Circuit Court for Montgomery County
Case No. 411670

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1368

September Term, 2017

JENNIFER MUNSON, PERSONAL REPRESENTATIVE OF THE ESTATE OF JOHN R. BRADEN

v.

CARRIE M. WARD, et al.

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

JJ.

Opinion by Graeff, J.

Filed: November 16, 2018

This appeal arises from a foreclosure action and the events that occurred after the property was sold and the sale was ratified by the court. Due to concerns resulting from the advertisement of the foreclosure sale, discussed *infra*, the purchaser did not pay the purchase price and proceed to settlement as provided in the terms of sale. Appellees, the Substitute Trustees of a purchase money deed of trust securing a mortgage loan encumbering the property ("Second DOT"), moved to resell the property. Robyn Isel, also an appellee, the substitute purchaser of the property, initially objected to a resale of the property, stating that she was ready to proceed to closing. Ultimately, however, she consented to an order granting the motion to resell the property.

Ms. Isel subsequently filed a Motion to Vacate the Earlier Order to Ratify the Foreclosure Sale, stating that she was prepared to purchase the property directly from the defaulting owner, "John Braden, the respondent in this proceeding." Jennifer Munson, personal representative of the Estate of John R. Braden,[1] appellant in this Court, objected to the motion, but the Circuit Court for Montgomery County granted the Motion to Vacate the Earlier Order to Ratify the Foreclosure Sale.

On appeal, Ms. Munson presents the following question for this Court's review, which we have rephrased slightly, as follows:

> Did the circuit court err or abuse its discretion in granting Ms. Isel's motion to vacate when there was no showing of fraud, mistake, or irregularity?

[1] John R. Braden passed away on July 12, 2017, several days before Ms. Isel filed the motion to vacate the order ratifying the foreclosure sale.

Ms. Isel rephrases the question presented, as follows:

> Did the circuit court properly exercise its discretion by expressly vacating the Ratification Order after *de facto* granting that relief in the Resell Order?

She also raises two additional questions, which we have rephrased slightly, as follows:

> 1. Should this appeal be dismissed as premature because the Order did not terminate the circuit court's involvement in the sale of the Property, which renders it an unappealable interlocutory order?
>
> 2. Does Ms. Munson's failure to appeal the Resell Order, which ordered the resale of the Property based on the irregularity in the advertisement of the March 9, 2016, foreclosure sale, bar the relief she seeks in this appeal?

For the reasons set forth below, we shall reverse the judgment of the circuit court.

FACTUAL AND PROCEDURAL BACKGROUND

The real property at issue, located at 5804 Kennedy Drive, Chevy Chase, Maryland (the "Property"), had two purchase money deeds of trust securing mortgage loans. The first Deed of Trust, held by The Bank of New York Mellon Trust Company, National Association FKA The Bank of New York Trust Company, N.A. as Successor to JPMorgan Chase Bank, as Trustee for Residential Asset Mortgage Products, Inc., Mortgage Backed Pass-Through Certificates, Series 2003-SK1 ("BNY Mellon") (the "First DOT"), secured a note for $624,000. The Second DOT, held by U.S. Bank, National Association, as Trustee for Residential Asset Mortgage Products, Inc., Mortgage Asset Backed Pass-Through Certificates, Series 2006-SP4 ("USBNA"), secured a note for $78,000.

On November 17, 2015, the Substitute Trustees of the Second DOT initiated proceedings in the circuit court to foreclose on the Property pursuant to Maryland Rule 14-207 and Maryland Code (2015 Repl. Vol) § 7-105.1 of the Real Property Article ("RP").[2] A foreclosure sale was held on March 9, 2016, and the Property was sold to DR Enterprises, LLC for the sum of $991,000. The advertisement of the foreclosure sale did not state that the Property would be sold subject to the First DOT.

On March 29, 2016, Joshua Coleman, one of the Substitute Trustees, filed a Report of Sale and Affidavit of Fairness of Sale and Truth of Report. The court gave notice that the sale of the Property would be ratified and confirmed unless cause to the contrary was shown on or before May 4, 2016. On May 9, 2016, the court issued an Order of Ratification of Sale.

On September 14, 2016, the Substitute Trustees filed a Motion to Resell Property pursuant to Rule 14-305(g), stating that the terms of the sale required settlement to occur within ten days of ratification, and the purchaser had breached that provision.[3] The original purchaser, DR Enterprises, LLC, responded, asserting that it was "ready, willing and able to complete settlement of the property," but the delay in settlement was a result of a pending

[2] The Substitute Trustees include Carrie M. Ward, 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. Breener, and Angela M. Dawkins, any of whom could act independently.

[3] Maryland Rule 14-305(g) provides: "If the purchaser defaults, the court, on application and after notice to the purchaser, may order a resale at the risk and expense of the purchaser or may take any other appropriate action."

"Claim Against Surplus Proceeds" filed on June 24, 2016, by BNY Mellon, the first lien holder.[4] On October 20, 2016, the court entered orders denying the Substitute Trustees' motion to resell the property and awarding BNY Mellon a claim to surplus proceeds.

On January 30, 2017, the court issued a consent order substituting Ms. Isel as the purchaser of the Property. On March 31, 2017, settlement of the Property remained pending, and the Substitute Trustees once again filed a Motion to Resell Property pursuant to Rule 14-305(g). Ms. Isel opposed the motion, requesting to proceed to closing. She argued that any delay in the closing "may be attributed to the uncertainty between the first and second mortgage holders as to how to address the disbursement of the surplus sale proceeds." She asserted, however, that the "earlier Orders in this case, ratifying the sale, allowing the first mortgage holder to participate in the surplus sales proceeds and denying the second mortgage holder's request to resell the property, establishe[d] the law of case." She asserted that "the substitute purchaser remains able and willing to proceed to closing," and any "uncertainty between the first and second lien holders as to how to address the disbursement of surplus sale proceeds" was unnecessary because there were "sufficient sales proceeds to satisfy the claims of the two lien holders and to provide the remainder to the original debtor."

[4] On June 24, 2016, BNY Mellon filed a claim against surplus proceeds, asserting that it held a First DOT and was "entitled to first-priority in the distribution of surplus proceeds arising from the foreclosure" conducted by the Substitute Trustees of the Second DOT.

On June 19, 2017, the court held a hearing. Counsel for the Substitute Trustees, BNY Mellon, and the substitute purchaser were present.[5] Counsel for the substitute purchaser stated that the "sale went forward with sufficient proceeds" to pay off both liens, with an excess to Mr. Braden, the original borrower, and the substitute purchaser wanted to go through with the sale and become the owner of clear, marketable title. Counsel for the Substitute Trustees, however, stated that the problem was that "[i]t is the law in the State of Maryland unfortunately that a senior lienholder doesn't have standing to come in and make a claim on surplus proceeds" because the Property would be "sold subject to their mortgage intact." Accordingly, the motion BNY Mellon had filed to claim surplus proceeds from the sale, which subsequently was granted, was "ill advised." The concern was that, because the sale was advertised subject only to the Second DOT, even if the court ordered that the monies be paid to BNY Mellon for the First DOT, the borrower, Mr. Braden (who was still living at the time of the hearing, but was not present at the hearing), subsequently could assert that the Property was purchased subject to the First DOT, and he was entitled to all the surplus after paying off the Second DOT. When the court asked the parties what order they wanted, they ultimately agreed to a consent order for the Substitute Trustees to resell the property subject to the First and Second DOT.

[5] Counsel for the Substitute Trustees stated that his firm also was representing BNY Mellon.

On July 11, 2017, the court issued an order, which was entered on July 13, 2017, providing that the parties consented to its terms by signing.[6] The order vacated the "earlier Order of this Court permitting the first lender to share in the surplus proceeds of the foreclosure sale so as to satisfy and fully discharge its security interest in this residential real property," and it ordered, among other things, that "the prayer for relief to resell the residential real property is GRANTED."

On July 17, 2017, four days after the entry of the order to resell the property, Ms. Isel filed a Motion to Vacate the Earlier Order to Ratify the Foreclosure Sale.[7] She noted that the court had directed the resale of the Property and stated that, "[w]ith the re-sale of the property, the earlier order of ratification of the foreclosure sale (DE #24) is effectively vacated." Ms. Isel argued that the court's objective in permitting the resale of the Property was to "restore all interested parties to the status quo as of the commencement of the foreclosure proceeding." She was "prepared to purchase this residential real property directly from the defaulting [borrower], John Braden," and the "proposed purchase price, accepted by the defaulting borrower, [was] more than sufficient to fully satisfy the two existing loans secured by the residential real property." Ms. Isel stated that Mr. Braden, the defaulting borrower, should not have to incur additional expense created by a foreclosure when she was ready to independently buy the Property. She also noted that the

[6] The agreement was signed by the attorney for BNY Mellon and the Substitute Trustees, as well as the attorney for Ms. Isel.

[7] As indicated *supra*, Mr. Braden had passed away on July 12, 2017, prior to the time of this filing.

underwriter for the loan had requested that "the earlier order of this Court[,] which ratified the earlier foreclosure sale, be formally vacated."

On August 4, 2017, Ms. Munson, as Personal Representative of Mr. Braden's Estate, filed an opposition to Ms. Isel's motion to vacate. She asserted that the "Earlier Order" to which Ms. Isel's motion referred was the May 9, 2016, Ratification Order that had been entered on the court's docket on May 11, 2016, and any revision of that order was governed by Maryland Rule 2-535, which required a showing of fraud, mistake, or irregularity. Because Ms. Isel's motion to vacate did not "make any argument grounded in fraud, mistake, or irregularity," Ms. Munson argued that it should be denied. Ms. Munson further asserted that the motion sought to "effectuate a contract Ms. Isel claimed to have entered into with [the then-deceased] Mr. Braden," who had no authority to sell the Property after the 2016 foreclosure sale. Rather, based on the posture of the case, only the Substitute Trustees had the ability to sell the Property, and they needed to do so in a way that would obtain the best price. Ms. Munson stated that a buyer was willing to purchase the property for significantly more than the first foreclosure price, and she requested that the court "not vacate the May 11, 2016, order [that ratified the foreclosure sale] and instead maintain the current posture of the case, in which the Plaintiffs/Substitute Trustees should proceed to sell the property in a manner that secures the best obtainable price."

On August 9, 2017, the court issued an order granting Ms. Isel's Motion to Vacate Ratification of Sale, rescinding the sale on March 3, 2016, vacating the Ratification of Sale,

and directing the Substitute Trustees "to re-sell the [P]roperty in accordance with the court order signed by the Honorable Joseph A. Dugan Jr. on July 13, 2017."

This appeal followed.

DISCUSSION

Ms. Munson contends that the circuit court erred in vacating the Order of Ratification of Sale. She asserts that, because the May 2016 Order of Ratification of Sale had been entered for more than 30 days, pursuant to Rule 2-535(b), it could be vacated only upon a showing of fraud, mistake, or irregularity, which was not shown.

Appellees make two arguments in response. First, they argue that the order vacating the ratification of sale was not a final order, and therefore, the appeal should be dismissed. Second, they contend that the court properly exercised its discretion in entering the order.

I.

Foreclosure Sales

Before addressing the parties' contentions, we will discuss briefly principles applicable to foreclosure sales. When a borrower defaults on a mortgage, he or she has "the right to reacquire clear title to the property mortgaged to secure a debt, upon repayment of the debt." *Greenbriar Condo., Phase 1 Council of Unit Owners, Inc. v. Brooks*, 387 Md. 683, 735 (2005) (quoting *Simard v. White*, 383 Md. 257, 272 n. 12 (2004)). Once there has been a foreclosure sale, however, the mortgagor has been divested of the equitable right of redemption. *Id*; *Butler v. Daum*, 245 Md. 447, 453 (1967). At the point of the sale, where the trustee accepts the purchaser's offer, the purchaser has an inchoate,

equitable title. *Merryman v. Bremmer*, 250 Md. 1, 8 (1968). A foreclosure sale is not final, however, until the court ratifies the sale. As the Court of Appeals has explained, a foreclosure sale "does not pass the title, unless it is ratified and confirmed." *Hanover Fire Ins. Co. v. Brown*, 77 Md. 64, 71 (1893). Once the foreclosure sale is ratified, "the purchaser's inchoate equitable title, acquired at the time of the acceptance of his offer by the trustee, becomes complete and the purchaser's equitable title is established retroactively to the time of the original acceptance of the offer by the trustee." *Merryman*, 250 Md. at 8. The purchaser obtains full legal title only after the purchase price is paid and the deed delivered to him or her. *Empire Properties, LLC v. Hardy*, 386 Md. 628, 650 (2005); *White*, 383 Md. at 319.

If the purchaser defaults, and does not pay the agreed upon purchase price, the trustees may seek a court order for a resale. This order "divests the defaulting purchaser of 'his equitable title as the substantial owner of the land.'" *White*, 383 Md. at 320 (quoting *Merryman*, 250 Md. at 8).

Pursuant to RP § 7-105.8, however, an order for resale does not affect the prior ratification of sale or change the status of the mortgagor. It provides, in pertinent part, as follows:

> The entry of an order for resale on default by a purchaser at a sale under §§ 7-105 through 7-105.7 of this subtitle and Title 14 of the Maryland Rules:
>
> (1) Does not affect the prior ratification of the sale and does not restore to the mortgagor or former record owner any right or remedy that was extinguished by the prior sale and its ratification[.]

With that background in mind, we address the issues raised by the parties.

II.

Motion to Dismiss

We begin by addressing Ms. Isel's motion to dismiss this appeal on the ground that the order at issue is "neither a final judgment nor an appealable interlocutory order." Ms. Isel contended in her initial brief that the order appealed from was not a final judgment because it did not terminate the circuit court's involvement in the sale of the Property, stating that the Property still must be re-sold and the court must enter an order of ratification of the "yet-to-be conducted second foreclosure sale."

Ms. Munson disagrees. In her briefs, she asserted that the order involved, the Order Vacating the Ratification of Sale, was an appealable interlocutory order. At oral argument, however, counsel asserted, for the first time, that the order was a final judgment. In supplemental briefing, she asserted that an "order vacating a prior final judgment is, in and of itself, a final appealable judgment." Ms. Munson contends that, because an order ratifying the sale in a foreclosure proceeding is an enrolled judgment, *see Manigan v. Burson*, 160 Md. App. 114, 120 (2004), the order vacating the ratification of sale was an appealable judgment.

As a general rule, "litigants may appeal only from what is known as a 'final judgment.'" *URS Corp. v. Fort Myer Constr. Corp.*, 452 Md. 48, 65 (2017). *See also* Md. Code (2013 Repl. Vol.) § 12-301 of the Courts and Judicial Proceedings Article ("CJP"). An order vacating an enrolled judgment is treated as a final judgment that is immediately

appealable. *Davis v. Att'y Gen.*, 187 Md. App. 110, 120 (2009). *Accord Ventresca v. Weaver Bros., Inc.*, 266 Md. 398, 403 (1972).[8]

Ms. Isel, in her supplemental briefing, does not dispute the general legal proposition that an order vacating a final judgment is appealable. Rather, she asserts that Ms. Munson did not timely appeal such an order. Ms. Munson contends that the final order that needed to be appealed, and was not, was the Order to Resell the Property. She states, citing *White*, 383 Md. at 320, that "'[t]he order of resale effectively revokes the ratification of the first sale,'" and the order to vacate the ratification order "merely clarified the obvious."

We disagree with Ms. Isel's analysis. After the *White* decision, the legislature amended RP § 7-105.8 to explicitly provide that "[t]he entry of an order for resale on default by a purchaser at a [foreclosure] sale . . . [d]oes not affect the prior ratification of the sale."

At oral argument, counsel for Ms. Isel conceded that RP § 7-105.8 would apply if Ms. Isel had defaulted. Counsel argued, however, that no finding was made by the lower court regarding whether Ms. Isel had been in default, and therefore, RP § 7-105.8 is inapplicable.

We disagree. Under the terms of the foreclosure sale, settlement was to occur within ten days of ratification. There is no dispute that Ms. Isel did not complete settlement within that time, and therefore, she defaulted. *See White*, 383 Md. at 265 (failure to complete

[8] A judgment becomes "enrolled" 30 days after it is entered. *Thacker v. Hale*, 146 Md. App. 203, 216, *cert. denied*, 372 Md. 132 (2002).

settlement within the time required by the terms of the sale constituted a default on the purchase of the property). *Accord Burson v. Simard*, 424 Md. 318, 322 (2012) (purchaser at foreclosure sale "defaulted by failing to go to settlement").[9]

Thus, the entry of the order to resell the Property did not revoke the ratification of the first sale. Therefore, the order vacating the ratification order was a final judgment, which is appealable. Accordingly, we deny Ms. Isel's motion to dismiss.

III.

Revisory Power over a Judgment

Ms. Munson contends that the circuit court "committed reversible error in granting [Ms. Isel's] Motion to Vacate and vacating a judgment that had been entered for more than thirty days without a showing of fraud, mistake, or irregularity, as is required by the Maryland Rules." She asserts that Ms. Isel made no attempt to show fraud, mistake, or irregularity, but instead made an equitable argument and relied "upon a facially void contract signed by Mr. Braden well after his right to alienate the Property had been extinguished by the foreclosure sale."

Ms. Isel contends that the court properly exercised its discretion in issuing the order, for either of two reasons. First, she argues, that "a showing of fraud, mistake or irregularity pursuant to Rule 2-535(b) was not necessary" because the order merely stated the "obvious

[9] That the failure to proceed may have been understandable does not detract from the fact that Ms. Isel did not proceed to settlement pursuant to the terms of the sale.

and inherent consequences" of the order to resell the Property, i.e., vacating the ratification order. We have already rejected the premise of that argument.

Second, Ms. Isel asserts that "a showing of irregularity was made during the June 19, 2017, hearing which led to the entry of the [Resale] Order." In support, she points to "[t]he failure of the foreclosure sale advertisement to state that the Property would be sold subject to the First DOT."[10] We agree with Ms. Munson that the court erred in vacating the Ratification Order, which had been entered more than one year earlier.

A court's revisory power of its judgments is governed by CJP § 6-408, which provides:

> For a period of 30 days after the entry of a judgment, or thereafter pursuant to a motion filed within that period, the court has revisory power and control over the judgment. After the expiration of that period the court has revisory power and control over the judgment only in case of fraud, mistake, irregularity, or failure of an employee of the court or of the clerk's office to perform a duty required by statute or rule.

Rule 2-535(a) similarly provides a 30-day period for a court to revise its judgment. It states, in pertinent part, as follows: "On motion of any party filed within 30 days after entry of judgment, the court may exercise revisory power and control over the judgment

[10] In her supplemental memorandum, which was permitted solely to address whether the order was a final judgment, Ms. Isel asserts the following additional irregularities: "Substitute Trustee Ms. Dawkins filing the Motion for Surplus Proceeds on behalf of BNY Mellon [] which the circuit court granted []"; "the Substitute Trustees' refusal to use the surplus proceeds from the sale of the Property to satisfy BNY Mellon's lien"; and "the Substitute Trustees taking the position at the June 19, 2017 hearing that the order granting the Motion for Surplus Proceeds was 'ill advised' and violated Maryland law." Because these arguments were not made in the brief, we will not consider them. *See Gazunis v. Foster*, 400 Md. 541, 554 (2007) (appellate courts ordinarily do not consider issues raised for the first time in a reply brief).

and, if the action was tried before the court, may take any action that it could have taken under Rule 2-534."

After that period of time, a motion must be made pursuant to Rule 2-535(b), which provides, "On 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 irregularity." This Rule applies to foreclosure cases. *See Billingsley v. Lawson*, 43 Md. App. 713, 718 (after 30 days, court may set aside final orders of ratification in foreclosure cases only if fraud, mistake, or irregularity is shown), *cert. denied*, 286 Md. 743 (1979), *cert. denied*, 446 U.S. 919 (1980). *Accord Manigan v Burson*, 160 Md. App. 114, 120 (2004).

Here, there is no dispute that the motion to vacate the order of ratification was filed more than 30 days after the order was ratified. Accordingly, Ms. Isel needed to establish fraud, mistake, or irregularity to justify the court order vacating the order ratifying the sale.

The terms fraud, mistake, and irregularity have been "'narrowly defined and strictly applied'" to ensure finality of judgments. *Pelletier v. Burson*, 213 Md. App. 284, 290 (2013) (quoting *Thacker*, 146 Md. App. at 217). In this case, Ms. Isel contends that the order was proper because there was an irregularity.

This Court previously has explained what constitutes an irregularity:

> "Under our cases, an irregularity which will permit a court to exercise revisory powers over an enrolled judgment has been consistently defined as the doing or not doing of that, in the conduct of a suit at law, which, conformable to the practice of the court, ought or ought not to be done. As a consequence, irregularity, in the contemplation of the Rule, usually means irregularity of process or procedure . . . , and not an error, which in legal parlance generally connotes a departure from the truth or accuracy of which a defendant had notice and could have challenged."

Manigan, 160 Md. App. at 121 (quoting *Billingsley*, 43 Md. App. at 720) (internal citations omitted). *Accord Thacker*, 146 Md. App. at 219 (the term "irregularity" has a "narrow definition" under Rule 2-535(b), which means "'a failure to follow required process or procedure'") (quoting *Early v. Early*, 338 Md. 639, 652 (1995)). Irregularities warranting revision under Rule 2-535(b) include "failure to send notice of a default judgment, to send notice of an order dismissing an action, to mail a notice to the proper address, and to provide for required publication." *Thacker*, 146 Md. App. 203, 219–20. *Accord Billingsley*, 43 Md. App. at 720–21.

"The burden of proof in establishing fraud, mistake, or irregularity is clear and convincing evidence." *Jones v. Rosenberg*, 178 Md. App. 54, 72, *cert. denied*, 405 Md. 64 (2008). *Accord Thacker*, 146 Md. App. at 217. "Once fraud, mistake, or irregularity has been shown, the court may vacate the judgment upon consideration of equitable factors, including whether the moving party has shown that he [or she] has acted in good faith and with ordinary diligence, and that he [or she] has a meritorious cause of action or defense, as the case may be." *Davis*, 187 Md. App. at 124. *Accord Thacker*, 146 Md. App. at 217 ("[T]he party moving to set aside the enrolled judgment must establish that he or she 'act[ed] with ordinary diligence and in good faith upon a meritorious cause of action or defense.'") (quoting *Platt v. Platt*, 302 Md. 9, 13 (1984)). "We review a circuit court's determination of whether there was fraud, mistake, or irregularity for clear error and legal correctness," and "the court's exercise of discretion to vacate the judgment, upon consideration of the equitable factors, for abuse." *Davis*, 187 Md. App. at 124.

As indicated, Ms. Isel contends on appeal that there was an irregularity in this case. She asserts that the "failure of the foreclosure sale advertisement to state the Property would be sold subject to the First DOT [] was a procedural irregularity that justified vacating the Ratification Order."

We note, initially, that this contention was not asserted below. The ground asserted in the motion to vacate was not based on fraud, mistake, or irregularity, but rather, it was based on Ms. Isel's desire to proceed with a contract she purportedly executed with the now-deceased Mr. Braden. And even on appeal, other than her bare assertion that the failure of the advertisement to state that the Property would be sold subject to the First DOT, she does not cite any authority supporting her contention that the advertisement here constituted an irregularity, i.e., a failure to follow required procedure. *Cf. Hughes v. Beltway Homes, Inc.*, 276 Md. 382, 389 (1975) (advertisement incorrectly stating number of bedrooms in dwelling was not irregularity giving court revisory power over judgments entered more than 30 days earlier). *See also Racette v. Bank of Am., N.A.*, 733 S.E. 2d 457, 463 (Ga. Ct. App. 2012) ("[A]dvertisement that fails to mention an existing senior lien on the property . . . does not render the advertisement defective as a matter of law.").

Given this posture, Ms. Isel did not prove, by clear and convincing evidence, that an irregularity warranted the court order vacating the prior order of ratification pursuant to Rule 2-535. Accordingly, the circuit court erred in vacating the order.

JUDGMENT OF THE CIRCUIT COURT FOR MONTGOMERY COUNTY REVERSED WITH DIRECTIONS TO REINSTATE THE MAY 11, 2016, ORDER OF RATIFICATION. COSTS TO BE PAID BY APPELLEE.