Circuit Court for Caroline County
Case No. C-05-CV-19-000084

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1444

September Term, 2020

JASON B. STANTON

v.

BRENNAN FERGUSON, *ET AL.*

Nazarian,
Shaw,
Wright,
(Senior Judge, Specially Assigned),

JJ.

Opinion by Nazarian, J.

Filed: May 26, 2022

This case arises out of a foreclosure proceeding that was complicated by the COVID-19 pandemic. Jason Stanton's home was sold at a foreclosure sale in March 2020. In the time preceding the sale, Mr. Stanton says that he believed he was participating in a loan modification plan, so he didn't file any pre-sale objections and he contends that he was unaware that his loan modification plan had been terminated by the servicer, NewRez. Mr. Stanton then filed exceptions after the sale had been ratified. The trial court found that the issues Mr. Stanton sought to raise as exceptions to the sale should have been raised as pre-sale objections. Mr. Stanton appeals and we affirm.

I. BACKGROUND

In 2006, Mr. Stanton signed a Purchase Money Deed of Trust with Saxon Mortgage, Inc., ("Saxon") securing real property located at 282 Tidewater Circle, Preston, Maryland, 21655 (the "Property"). In July 2018, Ocwen Loan Servicing, LLC, sent Mr. Stanton a notice of intent to foreclose, along with an application for loss mitigation options, after he failed to make timely mortgage payments. One of the documents in this initial notice detailed the timeline for foreclosure mediation and cautioned Mr. Stanton to continue opening his mail. After an initial failed loan modification in 2018, the six individuals assigned as trustees (the "Substitute Trustees")[1] filed an Order to Docket in the Circuit Court for Caroline County in May 2019 that included, among other documents, a Notice

[1] The six Substitute Trustees are Thomas W. Hodge, Christine N. Johnson, Brennan Ferguson, Jeana McMurray, Robert M. Oliveri, and Melissa Alcocer.

of Foreclosure.[2] Brock & Scott, the attorneys handling the foreclosure, served Mr. Stanton with the notice and other required documents.

The Notice of Foreclosure again highlighted the short timeline for a potential sale of the Property. It also stated, in bold, that once an Initial Loss Mitigation Affidavit is received, the loss mitigation application should be completed and returned immediately.[3] The Final Loss Mitigation Affidavit filed in July 2019 stated that Mr. Stanton had not applied for loan modification and thus had not been considered for a loan modification.

Mr. Stanton filed a timely application for Foreclosure Mediation, and on October 28, 2019, he and servicer, NewRez, entered into a loan modification trial period plan ("PHH plan"). Under the PHH plan, Mr. Stanton was to make three payments of $1,377.42 to avoid a foreclosure sale. One section of the PHH plan stated payment was due on or before November 1, 2019, December 1, 2019, and January 1, 2020. Another section stated "[t]ime is of the [e]ssence," and noted:

> If there is a failure to make the First Trial Period Plan payment by 11/01/2019, and we do not receive the payment by the *last day of the month* in which it is due, this offer may be revoked and we may refer the account to foreclosure; or if the account has been referred to foreclosure, foreclosure proceedings may continue and a foreclosure sale may occur.

[2] There is no physical copy of this failed initial loan modification in the record. However, there is the mailing from Ocwen Loan Servicing, LLC, which is listed in the "Other" section of the Preliminary Loss Mitigation Affidavit, and Mr. Stanton personally testified that there was a 2018 loan modification that did not go through due to failure to make timely payments.

[3] It is difficult to determine from the record whether some of the same documents from the July 2018 mailing were used in the July 2019 mailing, but any discrepancy isn't relevant to the issues before us here.

(Emphasis added.) Yet another section of the PHH plan stated, "We must receive each payment, in the month in which it is due." If Mr. Stanton violated, NewRez could void the plan and a foreclosure sale could continue.

Mr. Stanton made the first payment on October 31, 2019, before the first due date. His later payments came after the first day of the month, though: on December 30, 2019 for the month of December and January 31, 2020 for the month of January. These latter two payments were made after the due date listed in the contract but were received by NewRez in the month in which they were due. So on January 7, 2020, NewRez sent Mr. Stanton a letter terminating the PHH plan because he failed to "make all of the required Trial Period Plan payments by the end of the trial period." Mr. Stanton testified he did not receive this letter until the end of March 2020, but his last payment, made on February 28, 2020, was returned to him.

After NewRez terminated the PHH plan, the Substitute Trustees sent Mr. Stanton a notice of foreclosure sale on February 18, 2020. Mr. Stanton confirmed that he received the notice in February 2020, but contends that he believed he was still participating in the PHH plan and did not need to take any action.

The Substitute Trustees sold the Property on March 2, 2020 to Deutsche Bank Trust Company Americas ("Deutsche Bank"), who was Saxon's assignee. A notice of sale and ratification was filed in March 2020 and published over three successive weeks between March and April 2020. The notice stated that Mr. Stanton had until April 17, 2020 to file exceptions or the sale would be ratified. During this time, foreclosure proceedings were

stayed due to the COVID-19 pandemic. The sale was not ratified officially until September 4, 2020 because of the stay, and Mr. Stanton was granted an additional thirty days to file exceptions. Mr. Stanton filed exceptions on October 21, 2020 and requested a hearing. His exceptions objected to the sale on the grounds that the terms of the PHH plan were confusing and that he complied with his understanding of the contract language. He contended that because he believed was complying with the terms, NewRez wrongfully terminated his PHH plan and the foreclosure should not have been allowed to proceed.

The trial court denied Mr. Stanton's exceptions on the ground that the defenses he sought to raise should have been raised before the sale under Maryland Rule 4-211. The trial court found that Mr. Stanton's exceptions were known to him and ripe before the sale, and because he didn't raise them at the appropriate time, they were overruled.

Mr. Stanton filed a timely notice of appeal. Four Gems Real Estate, LLC ("Four Gems"), the current owner of the Property, filed a Motion to Intervene, arguing that it should be permitted to intervene as an appellee because "[w]hen it purchased the Property, Four Gems relied on the ratification of the foreclosure sale and would not have purchased the Property it if had known that [Mr.] Stanton was still contesting the foreclosure." On September 22, 2021, we granted the motion in part. We supply additional facts as appropriate below.

II. DISCUSSION

Mr. Stanton raises one issue on appeal: he argues that the circuit court erred in denying the exceptions on the grounds that they weren't timely.[4] The Substitute Trustees offer two responses that proffer different notions of timeliness: *first*, they argue that the exceptions filed after the ratification were an untimely motion to reconsider, and *second*, they argue that the circuit court did not err in denying Mr. Stanton's exceptions since the exceptions should have been filed before ratification of the sale. Four Gems also responds with two arguments: *first*, they argue that Mr. Stanton's exceptions were not timely filed

[4] Mr. Stanton phrased his Question Presented as follows:

> WHETHER THE CIRCUIT COURT FOR CAROLINE COUNTY ERRED WHEN IT HELD THAT THE ISSUE RAISED IN THE EXCEPTIONS HAD NOT BEEN RAISED TIMELY?

The Substitute Trustees phrased their Questions Presented as follows:

> I. WERE THE "EXCEPTIONS" FILED AFTER THE RATIFICATION WAS ENTERED ACTUALLY A MOTION TO RECONSIDER, THEREBY RENDERING THIS APPEAL UNTIMELY?
>
> II. DID THE CIRCUIT COURT CORRECTLY DECIDE THAT THE ISSUES RAISED AS EXCEPTIONS SHOULD HAVE BEEN RAISED PRIOR TO THE FORECLOSURE SALE AND THUS WERE NOT TIMELY FILED?

Four Gems phrased its Questions Presented as follows:

> 1. WHETHER STANTON WAIVED ALL PRE-TRIAL ISSUES BY FAILING TO FILE TIMELY EXCEPTIONS?
>
> 2. WHETHER THIS APPEAL HAS BEEN RENDERED MOOT BY STANTON'S FAILURE TO FILE A *SUPERSEDEAS* BOND?

and *second*, they argue that the appeal was rendered moot by Mr. Stanton's failure to post a *supersedeas* bond.

A foreclosure is an *in rem* proceeding. *Daughtry v. Nadel*, 248 Md. App. 594, 601 (2020) (*citing Huertas v. Ward*, 248 Md. App. 187, 201 (2020)). "In ruling on exceptions to a foreclosure sale . . . trial courts may consider both questions of fact and law." *Jones v. Rosenberg*, 178 Md. App. 54, 68 (2008) (internal citation omitted). We do not set aside the factual findings of the trial court unless "clearly erroneous," and "will give due regard to the opportunity of the trial court to judge the credibility of the witnesses." Md. Rule 8-131(c). We review a trial court's legal conclusions *de novo*. *Jones*, 178 Md. App. at 68.

A. Mr. Stanton's Exceptions Were Timely.

We start with the temporal timeliness argument: the Substitute Trustees and Four Gems argue that Mr. Stanton failed to file his exceptions by the deadline prescribed in the Maryland Rules.[5] Usually, exceptions must be filed within thirty days after the date of notice of a foreclosure sale. Md. Rule 14-305(e)(1). The Notice of Sale was issued on March 17, 2020 to be ratified on April 17, 2020, and Mr. Stanton did not file until October 21, 2020, over six months later.

[5] The Substitute Trustees characterize Mr. Stanton's exceptions as a motion to reconsider under Maryland Rule 2-533, and peg their timeliness argument to that. But we generally don't decide non-jurisdictional issues unless they "plainly [appear] by the record" to have been raised by the trial court. Md. Rule 8-131(a). And "when a party raises the issue of standing on appeal, [we] need not decide the issue if it was not raised and decided by the circuit court." *Granados v. Nadel*, 220 Md. App. 482, 499 (2014) (internal citations omitted). We see no evidence in the record indicating that this argument was raised in the circuit court, though, and we decline to take it up here in the first instance.

This position encounters two problems. *First*, we don't consider non-jurisdictional issues unless raised and decided by the trial court, and the issue of timeliness does not "plainly appear by the record" to have been raised by the Substitute Trustees to the trial court. Md. Rule 8-131(a). In fact, both parties and the trial court proceeded with the hearing on exceptions as though they were timely.

Second, Mr. Stanton's exceptions ultimately were timely under these pandemic-infected circumstances. While these proceedings were ongoing, the COVID-19 pandemic suspended many court proceedings, including foreclosure proceedings. On March 18, 2020, shortly after the notice of sale went out, the Court of Appeals released an administrative order staying "[t]hose foreclosures of residential properties and foreclosures of the rights of redemption of residential properties pending in the circuit courts[.]" Court of Appeals of Maryland Administrative Order on Suspension of Foreclosures and Evictions During the COVID-19 Emergency, at 2 (2020). The Substitute Trustees contend that because the notice and sale were sent to Mr. Stanton and published, he was aware of the issues and should have raised them before the sale was ratified. But the March 2020 Administrative Order suspended these proceedings and delayed the timeline for exceptions. Starting in May 2020, the Court of Appeals issued a series of Administrative Orders regarding the resumption of foreclosure proceedings on June 25, 2020. Court of Appeals of Maryland Administrative Order on Lifting of the Suspension During the COVID-19 Emergency of Foreclosures, Evictions, and Other Ejectments Involving Residences, at 2 (May 2020). Due to the initial stay, the sale was not actually ratified until

September 2020. Shortly after, also in September 2020, the court delayed the foreclosure proceedings for another thirty days to allow Mr. Stanton to file exceptions. So as a result, Mr. Stanton's exceptions were timely.

B. The Circuit Court Did Not Err In Denying Mr. Stanton's Exceptions.

Next, we address procedural timeliness. Mr. Stanton argues that the trial court erred in finding that he was required to raise his defenses before the foreclosure sale rather than after. Indeed, a foreclosure sale is presumed valid and the burden of proving otherwise rests on the party contesting it. *Hood v. Driscoll*, 227 Md. App. 689, 696–97 (2016). And "a homeowner/borrower ordinarily must assert known and ripe defenses to the conduct of a foreclosure sale prior to the sale, rather than in post-sale exceptions." *Bates v. Cohn*, 417 Md. 309, 328 (2010).

Under Maryland Rule 14-211(a)(1), a borrower may file a motion to stay and dismiss the foreclosure action before the sale. Here, that motion was due within fifteen days of November 11, 2019, the date the foreclosure mediation was held. Md. Rule 14-211(a)(2)(A)(iii)(a). And "[t]he failure to grant loss mitigation that should have been granted in an action to foreclose a lien on owner-occupied residential property may be a defense to the right of the plaintiff to foreclose in the pending action." Committee note to Md. Rule 14-211(a)(3)(B). But "[a] motion based on the failure to grant loss mitigation in an action to foreclose a lien on owner-occupied residential property must be denied unless the motion sets forth good cause why loss mitigation pursuant to a loss mitigation program should have been granted." Committee note to Md. Rule 14-211(b)(1)(B).

A party in a foreclosure action may file exceptions to the sale after the sale occurs. Md. Rule 14-305(e)(1). But post-sale exceptions may challenge only procedural irregularities or the statement of indebtedness. *Bates*, 417 Md. at 320. The exceptions must be in writing, set forth the "alleged irregularity with particularity," and be filed within thirty days after the date of notice of a foreclosure sale. Md. Rule 14-305(e)(1). Procedural irregularities include a faulty or insufficient advertisement of the sale, fraud that the creditor committed during the sale, or a challenge to the sale price. *Bates*, 417 Md. at 321. "Any matter not specifically set forth in the exceptions is waived unless the court finds that justice requires otherwise." Md. Rule 14-305(e)(1). But "[a] lender's failure to comply with pre-sale loss mitigation requests is one such defense." *Bates*, 417 Md. at 328. A court shall ratify a foreclosure sale if: (1) the time for filing exceptions has expired, and (2) "the court is satisfied that the sale was fairly and properly made." Md. Rule 14-305(f).

Both Mr. Stanton and the Substitute Trustees rely heavily, and appropriately, on *Bates*. The homeowner in *Bates* filed post-sale exceptions stating that the sale was not "fairly and properly made" because she was denied pre-foreclosure loss mitigation, as required by the U.S. Department of Housing and Urban Development. 417 Md. at 316–17. Notably, Ms. Bates didn't contend that there was fraud in her dealings with the servicer, only that she was denied access to loss mitigation. *Id.* at 324. "Nor [did] she assert that [the lender] actively encouraged her to sit on her rights and await the outcome of loss mitigation or loan modification efforts that would never come to pass, such that the sale was the product of a silent fraud and title *should not* pass." *Id.* at 325 (emphasis in original). The

Court of Appeals held that although denial of pre-loss mitigation may be a defense in a motion to stay a foreclosure proceeding pursuant to Rule 14-211, "Rule 14-305 [exceptions are] not an open portal through which any and all pre-sale objections may be filed as exceptions . . . when the operative basis underlying the objection . . . was known to the borrower." *Id.* at 327. Moreover, the Court held that a lender's failure to provide pre-loss mitigation was not a part of the "procedural handling of the sale" and that "a homeowner, who wishes to use the lender's failure as the basis of his or her claim, must do so through Rule 14-211's pre-sale injunctive relief apparatus." *Id.* at 329.

Mr. Stanton argues that *Bates* left open the question of whether post-sale exceptions can raise an objection that a foreclosure sale was the product of the lender "affirmatively and purposefully misleading the borrower in default that ultimately unsuccessful pre-sale loss mitigation or loan modification efforts would likely be successful . . . and therefore dissuading the borrower from seeking to assert pre-sale defenses in a timely manner." *Id.* at 328. In other words, although denial of pre-loss mitigation cannot be raised in post-sale exceptions, he claims that there is ambiguity in *Bates* about whether a "silent fraud" argument can be made in post-sale exceptions. *Id.* at 325. And he argues that in light of this ambiguity, he should be allowed to raise the "silent fraud" argument in post-sale exceptions because he believed he was complying with the terms of his PHH plan and never heard differently from NewRez before the sale. *Id.*

Mr. Stanton's argument fails, also for two reasons. *First*, his argument depends on his contentions that he didn't receive the letter from NewRez until March 7, 2020, after the

sale of the Property occurred, that until then he believed that he was complying and made all payments when he thought they were due, and thus that NewRez unreasonably terminated the PHH plan. But to use the "silent fraud" argument, *id.* at 325, NewRez would have had to mislead Mr. Stanton "affirmatively and purposefully" into believing that the plan would be successful when they knew it wouldn't. *Id.* at 328. And although delays and misunderstandings may have complicated communications between the two parties, NewRez tried to inform Mr. Stanton the plan was terminated. On January 7, 2020, NewRez sent Mr. Stanton a letter terminating the PHH plan. They returned his February payment. The delay may have caused confusion, but nothing in NewRez's behavior "purposely or affirmatively," *id.*, misled Mr. Stanton to believe the PHH plan would be successful—to the contrary, they tried to make him aware of the issue, which contradicts the "silent fraud" argument directly. *Id.* at 325.

Second, the language in the contract may not be a model of clarity, but it's not misleading. He points to the language defining the payment deadline: "[i]f there is a failure to make the First Trial Period Plan payment by 11/01/2019, and [NewRez does] not receive the payment by the last day of the month in which it is due, this offer may be revoked[.]" The PHH plan states further that NewRez "must receive each payment, in the month in which it is due." Mr. Stanton argues that this language meant he could make payments any time so long as they were received in the month in which they were due. But the contract also included a list of due dates and said that "[t]o successfully complete the Trial Period Plan, the Trial Period Plan payments below must be made." And language in the additional

information section states that "[o]nce each of the payments above have been successfully made *by their due dates* . . . the mortgage will be permanently modified . . . ." (Emphasis added.) In other words, the payments must be *made* by their due date to complete the PHH plan, but can be *received* by NewRez in the month that they're due. For example, if a debtor sent a check in the mail postmarked November 31 for a December 1 payment, but the check was not received by NewRez until after December 1 due to mailing delays, that payment still would be on time. Mr. Stanton, however, used an automatic money transferring service. So although his payments were *received* by NewRez in the month in which they were due, he hadn't *made* them (with the exception of the first payment) by the due dates listed on the PHH plan.

Under *Bates*, "a homeowner [] who wishes to use the lender's failure [to comply with loss mitigation requirements] as the basis of [their] claim must do so through Rule 14-211's pre-sale injunctive relief apparatus."417 Md. at 328. Although there was a delay in mailing, NewRez notified Mr. Stanton of his default and didn't "affirmatively and purposefully" encourage Mr. Stanton to continue complying with the plan after they voided it. *Id.* As such, Mr. Stanton can't use the "silent fraud" ambiguity to turn NewRez's conduct here into a servicer's failure to grant him continued loss mitigation. *Id.* at 325. By his own reckoning, he wasn't denied pre-loss mitigation because he's arguing that he complied substantially with a loss mitigation contract. And that's not part of the "procedural handling of the sale." *Id.* at 329. We agree with the trial court that these exceptions should have been raised before the sale and are not appropriate for post-sale exceptions.

Mr. Stanton argues as well that these defenses were not "known" or "ripe" to him before the sale. *Id.* at 328. He acknowledges, though, that he timely received each notice required, including notice from the Substitute Trustees that the foreclosure sale was proceeding. He admits that he didn't follow up on the notice that the Property would be sold because he believed he was still participating in the PHH plan and thought that the sale wouldn't proceed. Although his communications with NewRez were impaired by pandemic mail delays, Mr. Stanton nevertheless was aware of the sale. Mailings sent to Mr. Stanton before the sale gave clear warnings to open all mail and provided numbers to call. We agree with the circuit court's rejection of Mr. Stanton's claim that he had no way of knowing that the sale was proceeding and couldn't raise any defenses before the sale, and we agree with the court's finding that these defenses were "known and ripe" to Mr. Stanton before the sale. *Id.*

C. The Appeal Was Not Moot.

Lastly, Four Gems contends that Mr. Stanton was required to post a *supersedeas* bond and failed to do so, rendering the appeal moot. And in general, an appeal of an order ratifying a foreclosure sale is moot if the mortgaged property was sold to a *bona fide* purchaser in the absence of a *supersedeas* bond. *Baltrotsky v. Kugler*, 395 Md. 468, 474 (2006) (*citing Pizza v. Walter*, 345 Md. 664, 674 (1997)). There are two exceptions to the general rule: (1) collusion or unfairness between purchaser and trustee, or (2) when the property is purchased by the mortgagee or its affiliate at the foreclosure sale. *Mirjafari v. Cohn*, 412 Md. 475, 485 (2010).

Four Gems argues that, because Mr. Stanton failed to file a *supersedeas* bond, his appeal is moot. It argues further that as the subsequent *bona fide* purchaser, it didn't know of any pending appeals, and, had it known, it wouldn't have purchased the Property. We disagree, yet again for two reasons. *First*, Mr. Stanton is not appealing the ratification of the sale—he is appealing the circuit court's denial of his exceptions to the sale. The judgment that Mr. Stanton has asked us to review does not have a *supersedeas* bond amount set. *Second*, the Property was purchased by Deutsche Bank as Indenture Trustee for Saxon (the mortgagee) at the foreclosure sale and *then* sold to Four Gems. And as such, this case falls into the second exception: the Property was purchased by the mortgagee or its affiliate at the foreclosure sale, and Mr. Stanton wasn't required to file a *supersedeas* bond.

JUDGMENT OF THE CIRCUIT COURT FOR CAROLINE COUNTY AFFIRMED. APPELLANT TO PAY COSTS.