (citing *Parker*, 337 Md. at 290).

In the case at bar, Judge Ross' actions—deciding motions, issuing stay orders, rendering judgment, and ordering and holding a judicial sale of property—are clearly judicial functions and thus are entitled to immunity.

Hirshauer nevertheless argues that judicial immunity does not apply because she had not been served process and, thus, the circuit court had no jurisdiction. While it is true a judge will lose "absolute judicial immunity when he or she knowingly acts in the clear absence of all jurisdiction over the matter," *Id.*, "the circuit courts . . . [e]ach ha[ve] full common-law and equity powers and jurisdiction in all civil and criminal cases within its county[.]" Md. Code, Courts & Jud. Pro., §1-501. Thus, even had Hirshauer not been sufficiently served as to allow the circuit court to exercise proper jurisdiction over her, Judge Ross did not act in "clear absence of all jurisdiction" equivalent to a probate court trying a criminal trial. *See Bradley*, 80 U.S. at 352 (stating, as an example, a "clear absence of all jurisdiction" is present if a probate court were to try a criminal trial).

Moreover, in Hirshauer's previous appeal to this Court, we affirmed the circuit court's decision in which it found Hirshauer was properly served. Again, she reframes an issue previously decided.

2. *The court did not err in granting summary judgment on the Counterclaim as it related to AQ Holdings and Schumm.*

We analyze a court's granting of a motion for summary judgment *de novo*. *Dashiell v. Meeks*, 396 Md. 149, 163 (2006). "[W]e independently review the record to determine whether the parties properly generated a dispute of material fact and, if not, whether the moving party is entitled to judgment as a matter of law." *United States Auto. Ass'n v. Riley*,

393 Md. 55, 67 (2006). Factual disputes are resolved in favor of the non-moving party. *Dashiell*, 396 Md. at 163. "Only when there is an absence of a genuine dispute of material fact will [we] determine whether the court was correct as a matter of law." *Id.*

The doctrine of res judicata "precludes the same parties from relitigating a lawsuit based upon the same cause of action because the second lawsuit involves a judgment that is conclusive, not only as to all matters that have been decided in the original suit, but as to all matters which with propriety could have been litigated in the first suit." *Bank of New York Mellon v. Georg*, 456 Md. 616, 625 (2017). Relitigation is precluded if:

1. The parties in the present litigation are the same or in privity with the parties to the earlier action;
2. The claim in the current action is identical to the one determined in the prior adjudication; and
3. There was a final judgment on the merits in the previous action.

Id. at 626.

"A final judgment is any judgment or order which is so far final as to determine and conclude the rights involved in the action, or to deny to the party seeking redress by the appeal the means of further prosecuting or defending his rights and interests in the subject matter of the proceedings." *Grimberg v. Marth*, 338 Md. 546, 551 (1995).

We have held that, under Maryland law, "[t]he ratification of a sale is res judicata as to the validity of the sale . . . hence its regularity cannot be attacked in a collateral proceeding." *Chaires v. Chevy Chase Bank, F.S.B.*, 131 Md. App. 64, 77 (2000). Successors to an estate or interest will be held to be in privity to a person to a prior judgment where the succession occurred subsequent to the bringing of the suit in which the judgment was rendered. *See Walzl v. King*, 113 Md. 550 (1910).

In the present case, AQ Holdings is in privity with the Clemons as it relates to the Ratification because it was deeded the Property after the ratification of the sale. Accordingly, Hirshauer's appeal of the Ratification and our dismissal of that appeal rendered the Ratification a final judgment.

The Counterclaim at issue in this appeal sought to attack the validity of the Ratification. Hirshauer alleges deficiencies of service in the initial attachment of the Property. She also asserts the collection efforts, including the sheriff's sale of the Property to AQ Holdings, were a violation of the discharge of her debts in bankruptcy pursuant to 11 U.S.C § 524 because the Bankruptcy Court's ruling necessitated the finding that the Gerbens owned the Property and, therefore, her conveyance of the Property to the Gerbens was valid. Further, she contends the Clemons illegitimately obtained writs in the Levy Actions and that there was no pre-bankruptcy judgment from the Circuit Court for Queen Anne's County voiding the conveyance of the Property from herself to the Gerbens, no valid order to the clerk to issue any writs, nor notice to the Sheriff to levy the Property.

However, Hirshauer brought or could have brought these claims as defenses to the Ratification in the prior lawsuit. Hirshauer is now barred from bringing these claims as her appeal of the Ratification was dismissed. As such, the court did not err in dismissing the Counterclaim because it is barred by the doctrine of res judicata.

The validity of a sale may be attacked in cases of fraud or illegality pursuant to Maryland Rule 2-535. *Chaires v. Chevy Chase Bank, F.S.B.*, 131 Md. App. 64, 77 (2000). Hirshauer next argues Maryland Rule 2-535 allows her to collaterally attack the Fraudulent Conveyance Judgment in separate litigation "with no time limit" on the basis of fraud,

mistake, or irregularity. She cites Maryland Rule 2-535(b), which states, "[o]n a motion of any party filed at any time, the court may exercise revisory power and control over the judgment in case of fraud, mistake, or irregularly." Hirshauer, however, did not file a motion with the court pursuant to Maryland Rule 2-535(b).

Further, "[j]udgments of a legally organized judicial tribunal, proceeding within the scope of its allotted powers, and possessing the requisite jurisdiction over the subject matter of the suit and the parties thereto, whether correct or erroneous, cannot be called in question by the parties or privies in any collateral action or proceeding." *Klein v. Whitehead*, 40 Md. 1, 20 (1978). A collateral attack on a judgment "is an attempt to impeach the judgment by matters dehors the record, before a court other than the one in which it was rendered, in an action other than that in which it was rendered; an attempt to avoid, defeat, or evade it, or deny its force and effect, in some incidental proceedings not provided by law for the express purpose of attacking it." *Id.*

In *Shepard v. Nabb*, we considered whether the application of the doctrine of collateral attacks was appropriate where claims were brought against parties who were not parties to the prior proceeding. 84 Md. App. 687, 693–94 (1990). In that case, the defendants previously sued the plaintiff, a trustee, for wrongdoing relating to a trust's administration. *Id*. at 690. In the complaint, the defendants asked the court to assume jurisdiction over the two trusts, to remove the plaintiff as trustee, and to appoint successor trustees. *Id.* at 691. The complaint alleged, *inter alia*, the plaintiff had acquired her appointment as trustee by fraud, duress, and undue influence; charged excessive fees; and mismanaged assets and income of the estates and trusts. *Id*. The plaintiff consented to the

relief sought and resigned, but denied the accusations within the complaint. *Id*. The court eventually entered a final judgment in those proceedings. *Id.* at 692. A month later, the plaintiff sued the defendants for removing her from the trustee position, alleging malicious interference, defamation, and harassment. *Id*. In this suit, the plaintiff not only named the defendants of the prior proceeding, but also counsel for those defendants in the prior proceeding. *Id*. We held the court did not err in dismissing the plaintiff's complaint as to those three counts because they represented collateral attacks on judgments entered in the prior proceeding. *Id.* This was so because the claims "could have been presented as defenses in [the prior proceeding]; had they been, and had they proven successful, the damage alleged in [the complaint] would either not have occurred or would have been redressed." *Id*. at 694. We reiterated the doctrine of collateral attacks on judgments "forbids . . . seek[ing] damages against those persons who were parties, instigators, or witnesses in the earlier actions and who, by achieving the result they desired . . . ultimately prevailed in those actions, for their conduct in bringing and prosecuting the actions." *Id.*

Hirshauer, in the Counterclaim, claims Schumm committed civil conspiracy to "steal" the Property from Hirshauer; fraudulently omitted information when obtaining writs of execution; and intentionally inflicted emotional distress with his intentional acts in his role in the Fraudulent Conveyance Action. As in *Shepard*, these claims seek to impeach the valid final judgment rendered in the Fraudulent Conveyance Action, which we affirmed. Hirshauer had the chance to bring these claims and defenses in that action. Had they been successful, the writs of execution used to levy the Property would not have

been upheld. However, Hirshauer did not do so and she is now precluded from asserting these claims.

For the foregoing reasons, the court did not err in granting summary judgment on the Counterclaim as it related to Schumm and AQ Holdings.

III. Whether the court had jurisdiction.

Hirshauer questions whether the court had jurisdiction to hear the partition. As stated previously, a circuit court "has full common-law and equity powers and jurisdiction in all civil and criminal cases within its county . . . except where by law jurisdiction has been limited or conferred exclusively upon another tribunal." Md. Code Ann., Court and Jud. Proceedings, § 1-501. Pursuant to Section 14–107(a) of the Maryland Real Property Article, circuit courts have jurisdiction to hear claims for a decree to partition any property. As we see it, the complaint was fully within the subject matter jurisdiction of the court.

A court's lack of personal jurisdiction over a party must be asserted in a motion to dismiss filed before an answer. Md. Rule 2-322(a)(1). Hirshauer makes no such assertion, thus any argument relating to lack of personal jurisdiction is waived.

IV. Whether the court erred in holding trial on the scheduled date.

"To grant or deny . . . a motion for continuance is in the sound discretion of the court." *Serio v. Baystate Properties, LLC*, 209 Md. App. 545, 554 (2013). "[U]nless the court acts arbitrarily in the exercise of that discretion, its action will not be reviewed on appeal." *Id.* "An abuse of discretion occurs where no reasonable person would take the view adopted by the court or if the court acts without reference to any guiding rules or principles." *Id.*

On the day of trial, Hirshauer requested a continuance because she alleged she required medical treatment and was under the effects of Tramadol, a narcotic that affected her ability to advocate on her own behalf. She presented the court with a doctor's note, which was unsigned, to that effect. However, a postponement of trial could have delayed the proceedings four to six weeks. Moreover, AQ Holdings had scheduled a witness to appear at trial. The court's denial of Hirshauer's motion for a continuance, under these circumstances, was not an abuse of discretion.

Hirshauer also contends the court erred in denying her motion for a continuance because "her defense [was] under appeal." Hirshauer argues that since her claims in the Counterclaim were then on appeal, so were her defenses to the partition or sale of the Property. We disagree and hold the court did not abuse its discretion in proceeding with trial to determine whether partition or sale of the Property was appropriate. Hirshauer was free to assert the claims she brought in the Counterclaim as her defense to AQ Holdings' assertion that the Property should be partitioned or sold, and she did so.[13] Moreover, the court, in its final memorandum opinion, noted these arguments and found them unpersuasive.[14] Thus, we cannot conclude the court abused its discretion in denying Hirshauer's motions to continue trial.

[13] At trial, Hirshauer stated, "[M]y rebuttal is. . . because you had an illegally requested writ of execution, which would adjudicate me of fraud ex parte with the courts not having jurisdiction, no service, no due process, so, therefore, your writ of execution is void. And your writ of execution is in my name. The [P]roperty was in the Gerben[s'] name. So, when [the Clemons] levied, [the Clemons] levied nothing."

[14] "Mrs. Hirshauer's major objections at trial concern the events of 2006 and 2007 which Hirshauer contends show that AQ Holdings acquisition of the two thirds interest in the [P]roperty was not in accord with various statutes, court rules, and constitutional

V. Whether the court erred in ordering the Property to be sold rather than partitioned.

"A circuit court may decree a partition of any property . . . on the . . . petition of any . . . tenant in common" and "[i]f it appears that the property cannot be divided without loss or injury to the parties interested, the court may decree its sale and divide the money resulting from the sale among the parties according to their respective rights." Md. Code Ann., Real Prop. Art., § 14-107(a). "[T]he determination of whether property shall be partitioned in kind or be sold in lieu of partition, is for the court to determine[.]" *Boyd v. Boyd*, 32 Md. App. 411, 416 (1976). "Such an action is equitable in nature so that the [court] is accorded broad discretionary authority." *Maas v. Lucas*, 29 Md. App. 521, 525 (1975). The trial judge's determination whether partition in kind or sale in lieu of partition was appropriate will only be reversed if found clearly erroneous. *Boyd*, 32 Md. App. at 420.

When determining whether a party will suffer injury or loss from a partition in kind, it "is not whether there was a 'possibility' that the tract could be partitioned in kind without loss or injury, but whether upon the basis of a preponderance of the evidence it appears that the property could not be divided without loss or injury to the parties interested." *Id.* at 419.

Here, the court considered all the evidence before it and concluded sale in lieu of partition was more appropriate than partition in kind. Although the court found the

provisions. . . . In dismissing the [C]ounterclaim on January 18, 2017 filed by Hirshauer this court has also found that there is no merit in her contentions and that various doctrines of finality bar her from raising these issues in this proceeding."

Property could "with difficulty be partitioned," it held the partition process "would be onerous, expensive and lead to years of continued litigation before finality is obtained."[15] This assessment was, in part, premised on the court's finding that Hirshauer would likely hinder any expeditious partition process "given the continued obstruction that Hirshauer has engaged in where AQ Holdings interests [were] concerned[.]" The court found partition in kind would "result in substantial economic loss to AQ Holdings" because the costs of obtaining any partition would greatly detract from the value AQ Holdings received from a sale of the Property. The court also considered the sentimental value of the Property to Hirshauer and her family and the "vague" suggestion her relatives' ashes had been spread on the Property. However, the court concluded, based upon the preponderance of the evidence, the Property could not be divided without loss or injury to both parties. We do not find the court's determination to be clearly erroneous.

Hirshauer argues the court erred in attempting to predict Hirshauer's future actions. On review, "because the determination of the propriety of partition is exclusively in the province of the [court]," we will only reverse that determination where it is found to be clearly erroneous. *Id.* at 420. The court was presented with Hirshauer's extensive litigation record regarding the ownership of the Property, which has thus far spanned over a decade. The court found Hirshauer would likely impede the quick resolution of a partition action.

[15] The court found, if partition of the Property was granted, Hirshauer would likely require appointment of commissioners pursuant to Md. Rule § 12-401 and that disputes as to which commissioners to appoint would arise between the parties.

The court's reasoning that this trend would continue was not a prediction, but rather an assessment supported by the evidence, which we hold was not clearly erroneous.

Hirshauer also contends the court erred in considering Schumm's affidavit as to how Hirshauer acquired her one-third interest in the Property. However, "if a party fails to raise a particular issue in the court, or fails to make a contemporaneous objection, the general rule is that he or she waives that issue on appeal." *Lewis v. State*, 452 Md. 663, 693 (2017). Because Hirshauer did not object to the court considering the affidavit submitted regarding how she became owner of the Property, she has waived our consideration of the issue.

JUDGMENTS OF THE CIRCUIT COURT FOR KENT COUNTY AFFIRMED AND COSTS TO BE PAID BY APPELLANT.