UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1526

September Term, 2013

MINH VU HOANG, *et vir*.

v.

CINDY DIAMOND, *et al.*

Meredith,
Woodward,
Alpert, Paul E.
(Retired, Specially Assigned),

JJ.

Opinion by Meredith, J.

Filed: August 7, 2015

Appellants in this case are Minh Vu Hoang and Thanh Hoang ("appellants"), a married couple who are before this Court asserting that their home at 9101 Clewerwall Drive in Bethesda was wrongfully foreclosed upon and sold by the appellees in this case, namely: Cindy Diamond, Esq. and Bruce Brown, Esq., the substitute trustees who handled the foreclosure and sale; Fay Servicing, LLC, the loan servicer; Citigroup Global Markets Realty Corp.; and Citibank, N.A. (all "appellees"). Following the foreclosure sale, the denial of appellants' exceptions, and the ratification of the sale by the court, appellants filed a purported "Counterclaim and Third-Party Complaint" against appellees, attacking the foreclosure proceedings that had already concluded. Appellees filed a motion to dismiss the counterclaim and third-party complaint, and that motion was granted by the Circuit Court for Montgomery County. Appellants then noted this appeal.

QUESTIONS PRESENTED

Appellants have presented the following questions to this Court:

1. Was the lower court legally correct by denying the Appellant a hearing before rendering a decision disposing of a claim?

2. If the lower court had transmuted Appellees' Motion to Dismiss into a motion for summary judgment, was [its] basis for granting summary judgment to all counts of the counterclaim legally correct while Maryland Rule 2-501 requires a trial court to decide issues of law, not fact?

3. While Maryland permissive counterclaim rule was created so that the grounds asserted in the counterclaim could have been a good defense to the foreclosure and Appellants have repeatedly raised their defense. Was the lower court erroneous when it disallowed Appellants to file their counterclaim within the foreclosure action and before the foreclosure hearing for ratification of sale?

4. Whether the lower court erred in considering matters outside the complaint in deciding appellees' motion to dismiss for [r]es judicata?

5. Whether the lower court [was] legally incorrect to apply a foreclosure as *res judicata* to the existence of a foreclosure-triggering default, when in counterclaim suit, the homeowner alleges there is no default? When "the prior" adjudication is not final or conclusive[?]

For the reasons explained below, we conclude that the circuit court did not err in granting appellees' motion to dismiss appellants' "Counterclaim and Third-Party Complaint." We affirm.

FACTS AND PROCEDURAL HISTORY

In the motion to dismiss that generated the instant appeal, appellees argued that all of the issues raised by appellants in their "Counterclaim and Third-Party Complaint" either had been, or could and should have been, raised previously by appellants in their attempts to oppose the foreclosure, and that *res judicata* therefore barred any further claims appellants might seek to make. The motion to dismiss was granted without a hearing, and, although the court did not issue an opinion explaining its conclusions, its grant of appellees' motion to dismiss on *res judicata* grounds was correct, as the following timeline of relevant events demonstrates.

Foreclosure Proceedings

The foreclosure proceedings at issue here began on February 17, 2011, with the filing of the Order to Docket by appellees. Attached as exhibits to the Order to Docket were the following documents evidencing appellants' default and appellees' right to foreclose:

1) A copy of the May 4, 1990 Promissory Note from appellants to Home Savings of America, F.A. ("HSA") in the principal amount of $1,000,000.00;

2) A certified copy of the Deed of Trust dated May 4, 1990, and recorded among the Montgomery County Land Records at Liber 9313, Folio 445 from

appellants to Randy Weiss, Esquire, as Trustee for the benefit of HSA; the Deed of Trust vested in the Trustee a power of sale with respect to the property at issue;

3) A Deed of Appointment of Substitute Trustees dated February 4, 2011, setting forth that:

   a) The Deed of Trust gave to the Note Holder an irrevocable power to appoint Substitute Trustees;

   b) Citi Property Holdings, Inc., as the Note Holder, was exercising the power to appoint Cindy R. Diamond and Bruce D. Brown as Substitute Trustees "with identically the same title and estate in and to the land, premises and property conveyed by said Deed of Trust, and with all rights, powers, trusts, and duties of Randy Weiss, Esq., predecessor in trust, with like effect as if originally named as Trustees under said Deed of Trust.";

4) An affidavit of Right to Foreclose and Statement of Deed of Trust Debt, reflecting a payoff total as of March 3, 2011 of $1,112,745.38, with interest accruing at $152.87 per day;

   a) The Affidavit of Right to Foreclose was notarized by a notary public in Humboldt County, California, who certified that the Asset Manager of SN Servicing Corporation, servicing agent for Citi Property Holdings, Inc., personally appeared and "made oath in due form of law" that CPH "has the right to foreclose pursuant to the terms of the Deed of Trust";

5) Affidavits reflecting that neither appellant was serving in the military;

6) An Affidavit of Default and Right to Foreclose; and

7) Notices required by § 7-105.1 of the Real Property Article.[1]

[1] This section is captioned, and governs, "Residential property foreclosure procedure." It sets forth a long list of documents that must be filed before a note holder may foreclose. Appellants do not contend that any of the required documents was absent from the foreclosure filing, but made a variety of other contentions about the legitimacy of the documents in their motion to stay and dismiss.

On August 29, 2011, appellant Minh Vu Hoang filed a "Motion to Stay Sale of Property and Dismiss Action to Foreclose," in which she attacked the sufficiency of the documentation underlying the foreclosure, specifically asserting:

1. That there was no "competent evidence" of an assignment of interest in the property from the original lender, Home Savings of America ("HSA"), which appeared on the 1990 re-finance deed of trust appellees here sought to foreclose, to any of the appellees or entities controlled or represented by appellees;

2. That there was "absolutely no documentation of the mechanism by which CMLTI Asset Trust is now the alleged Secured Party on whose behalf the putative Substitute Trustee, Cindy Diamond, is now proceeding herein";

3. That, in the absence of "a valid instrument that vests CMLTI Asset Trust with the rights, title and interests of the Beneficiary of the Deed of Trust, and the Secured Party of the Promissory Note, CMLTI Asset Trust has no standing to proceed" to foreclose on appellants' property;

4. That, with regard to CitiProperty Holdings, Inc. ("CPH"), which had been identified in the Order to Docket as the current holder of the Deed of Trust, there was no "competent evidence of CPH's interest in the subject property";

5. That CPH therefore lacked standing to foreclose, or to appoint substitute trustees;

6. That, although CitiGroup Global Markets Realty Corp. ("CGMRC") was "explicitly designated" in the Notice of Intent to Foreclose as the secured party, there is "no instrument by which HSA assigned, transferred or conveyed its rights, title, and interests in the Note and/or Deed of Trust to CGMRC";

7. That, since there was no recorded instrument by which HSA transferred its interest in the property to any entity, Quantum Servicing Corporation and Washington Mutual Bank, F.A. lacked standing to proceed to foreclosure;

8. That there was no recorded instrument demonstrating an assignment of interest in the loan to Fay Servicing, LLC, the loan servicer at the time the Notice of Intent was docketed;

9. That the appointment of the Substitute Trustees was void;

10. That the Promissory Note attached to the Order to Docket was "barely legible"; was not an original copy, in any event; and was not supported by affidavit, as required by Rule 14-207(b)(3);

11. That there were "irregularities" on the affidavits that had been submitted, that led appellants to conclude that they were "robo-signed," and were otherwise — along with **"all the documents included in the Order to Docket, except the Deed of Trust" —** "'rogue documents,' i.e., computer-generated form affidavits . . . [with] the appearance of legitimacy, but [ ] entirely rogue, or sham, in nature."

(Emphasis added.)

Hoang requested that the court stay the sale of the property and dismiss the foreclosure, given that appellant asserted that she had, in this motion,

> clearly established that the documentation that accompanies the Order to Docket by which this action to foreclose was initiated is woefully inadequate, and so highly suspect that the identity of the Secured Party is unknown; the purported servicing agent is acting without due authorization; the affidavits required by Rule 14-207 were executed under oath by persons acting on behalf of a loan servicing agent that was not duly empowered to represent the unknown Secured Party's interests, independent of, and out of the presence of the Notary; and, the Promissory Note is not verified as a true and accurate copy of the original, nor is its ownership certified.

On August 31, 2011, the court denied the "Motion to Stay and Dismiss" by order, without elaboration. On the same day, appellant Thanh Hoang filed the same "Motion to Stay and Dismiss" as had been filed by appellant Minh Hoang on August 29.

On September 9, 2011, appellees filed an opposition to the "Motion to Stay and Dismiss," in which they asserted, first, that the Motion to Stay and Dismiss should be denied as untimely, but also that it failed on the merits.[2] Appellees laid out the chain of title of the

[2]We infer that the court's denial order of August 31, 2011, and appellees' opposition (continued...)

Note and Deed of Trust at issue, attaching the relevant assignments as exhibits. Appellees' opposition also refuted the other "vague, non-specific allegations regarding the loan documents" appellants made in their motions to stay and dismiss, pointing out that appellants' argument about "robo-signing" and "sham documents" was unsupported by any evidence.

On September 7, 2011, appellant Minh Vu Hoang filed a "Motion for Reconsideration of and Evidentiary Hearing on Motion to Stay Sale of Property and Dismiss Action to Foreclose." Appellant had not requested a hearing in her original "Motion to Stay and Dismiss." Appellees filed an opposition to the motion for reconsideration on September 15, 2011, and the court denied the motion to reconsider by order docketed on October 6, 2011.

The foreclosure sale was set for November 9, 2011. On October 28, 2011, appellants filed a "Motion to Stay Foreclosure Sale on November 9, 2011 While Appeal is Pending," noting that they had filed an appeal to this Court on October 24, 2011, in which they had asked, or would ask, to participate in mediation. On November 1, 2011, the circuit court denied appellants' motion to stay. On the morning of November 9, 2011, appellants filed a "Motion Seeking Order to Cancel Foreclosure Sale Set on November 9, 2011 at 10:00 AM," asserting that they had a "bona fide contract" to sell the property at issue "at the sale price to satisfy the full pay off of the foreclosed lender," and complaining that they "were not

[2](...continued)
of September 9, 2011, crossed in the mail.

allowed to [sic] a fair and diligent Foreclosure Mediation, per Rule 14-209.1(f)(3)(A)." By order of the same date, the court denied the motion.[3]

The property was sold at foreclosure on November 9, 2011, for $1.3 million.

On January 25, 2012, appellants filed Exceptions, raising a variety of grounds. Because some of these grounds have re-appeared again in the instant appeal, we will set them forth in detail here. In their Exceptions, appellants contended, *inter alia*, that:

1. There was "[e]rror, mistake, misrepresentation and misconduct" in that the "Substitute Trustees violated the Maryland Consumer Protection Act § 13-301(3)(9)(i)" by "discourag[ing]" their buyer, Mr. Vu, from bidding on the property because it "has large IRS debts/liens,"

    a. Appellants accused the Substitute Trustee, Ms. Diamond, of "either wrongfully mislead[ing] the potential bidder and chill[ing] his bid or she intentionally violated 26 U.S.C. § 7425 for not notify the IRS." [sic]

    b. Appellants accused Ms. Diamond of violating the Maryland Consumer Protection Act by "engaging in [the] unfair and deceptive trade

[3] Appellants represented that their alleged buyer, by nature of having submitted what they characterize as a "bona-fide contract," had an equitable interest in the property, and that he should be allowed to file a motion pursuant to Rule 14-211(a)(1) to halt the foreclosure sale. Appellants further represented that, "[a]s an equity owner and future landlord, Vu [the putative buyer] agrees to rent the Property to the Hoangs on a month-to-month lease." It emerged later in these proceedings that Vu is appellant Minh Hoang's brother. Appellants attached to their opposition to the motion to dismiss a copy of a "Trustee's Contract for Sale of Real Property" dated April 1, 2009 that recites that it is between "Gary A. Rosen, Trustee" and "Trung Vu, M.D." We see no indication that Vu's "contract" was ever accepted in the bankruptcy court. There has been no action filed seeking specific performance of an actual binding contract. Vu's own affidavit, filed in support of appellants' Exceptions, does not indicate that he had a valid contract to buy the property in the fall of 2011, when the foreclosure at issue occurred. Similarly, it is unclear what an unexecuted 2009 "contract" between the bankruptcy trustee and appellant Minh Hoang's brother has to do with foreclosure proceedings filed in 2011.

practice" of "plant[ing]" "suspicion on the buyer's mind about the IRS lien/debt on title";[4]

2. That "the substitute trustee and the lender refused to provide the Note (Maryland status [sic] of Fraud) and past payments from party number three, it can not prove as if the demanded paidoff [sic] is 1.2 Millions or more or less or if the loan was paid off by the [bankruptcy] estate. The burden of proof lies on the claimant.";

3. In a paragraph captioned "Fraud by Mortgagee," appellants asserted:

   a. That "the Plaintiffs are liable in a tort action or fraud or deceit because:

[4]Appellants accused Ms. Diamond of telling Russ Robinson, III, Mr. Vu's attorney, that "the property has large IRS debts/liens." Mr. Vu submitted an affidavit with appellants' Exceptions, asserting that Ms. Diamond had told his attorney that "there are many liens on the property" and "there is a $30 million IRS debt." Mr. Vu went on to aver that these statements "discouraged me from reinstating the loan or to make a higher bid due to concern about the IRS debt/lien." Mr. Vu further asserted in his affidavit that, on the morning of the foreclosure sale, he asked Ms. Diamond directly and she responded "'there is no IRS lien on the property,' contradicting what she had told Mr. Russ Robinson on October 31, 2012." (The reference to "2012" is an obvious drafting error by the affiant; the foreclosure sale occurred on November 9, 2011.) Mr. Robinson submitted an affidavit with appellees' Response to Exceptions . This affidavit does not support appellants' view of the conversation between Ms. Diamond and Mr. Robinson. In his affidavit, Mr. Robinson states that he and Ms. Diamond spoke by phone on November 1, 2011, and that Ms. Diamond advised him that there "were many liens" on the property; that the Hoangs "had been charged with tax evasion and bankruptcy fraud and that Minh Vu Hoang had been or was currently in federal prison," and that Ms. Diamond estimated that the Hoangs "were in debt to the IRS in the estimated amount of 30 to 40 million dollars." If Ms. Diamond made the statements attributed to her in Mr. Robinson's affidavit, they were all truthful, as demonstrated in a copy of a memorandum of decision by the United States Bankruptcy Court denying a motion to dismiss filed by appellant Minh Vu Hoang. This memo was in the record in the underlying case. Among other things, it provides that Minh Vu Hoang "engaged in a massive scheme in which she acquired hundreds of properties at foreclosure sales using more than 450 sham or fictitious partnerships and other entities," and then "concealed these assets and the income she earned from them from the Internal Revenue Service and the Bankruptcy Court." The opinion noted that the IRS had "filed a proof of claim asserting a priority claim of $14,063,288.19 and a general unsecured claim of $20,830,933.94."

(1) They know their representation of the Note is false. They do not have the Note and do not have ther [*sic*] terms of the Note to calculate the interest";

(2) "There was no valid Deed of Appointment of Substitute Trustees";

(3) That "the Notary Public's signature" on a May 26, 2009 Limited Power of Attorney executed by Citi Property Holdings "appeared to be forged," when compared to a different, later-executed Limited Power of Attorney;

(4) "Who is the Secured Party? Does the Promissory Note which secured by the foreclosing Deed of Trust exist?"

"When sifting through the documents to confirm the identity of the secured party, mortgagors challenge to the validity of the loan documents and Plaintiff's [sic] standing must have been specific, and not vague as Plaintiff alleges. Since the Vendor/Court's agent can not prove or does not want to prove the validity of each Assignment of Deed of Trust, the instrument giving the Power of Sale; the Sale was conducted under Defective Power of Sale. The whole foundation for the exercise of summary jurisdiction by the Court, in the receipt of reports and ratification of sale under Article 64 of the Code, is based on the assumption that there is a valid po[we]r of sale; for without that no sale under the statute can be made, and of course none can be legally reported and ratified."

(i) Appellants specifically asserted in this section that there was no proof of "who provided the power to Citibank to appoint Fay Servicing, LLC"; and

(ii) That "[t]he substitute trustee, as an officer of court, agent for a judicial sale, together with Fay circumvented the judicial procedure. They undermined and undercut the Homeowners right and pushed forward the foreclosure action.";

4. In a section captioned "Rule of Evidence On: Lost Document and the Falsified Affidavit of Note and Note Ownership," appellants asserted that:

a. Citi Property Holdings submitted false affidavits reflecting its status as assignee of the Deed of Trust as of February 4, 2011 and March 3, 2011, when in truth CPH did not become assignee until August 11, 2011;

b. The February 4, 2011 and March 3, 2011 affidavits are therefore "clear and convincing evidence" of fraud;

c. "The Agent of the Vendor/Court showed Abuse of Process, the sale must be set aside by the Vendor.";

5. In a section captioned "Lost Promissory Note or No Note," appellants asserted that appellees "failed to produce the Note, nor undertook to account for its absence. The Substitute Trustee and their lender(s) made the claim that they have and 'pursuant to said power and as holder of the Note,' on the Deed of Appointment of Substitute Trustees actually had no power of sale nor authority to act. Accordingly, the sale need to be set aside";

6. In a section captioned "The Falsified Deed of Appointment of Substitute Trustees," appellants asserted that neither Citi Property Holdings, as holder of the Note, nor SN Servicing (an earlier servicer of the Note, prior to Fay Servicing, LLC's involvement) had the power to validly appoint substitute trustees, again in reliance on appellants' earlier argument that Citi Property Holdings was not actually the holder of the Note at the time the appointments were made.

Appellants argued that

> "In this case evidences [*sic*] showed:
>
> 1) that Plaintiffs made a false representation to the Court and Defendants by filing Order to Docket with falsified Deed of Appointment, Affidavit of Right to Foreclose and Statement of Debt, Affidavit of Default and Right to Foreclose and Affidavit of Note Ownership[,]
>
> 2) that its falsity was either known to the Plaintiffs or that the representation (by Lender, through Lender) was made with reckless indifference as to its truth[,]

> 3) that the misrepresentation of documents were made for the purpose of defrauding the Court and Defendants[, and]
>
> 4) that the Defendants suffered compensable injury resulting from the misrepresentation."

Appellants went on to contend in this section that appellees deliberately deceived them "by means of a representation which they know to be false. They know the noteholder does not and may be never has the Note, with no Note to secured, the Deed of trust secure to nothing. They know, on February 4, 2011, Citi Property Holdings, Inc. was not the Note Holder or Owner, they also know SN Servicing has no power to appoint them to be substitute trustees. But they filed the Order to Docket and hastily pushed forward the auction sale on November 9, 2011. They refused to convey/accept a full paid off Contract between homeowners and a bona fide Buyer with ill motive to gain more in commission th[a]n legal fee on the Sale versus the foreclosure auction";

7. In a section captioned "Mortgage Void-Public Policy," appellants made the following argument:

> The significance here is not just that robo-signing was used which violates even the common sense rules of evidence. It is the fact that the false affidavits were used to force foreclosure, where pretenders are using false representations, fabrications, forgeries and perjured testimony to speed up processes. Public policy, it must be borne in mind, lies at the basis of the law in regard to illegal (documents), and the rule is adopted not for the benefit of parties but of the public.
>
> In this case, defendants urge the court to consider applying in pari delicto doctrine, that the Plaintiff who has participated with the lender(s) in wrongdoing should not [be] allowed to collect the mortgage, if any, resulting from their wrongdoing to the defendants.

8. Appellants concluded their argument in a section entitled "The Chain of Title is Broken," in which they argued that, "For the holder to have good title, every prior negotiation must have been proper . . . Preponderated [sic] evidences

> [sic] showing the Plaintiff has no power and no right to conduct the judicial sale," and "The Court . . . needs to set aside the foreclosure."[5]

On February 17, 2012, appellees filed a response in opposition to appellants' exceptions. In their response, appellees pointed out that appellants had previously made the same arguments they did in the Exceptions — including in the identical motions to stay and dismiss, filed by appellant Minh Vu Hoang on August 29, 2011, and by Thanh Hoang on August 31, 2011 — and that each of the arguments had been "repeatedly" rejected by the court. Appellees urged the court to find that *res judicata* barred the further litigation of these arguments. Appellees noted further that the exceptions did not "set forth with particularity any alleged irregularity in the foreclosure sale," and should be denied.

On or about February 27, 2012, appellants filed a response to appellees' opposition, in which they argued that *res judicata* did not apply because the issue of the validity of the assignments and integrity of the documents underlying the foreclosure had never actually been decided.

On March 19, 2012, the circuit court entered an order denying appellants' exceptions. In their motion to dismiss, appellees represented that the foreclosure was ratified the same day, but that the court's order of ratification was vacated by order of March 29, 2012, "as the foreclosure sale contract contained a contingent fee to be charged to the purchasers in the

[5]Appellant Minh Vu Hoang signed the Exceptions from a federal prison camp in Florida, where she was then serving a sentence after having pled guilty, in federal court, to tax fraud and bankruptcy fraud.

event that a substitution of purchaser was requested." See *Maddox v. Cohn*, 424 Md. 379 (2012).[6] The property was thereafter re-sold to third-party buyers on May 14, 2012.[7]

The record reflects that, on October 16, 2012, the court docketed an order denying appellants' exceptions. In that order, the court noted that it had determined, "that under [Rule] 14-305(d)(2) . . . no hearing is necessary or required[.]"[8] We infer that either the appellants re-filed their exceptions, or that the court re-considered the previously-filed

[6] *Maddox v. Cohn* was filed on January 24, 2012, and in that case, the Court of Appeals held

> that, in the absence of specific authority in the contract of indebtedness or contained in statute or court rule, it is an impermissible abuse of discretion for trustees or the lenders who 'bid in' properties, to include the demand for additional legal fees for the benefit of the Trustees in the advertisement of sale, or in any other way, in that it is contrary to the duty of trustees to maximize the proceeds of the sales and, moreover, is not in conformance with state or local rules and as we have said, is against public policy.

424 Md. at 399-400.

[7] It is not at issue on this appeal, but on May 9, 2012, appellants filed a "Complaint for Equitable Relief, Declaratory Relief, and Application for Class Certification," in which they again raised their complaints about the "sham affidavits," "rogue documents," and the chain of title for the original Note and Deed of Trust. Appellants asserted, among other things, that Substitute Trustees Diamond and Brown "filed four false affidavits" and materially misled the court. On January 25, 2013, the court granted appellees' motion to dismiss that action.

[8] Maryland Rule 14-305 is captioned "Procedure following sale," and subpart (d) governs "Exceptions to sale." Rule 14-305(d)(2) provides:

> The court shall determine whether to hold a hearing on the exceptions but it may not set aside a sale without a hearing. The court shall hold a hearing if a hearing is requested and the exceptions or any response clearly show a need to take evidence. The clerk shall send a notice of the hearing to all parties and, in an action to foreclose a lien, to all persons to whom notice of the sale was given pursuant to Rule 14-206(b).

exceptions following the March 29, 2012, vacation of the order of ratification, because the only exceptions in the record are those filed by appellants on January 25, 2012, which were denied by the court on March 19, 2012.

On October 25, 2012, the court entered an order ratifying the sale. By its terms, that order embodied a finding by the court "that the sale in the above matter was fairly and properly made in accordance with the Maryland Rules[.]"

Appellants thereafter filed motions to stay order of ratification, and to alter, vacate, or amend the judgment; and an application under Maryland Rule 14-305(g) "regarding trustee sale contract" for the property.[9] Each of these filings was denied via orders filed on December 27, 2012.

Grant of Motion to Dismiss

The foreclosure case that had been initiated by the filing, on February 17, 2011, of the Order to Docket had been assigned Case No. 344029V. The "Complaint for Equitable Relief, Declaratory Relief and Application for Class Certification" filed by appellants on May 9, 2012, and which is not at issue on appeal, was apparently assigned Case No. 362931. The pleading which generated the present appeal was the "Counterclaim and Third-Party Complaint" appellants filed on January 4, 2013. Appellants attempted to file this paper in

[9]Maryland Rule 14-305 is captioned "Procedure following sale," and at subpart (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."

the foreclosure case, *i.e.*, case number 344029V, but the pleading was assigned a new case number, 371979-V.

In the "Counterclaim and Third-Party Complaint," which also included a demand for jury trial, appellants made a number of allegations and attempted to state five counts, as follows:

1) Count I is captioned "Claims Under the Maryland Consumer Debt Collection Act (MCDCA)." Count I incorporated the nineteen paragraphs of allegations that preceded it, and its thrust was summarized by appellants in this conclusory paragraph:

> Essentially, [appellants] allege that Fay and Citigroup unlicensed in the business of collecting a consumer claim either directly or indirectly violated MCALA [referring to an allegation made in ¶ 19, that the Maryland Collection Agency Licensing Act requires a debt collector to be licensed as such] § 7-101 and 7-301(a). They knowingly violate the MCDCA's prohibition on attempting and enforcing a right by appointed Cindy Diamond and Bruce Brown to foreclose [appellants'] Property for their benefits; they are enforcing a right with knowledge that the right does not exist, and that violation, in turn, provides the basis of the Maryland Consumer Protection Act ("MCPA") violation. Each statute creates a private right of action for victims of debt collectors that violate its provisions. *See id.* § 14-202 (MCDCA) and § 13-408(a) (MCPA).

2) Count II is captioned "Claims Under the Maryland Consumer Protection Act (MCPA)." Count II did not specifically incorporate the paragraphs that preceded it. In Count II, appellants built on the allegations made in Count I that neither Fay nor Citibank was licensed as a debt collector in Maryland. Specifically, appellant contended in Count II that:

> In this case Fay and Citigroup violated the MCDCA which methods in collecting or attempting to collect a delinquent debt. Md. Code Ann., Com. Law §§ 14-201 to 14-204. Specially, the MCDCA states that a "person

collecting or attempting to collect an alleged debt arising out of a consumer transaction," *id.* § 14-201(b), may not "[c]laim, attempt, or threaten to enforce a right with knowledge that the right does not exist." *Id.* § 14-202(8). SN appointed Cindy Diamond and Bruce Brown substitute trustees to enforce the lien instrument by Deed of Appointment of Substitute Trustees signed and dated by SN's Vice President as attorney-in-fact for Citi Property Holdings Inc. ("CPH"), but CPH did not have the authority to give the Power of Attorney to SN until it allegedly became the Assignee of the deed of trust on August 17, 2011. . . .

* * *

[Appellants] complained that Citigroup and Fay may not claim, attemp[t] to enforce a right, with knowledge the right, the ownership, the possession, the existence of the Note, does not exist. § 14-202(8). [Appellants] alleged neither Fay nor CMLTI nor any of their transrors [sic] or transferors own, possess, witness, seen the note. The Note, if exist, would be inseparable with the mortgage[.] [. . .] [Appellees] knew that they do not have the right to appoint the substitute trustees to foreclose, they forged the "underhanded methods in collecting." They undermined Maryland Rule Real Prop § 7-105.1(d-1) by not filing the lost note affidavit they practiced "unfair or deceptive trade practices," Md. Code Ann., Com Law § 13-301, and expressly, the Maryland Consumer Protection Act ("MCPA") are expressly designated as "unfair or deceptive trade practices" under the Maryland Consumer Protection Act. This Court also be requested to address both Acts together due to the interrelation of the two statutes. Plaintiffs/Third Party Defendants Fay Servicing, LLC and Citigroup Global Markets Realty Corp. violated: Md Commercial Law Code Ann § 13-301(1)(3)(9)(iii) and (14) (iii). Defendants/Counterclaimants respectfully filing the above Count I and Count II against third party defendants Fay Servicing LLC and Citi Global Markets Realty Corp. as permissive counterclaim, pursuant to Md Rule 2-331(a).

3) Count III is captioned "Claims Under Maryland Status [sic] of Fraud R.P. 5-104 Fraud and Deceit." Appellants opened Count III by citing Maryland Code (1974, 2010 Repl. Vol.), Real Property Article ("RP"), § 5-104, which provides:

No action may be brought on any contract for the sale or disposition of land or of any interest in or concerning land unless the contract on which the

> action is brought, or some memorandum or note of it, is in writing and signed by the party to be charged or some other person lawfully authorized by him.[10]

In Count III, appellants attempted to also assert a claim for intentional misrepresentation against the Substitute Trustees and Citibank, N.A. as trustee for CMLTI Asset Trust. Their explanation is hard to follow, but the end result is that appellants accused appellees of intentionally misrepresenting that the Note in their possession was enforceable and had been validly assigned.[11]

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[10] In Count III, appellant bolded and underlined the word "note" in the final sentence. It is apparent from this and other filings in this case that appellants were claiming that the original promissory Note (which they claimed not to remember signing) was lost. And if the original Note was lost, went the argument, then all the foreclosure proceedings that flowed from it — the assignments, affidavits, the power of sale — were defective and should be dismissed. It is true that the Note in the record is a copy of the original. But, as the record plainly reveals, the Note and the Deed of Trust securing it were executed together on May 4, 1990. The documents refer to each other. The Notary Public's certification on the Note provides that it "is the Note described in, and secured by, a Deed of Trust dated herewith to Randy Weiss, Esq. as Trustee[ ] conveying real property located in Montgomery County, Maryland, the said Deed of Trust and this Note having been executed in my presence on the date first above written," which was May 4, 1990. The Deed of Trust — which appellants do not dispute is valid — provides that it was made on May 4, 1990 between appellants and Randy Weiss, Esq., as Trustee for the interest of Home Savings of America, the Beneficiary. Appellants were identified in the Deed as "Grantors," and the Deed provided that "The Grantor absolutely and irrevocably grants, transfers and assigns to Beneficiary the rents, income, issue and profits of all properties covered by this Deed of Trust." The Deed set forth that it was executed "FOR THE PURPOSE OF SECURING: (1) Payment of the principal sum of $1,000,000.00 with interest thereon, according to the terms of a promissory note of even date herewith and having a final maturity date of May 10, 2030 made by Grantor, payable to Beneficiary or order . . .[.]"

[11] For instance, appellants write in Count III that Citibank, N.A. and the Substitute Trustees represented that Washington Mutual Bank sold the Note and Deed of Trust to Citigroup on March 15, 2006, "while W[ashington] M[utual] B[ank] had no Note to assign," and that this representation was recklessly made "because these important, legal documents which severely effect [sic] the legality of the foreclosure proceedings . . Maryland law makes clear that the assignment transferred the **Note**, the right to enforce **the deed of trust**

(continued...)

Appellants also assert a claim for fraudulent concealment against appellees within Count III (which count, again, purportedly is based on the Statute of Frauds.) Appellants claim that appellees had a duty to disclose to them a material fact; namely, "that they never have/possess/witness/evidence the promissory note" and "that the note is not lost and they did not submit the Lost Note Affidavit while filing order to docket." Appellants claim that appellees' "fraudulent concealment" of the whereabouts of the Note (a copy of which had been filed with the Order to Docket) induced them to "rel[y] to the threat of Cinthya [sic] Burger through SN Serving [sic] Corp's Notice of Intent to Foreclose, took hasty and panicky action in justifiable reliance on the concealment." Appellants asserted later in Count III that

> the concealment is continued until the date of sale the material facts of the trustee's payments, tax payments and tax liens causing the "chilling effect" of the Investor causing the Hoang [sic] to not just lose their home for 28 years but also become homeless, they can not even stay there as a renter as agreed with the investor/buyer.

4) Count IV was captioned "Neither the Plaintiffs, the Servicer, Nor the Alleged Note Holder has the Power to Enforce the-No-Note. Wrongful Foreclosure." Appellants recognized in the body of Count IV that "[w]rongful [f]oreclosure is not a separate cause of action in Maryland," but they nonetheless "allege a common-law claim for Wrongful Foreclosure against all plaintiffs and third-party defendants[.]" [12] Appellants' construction

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[11](...continued)
followed." (Bolding in original.)

[12] Although "[c]ommon-law foreclosures apparently are still viable in Maryland," *Simard v. White*, 383 Md. 257, 277-78 (2004), it is beyond reasonable dispute that this foreclosure proceeded pursuant to the power of sale granted in the May 4, 1990, Deed of Trust.

of a claim for common-law wrongful foreclosure depends on their contention that only the original copy of a promissory note is sufficient to effect a foreclosure and that a copy will not do.[13]

Appellants cited the Commercial Law Article of the Maryland Code, specifically, "§§ 3-1-2-3-605," to support the claim that "neither the plaintiffs, the Servicer, nor the alleged note holder has the power to enforce the copy-of-copy note," because "the copy-of-copy note, to date the only proof plaintiffs have submitted to . . . this court — show it is payable to order of Home Saving of America and assuming it is absent of indorsement(s) [sic], only HSA can either negotiate or transfer the "note".[14]

Further along in Count IV, appellants asserted that appellees lacked standing to foreclose, insisting again that, under the original Note, only Home Savings of America, the original beneficiary of the Note in 1990, can enforce the Note.

Still later in Count IV, appellants asserted, in a bolded title to ¶ 29, that "The Noice [sic] Afforded to Defendant is Legally Insufficient to Give Notice that a Court Proceeding Has Been Started or Give Notice to the Defendants of the Time in Which to Respond." In

[13] This contention is erroneous. Rule 14-207(b)(3) allows for the filing of copies of notes as exhibits to the order to docket, if "supported by an affidavit that it is a true and accurate copy and certifying ownership of the debt instrument[.]" An Affidavit of Note and Note Ownership was filed as Exhibit H to the Order to Docket in this case, and it provided that "the copy of the Note filed in these proceedings is a true and accurate copy of the original Note."

[14] There is no "§§ 3-1-2-3-605" in Maryland Code (1975, 2013 Repl. Vol.), Commercial Law Article ("CL"). Title 3 of that Article deals with Negotiable Instruments generally. A promissory note can be a negotiable instrument. See CL § 3-104. Promissory notes can be transferred, in which case the transferee is vested with the same right to enforce the instrument as the transferor had. CL § 3-203.

this regard, appellants conceded that appellant Thanh Hoang was mailed a copy of the order to docket "soon after" it was filed on February 17, 2011, but they claimed that appellant Minh Hoang "who did not live at the Property since January 2008 was not served."[15] Appellants wrapped up their claims in Count IV by arguing: "The Notice of Intent to Foreclose, Order to Dockets are legally insufficient, violated Md Rules as pleaded above. The action should be dismissed because it is a wrongful foreclosure."

5) Count V was captioned "Quiet Title," and cited RP § 14-108. In this count, appellants contended again that Mr. Vu, appellant Minh Hoang's brother, had submitted a "binding contract to purchase the property from the Chapter 7 Trustee" on June 29, 2009, and that therefore Mr. Vu was a "bona fide purchaser" to whom "equitable title to the Property had already passed . . . by the time the suit was filed." Appellants cited the "doctrine of equitable conversion" in this count. Appellants also raised again their assertion that there was some kind of IRS lien on the property that the substitute trustees failed to list in the advertisement for the foreclosure sale. Despite the fact that it was established earlier that there was no IRS *lien* on the property, in Count V appellants argued: "To the extent that Thanh and Minh Vu Hoang $34,000,000.00 tax claims. . . substitute trustee did not notify bidders through notice of mortgage sale created an error and adequacy of advertisement." Appellants then argued:

> Together with all factual allegations above, defendants plead that they met all conditions and factors required under Md. Code Ann., Real Prop. § 14-108 for

[15] Appellants note that Minh Hoang "resided at Alderson, West Virginia from 11/2010 through 9/2011[.]"

> a Quiet Title claim. Furthermore, since the circuit has not ratify the sale, defendants thus do not challenge the validity of ownership rights in the property. See Md. Code Ann., Real Prop. § 14-108(a). They seek to decree that lender(s) never possess, own, have, witness, seeing the alleged promissory note, without the note existence, the lien against the Property was invalidly created or has become invalid.

On March 21, 2013, appellees filed their Motion to Dismiss, the grant of which led to this appeal. In that motion, appellees pointed out first that appellants' purported counterclaim and third-party claim was not timely filed, as it came two-and-a-half months after the court ratified the foreclosure sale on October 25, 2012. There was, in essence, no remaining "claim" for appellants to "counter" with the filing of their "counterclaim and third-party complaint," and because the validity of the foreclosure proceedings had been approved by the circuit court by virtue of the ratification of the sale, it was not proper for appellants to attempt to attack the foreclosure via a collateral proceeding. Appellees urged the court to find that principles of *res judicata* dictated that the "counterclaim and third-party complaint" be dismissed. They pointed out that appellants' arguments had been repeatedly made, and rejected, in the foreclosure case. Appellees attached as exhibits to the motion to dismiss:

- appellant Minh Vu Hoang's August 29, 2011 Motion to Stay Sale of Property and Dismiss Action to Foreclose (Ex. A);
- appellees' opposition to that motion, filed September 9, 2011 (Ex. B) (along with the exhibits that had been attached to that motion, which demonstrated, inter alia, the chain of title of the assignments of interest in the Note and Deed of Trust);
- the court's denial of the Motion to Stay Sale, filed August 31, 2011 (Ex. C);

- appellant Minh Vu Hoang's September 7, 2011 motion for reconsideration (Ex. D) and appellees' September 15, 2011 opposition (Ex. E);

- the September 28, 2011 denial by the court of the motion to reconsider (Ex. F);

- appellants' October 28, 2011 "Motion to Stay Foreclosure Sale on November 9, 2011 While Appeal is Pending" (Ex. G), and the court's denial of same on November 1, 2011 (Ex. H);

- appellants' November 9, 2011 "Motion Seeking Order to Cancel Foreclosure Sale Set on November 9, 2011 at 10:00 AM" (Ex. I) and the court's denial of that motion on the same date (Ex. J);

- appellants' exceptions (Ex. K), appellees' response in opposition (Ex. L), and appellants' response to appellees' opposition (Ex. M);

- the March 19, 2012 order of court denying appellants' exceptions (Ex. N and Ex. O);

- the October 16, 2012 order denying exceptions following the vacation of the March 19 order (Ex. P);

- the October 25, 2012 order of ratification of sale (Ex. Q);

- the orders of December 27, 2012, denying appellants' motion to stay order of ratification (Ex. R), motion to alter or vacate or amend (Ex. S), and application pursuant to Maryland Rule 14-305(g) regarding trustee sale contract (Ex. T);

- the May 9, 2012 "Complaint for Equitable Relief, Declaratory Relief, and Application for Class Certification" filed by appellants (Ex. U); and

- the January 28, 2013 order of court granting appellees' motion to dismiss that action (Ex. V).

Appellants filed an opposition on April 11, 2013, arguing that *res judicata* did not bar this suit. Appellants began their argument by noting, "[a]t first blush, [appellees'] representation of the three elements of *res judicata* appear to be satisfied in the present

case."[16] But appellants argued that it did not apply here because, they contended, Gary Rosen, who was appointed by the United States Bankruptcy Court for the District of Maryland to act as the Trustee of the appellants' bankruptcy estate — which had been pending since May 10, 2005 — was not a party to the foreclosure proceedings in the Circuit Court for Montgomery County.[17] Appellants argued that Mr. Rosen was an "indispensable party who under Bankruptcy Court's approval; has claimed his trustee-bona fide purchaser status and have a valid contract to sell the same Property to third party." Appellants also argued that:

> In this case, there is no final determination from the Court as if the Property is still available for the second trustees to sell while the bankruptcy trustee have [sic] sold it to a bona fide purchaser. [C]onsequently that Purchaser has already acquired the equitable title of the very same Property [appellees] want to foreclose. There has not been a final judgment on the merits in the previous case, claim preclusion remains problematic, defendants [sic] seek the remedy may be unavailable to them [sic].

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[16] In their motion to dismiss, appellees cited *R & D 2001, LLC v. Rice*, 420 Md. 648 (2008), to set forth the elements of *res judicata*, and appellees asserted:

> Pursuant to Maryland law, a subsequent claim is barred by the doctrine of res judicata when (1) the parties in the present litigation are the same or in privity with the parties to the earlier suit; (2) the second suit presents the same cause of action or claim as the first, or the claim could have been raised in the prior suit but was not, and (3) the prior adjudication was a final judgment on the merits by a court of competent jurisdiction.

[17] Mr. Rosen was not a party to either the foreclosure case **or** the "Counterclaim and Third-Party Complaint," which makes appellants' contention that he was "an indispensable party" difficult to comprehend. Appellants did name Mr. Rosen as a defendant in the "Complaint for Equitable Relief, Declaratory Relief and Application for Class Certification" they filed on May 9, 2012 (Case No. 362931-V.) That case was dismissed on January 25, 2013, upon the grant of appellees' motion to dismiss. Appellants did not appeal that dismissal.

Appellants cited *Esslinger v. Baltimore City*, 95 Md. App. 607 (1993), and argued that the rationale of that case "not only control here," but that the court should "fully embrace[ ] its good sense."[18] Appellants concluded by arguing:

[18] *Esslinger* dealt with a series of appeals by a man who wanted to put a satellite dish on his property in Baltimore City. In 1986, he put up the dish and then sought permission from the City Board of Zoning Appeals. Permission was denied. On judicial review to the Circuit Court for Baltimore City, Esslinger argued that the agency's decision was not supported by substantial evidence, and that FCC regulations pre-empted Baltimore City's satellite dish ordinance. Esslinger's petition for judicial review was denied. He tried again in 1989, but his application to install a satellite dish was denied by the Board of Zoning Appeals. Esslinger did not appeal. In 1991, he tried a third time, again arguing to the Board that FCC regulations pre-empted local ordinances. The Board again denied Esslinger's application, and he again filed a petition for judicial review, raising his pre-emption argument. The City responded with a motion for summary judgment on the basis of *res judicata* and collateral estoppel. The circuit court did not grant the City's motion, but ruled against Esslinger on the basis of its finding that there was no federal pre-emption, and that there was substantial evidence in the record for the Board to have denied Esslinger's application. On appeal, in an unreported opinion, this Court held that the circuit court should have granted summary judgment to the City on the basis of *res judicata*. We reversed and remanded for the entry of summary judgment. Esslinger had, in the meantime, filed the identical suit in federal court, seeking declaratory and injunctive relief. The federal court granted the City's motion to dismiss on the grounds of abstention. Esslinger then filed the same suit in the Circuit Court for Baltimore City. He contended that the City's 1989 denial of a conditional use permit for his satellite dish implicated his civil rights under 42 U.S.C. § 1983. He sought declaratory and injunctive relief and money damages, including punitive damages. The City filed a motion to dismiss based on *res judicata* and collateral estoppel, which was granted.

Esslinger appealed to this Court. We found that "the claim presented in this civil rights action is identical to that determined in the prior adjudication; all three *res judicata* elements are thus present. When this is so 'a plaintiff may not relitigate a claim for relief by switching legal theories.'" 95 Md. App. at 620 (quoting *Kent Cty. Bd. of Educ. v. Bilbrough*, 309 Md. 487, 500 (1987)). However, we found that the court erred in granting the City's motion to dismiss Esslinger's claims for money damages on the basis of *res judicata*, because money damages would not have been available to Esslinger in the original zoning case upon which the City's *res judicata* argument rested: "Accordingly, although Esslinger's claims for injunctive and declaratory relief are barred by *res judicata*, his claims for damages are not (continued...)

> Based on the operative facts and the Doctrine of res judicata which bars claims that were actually litigated, but also claim that could have been litigated, [appellants] assert that they did not "have a day in court," nor that the Court has adjudicated the claims against Defendant Rosen. [Appellants] plead that none of Hoang's claims is barred by res judicata or an exception to res judicata has applied.

Appellants closed by asking the court to deny appellees' motion to dismiss, and "order a consolidation of Civil Actions 371979V [the "Counterclaim and Third Party Complaint" filed on January 4, 2013], 362931V [the May 9, 2012 "Complaint for Equitable Relief"] and 344029V [the foreclosure case] for conservation of judicial recourses [sic] and efficiency and avoiding inconsistent results."

Appellants did not request a hearing on the motion to dismiss in their opposition. On September 11, 2013, the Circuit Court for Montgomery County granted the appellees' motion to dismiss. This appeal followed.

DISCUSSION

In *Fagnani v. Fisher*, 418 Md. 371 (2011), the Court of Appeals provided the following overview of the foreclosure process:

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[18](...continued)
barred by *res judicata* since the latter could not have been asserted in the circuit court action reviewing the initial zoning case." 95 Md. App. at 624.

The rationale expressed in *Esslinger* does not apply here. In that case, Esslinger added new claims for damages that would have been unavailable in his earlier filings. Here, appellants' requests for relief and theories of recovery have been the same across all filings. *Res judicata* precludes the issues litigated — or that could have been litigated – in the foreclosure case from being re-litigated pursuant to appellants' "Counterclaim and Third-Party Complaint."

One who borrows money from a lender/creditor or mortgagee is designated as a borrower/debtor or mortgagor. In order to ensure repayment, a lender or creditor may require the debtor to convey property to the creditor to be held as collateral to secure the debt. The conveyance ensures that the creditor will either be repaid the loan or retain ownership of the collateral. See *Simard v. White*, 383 Md. 257, 270–271, 859 A.2d 168, 176 (2004). Where the legal relationship exists between only the debtor and the lender, it is evidenced by a mortgage document; however, where the debtor conveys the property to a third party trustee rather than the lender, it is evidenced by a deed of trust. 383 Md. at 281, 859 A.2d at 182 (quoting Ricard M. Venable, The Law of Real Property 179 (1892)). A deed of trust is a "security interest device [that] transfers the legal title from a property owner to one or more trustees to be held for the benefit of a beneficiary." *Springhill Lake Investors Ltd. P'ship v. Prince George's County*, 114 Md. App. 420, 428, 690 A.2d 535, 539, cert. denied, 346 Md. 240, 695 A.2d 1229 (1997). The conveyance transfers the estate of the debtor to the trustee, giving the trustee legal title to the property. The debtor retains an "equity of redemption" or the right "to reassert complete [ ] ownership of the land, upon payment of debt and any other charges rightly assessed under the terms of the lien instrument." 383 Md. at 272 n. 12, 859 A.2d at 177 n. 12 (internal citations omitted). The conveyance can then be "defeated on the performance of a condition subsequent (the payment of the money)." *Simard*, 383 Md. at 271, 859 A.2d at 176 (quoting *Venable*, 177); see also *Williams v. Safe Deposit & Trust Co.*, 167 Md. 499, 504, 175 A. 331, 333 (1934) ("[A] mortgage conveys the whole legal estate to the mortgagee, subject, generally, to the condition subsequent that, upon due payment of the mortgage debt and a performance of all the covenants by the mortgagor, the mortgage deed is avoided.").

Not unlike a mortgage, the deed of trust may contain a power of sale. In a deed of trust, the power of sale enables the trustee to sell the property upon the debtor's default, in order to reimburse the lender for the debt. 383 Md. at 281, 859 A.2d at 182. Pursuant to the power of sale provision, a trustee may institute a foreclosure action, in which the trustee may "order and direct that the mortgaged premises, or so much thereof as may be necessary to discharge the money due and costs, be sold for ready money." 383 Md. at 276–77, 859 A.2d at 180–81 (internal citations omitted).

A foreclosure sale is governed by Md.Code (1974, 1996 Repl.Vol.1999 Supp.), § 7–105 of the Real Property Article, and the Maryland Rules. **Maryland Rule 14–305(d) provides that if a party perceives an irregularity in the foreclosure sale, it may file exceptions to the sale of the property**. **The ratification of a foreclosure sale is, however, presumed to**

be valid. *Webster v. Archer*, 176 Md. 245, 253, 4 A.2d 434, 437–438 (1939). **It is settled law that, "there is a presumption that the sale was fairly made, and that the antecedent proceedings, if regular on the face of the record, were adequate and proper, and the burden is upon one attacking the sale to prove the contrary.**" *Id*. The party excepting to the sale bears the burden of showing that the sale was invalid, and must show that any claimed errors caused prejudice. *Ten Hills Co. v. Ten Hills Corp*., 176 Md. 444, 449, 5 A.2d 830, 832 (1939). Additionally, "[i]n reviewing a court's ratification of a foreclosure sale, we will disturb the circuit court's findings of fact only when they are clearly erroneous." *Fagnani*, 190 Md. App. at 470, 988 A.2d at 1138 (relying on *Jones v. Rosenberg*, 178 Md. App. 54, 68–69, 940 A.2d 1109 (2008)). Further, "**if a mortgagee or his assignee complies with the terms of the power of sale in the mortgage, and conducts the foreclosure sale properly, the court will not set aside the sale merely because it brings loss and hardship upon the mortgagor.**" *Bachrach v. Washington United Cooperative, Inc.,* 181 Md. 315, 324, 29 A.2d 822, 827 (1943).

When a foreclosure sale is held pursuant to the terms in a deed of trust, trustees must adhere to certain standards in carrying out their duties. Trustees are under a duty "to exercise the same degree of prudence, care, diligence and judgment, that a man of ordinary business judgment and experience would exercise, in selling his own property." *Webster,* 176 Md. at 254, 4 A.2d at 438. In performing their obligations, trustees have " discretion to outline the manner and terms of the sale, provided their actions are consistent with the deed of trust and the goal of securing the best obtainable price." *Simard*, 383 Md. at 312, 859 A.2d at 200 (2004) (relying on *Waters v. Prettyman*, 165 Md. 70, 75, 166 A. 431, 433 (1933)). Further,

> Unless the precise method of sale is prescribed by contract or decree, some discretion is necessarily granted to the trustee, attorney or assignee, making the sale, as to the manner in which the property will be offered. That discretion will naturally be affected by the character and location of the property and other circumstances peculiar to the case, so that it is impossible to lay down a hard and fast rule . . . .

Webster, 176 Md. at 254–55, 4 A.2d at 438.

418 Md. at 382-85 (footnotes omitted, emphasis added).

In this appeal, we are not reviewing the denial of appellants' exceptions; it appears no timely appeal was filed in the foreclosure case. Therefore, the propriety of the foreclosure sale is a settled question. *See, e.g.*, *Ed Jacobsen, Jr., Inc. v. Barrick*, 252 Md. 507, 511 (1969); *Chaires v. Chevy Chase Bank*, *F.S.B.*, 131 Md. App. 64, 77-78 (2000).

We are reviewing only the grant of a motion to dismiss. In *Higginbotham v. Public Service Com'n of Maryland*, 171 Md. App. 254, 264 (2006), we said:

> The proper standard for reviewing the grant of a motion to dismiss is whether the trial court was legally correct. In reviewing the grant of a motion to dismiss, we must determine whether the complaint, on its face, discloses a legally sufficient cause of action. In reviewing the complaint, we must presume the truth of all well-pleaded facts in the complaint, along with any reasonable inferences derived therefrom. Dismissal is proper only if the facts and allegations, so viewed, would nevertheless fail to afford plaintiff relief if proven.

(Citations omitted.)

I. Appellants' questions 1, 2, and 4

Appellants' first claim on appeal is that the court "never granted them a meaningful hearing as requested," which appellants contend means "[t]heir elementary and fundamental requirements of due process . . . [was] not provided." The short answer to this contention is that appellants did not request a hearing on the motion to dismiss. Rule 2-311(f) provides:

> A party desiring a hearing on a motion, other than a motion filed pursuant to Rule 2-532, 2-533, or 2-534, shall request the hearing in the motion or response under the heading "Request for Hearing." The title of the motion or response shall state that a hearing is requested. Except when a rule expressly provides for a hearing, the court shall determine in each case whether a hearing will be held, but the court may not render a decision that is dispositive of a claim or defense without a hearing if one was requested as provided in this section.

Because appellants failed to request a hearing, none was required, and they cannot complain on appeal that the court erred in failing to grant them a hearing they never requested.

Among appellants' complaints on appeal, as their second and fourth questions presented, is a contention that the motions court improperly considered matters outside the pleadings, thus "transmuting the motion to dismiss into a motion for summary judgment" without "adequately notify[ing] the parties of its intention to consider appellees[']extraneous materials." The "extraneous materials" to which appellants refer are Exhibits A through V, discussed above and appended to appellees' motion to dismiss. The materials were all filed in the foreclosure action, 344029-V, the case in which appellants tried to file the "Counterclaim and Third-Party Complaint" at issue here, and they were the basis for appellees' argument that appellants either had, or could and should have, raised all the contentions they made in their "Counterclaim and Third Party Complaint" in the foreclosure case, and that *res judicata* therefore applied. Because the documents were attached simply to show what records existed in another of the circuit court's files, it would not have been inappropriate for the court to take judicial notice of its own records. Maryland Rule 5-201. Further, Maryland Rule 2-322(c) permits a court to consider certain matters outside the complaint, provided the parties are given "reasonable opportunity" to respond. Here, over five months elapsed between the time appellees filed the documents with their motion to dismiss and the date the court ruled on the motion.

In *Cochran v. Griffith Energy Services*, 426 Md. 134 (2012), the Court of Appeals considered judicial notice in a case that had been dismissed on the basis of *res judicata*. *Cochran* concerned litigation by Elizabeth Ingoe and Robert Cochran, Jr., the adult children ("the Children") of the plaintiffs in an earlier suit ("the Parents") against Griffith Energy Services.[19] In the earlier suit, the Parents won a judgment against Griffith, but their fraud claim was dismissed. The Children then sued Griffith for fraud and negligent supervision over the same oil spill that had been the basis of the Parents' suit. Griffith defended by arguing that *res judicata* applied, and the trial court granted Griffith's motion to dismiss. In an unreported opinion, this Court affirmed on appeal. The Court of Appeals granted certiorari, holding that the Children, although they had not been parties to the first litigation, were in privity with the Parents, for the purposes of *res judicata*. However, the Court also had to consider "a counterpoint highlighted by" the Children at oral argument: namely, that certain statements made in the first lawsuit against Griffith (regarding the fact that the Parents were not seeking damages on behalf of the Children) should be judicially noticed. The Court of Appeals agreed that it would take judicial notice of "pertinent filings from the first lawsuit," *id.* at 144-45.

The *Cochran* Court further highlighted why, in the Children's case where the question of *res judicata* had been raised, it would take judicial notice of materials of record in the Parents' case:

[19] The genesis of the Parents' suit was a 2002 spill of fuel oil into their basement by Griffith. The Children lived at the home only when they were on break from college, and were not parties to the Parents' suit.

> If we were to hold that Petitioners could have a "second bite at the apple" after the conclusion of the first suit, we would violate the finality principles underlying *res judicata*. Such a holding would effectively allow the Cochran family to make a strategic decision to exempt themselves from preclusion principles in case they considered the verdict in the first lawsuit insufficient. We bear in mind the observation from the Wright treatise that "it has come to be recognized that the privity label simply expresses a conclusion that preclusion is proper." 18A Charles A. Wright et al., Federal Practice and Procedure § 4449 (2d ed. 2002). **Surely, to allow a second litigation against the Respondents on this same issue would contravene the** *res judicata* **doctrine, which, by design, " avoids the expense and vexation attending multiple lawsuits, conserves the judicial resources, and fosters reliance on judicial action by minimizing the possibilities of inconsistent decisions."** *Norville*, 390 Md. at 107, 887 A.2d at 1037 (citations and quotation marks omitted).

426 Md. at 147 (emphasis added).

Similarly, in this case we find no error in the circuit court's consideration of pleadings from its own records in the foreclosure case.

II. Appellants' questions 2 and 5 *(Res judicata)*

In *Griffith, supra,* 426 Md. at 140, the Court of Appeals stated:

> The doctrine of *res judicata* "bars the relitigation of a claim if there is a final judgment in a previous litigation where the parties, the subject matter and causes of action are identical or substantially identical as to issues actually litigated and as to those which could have or should have been raised in the previous litigation." *R & D 2001, LLC v. Rice*, 402 Md. 648, 663, 938 A.2d 839, 848 (2008) (citations and quotation marks omitted); see also *Anne Arundel County Bd. of Ed. v. Norville*, 390 Md. 93, 106–07, 887 A.2d 1029, 1037 (2005) (same). As we have previously described, the *res judicata* doctrine "embodies three elements: (1) the parties in the present litigation are the same or in privity with the parties to the earlier litigation; (2) the claim presented in the current action is identical to that determined or that which could have been raised and determined in the prior litigation; and (3) there was a final judgment on the merits in the prior litigation." *Rice*, 402 Md. at 663, 938 A.2d at 848.
>
> As we explained in *Norville*:

> *Res judicata* protects the courts, as well as the parties, from the attendant burdens of relitigation. This doctrine avoids the expense and vexation attending multiple lawsuits, conserves the judicial resources, and fosters reliance on judicial action by minimizing the possibilities of inconsistent decisions.

Norville, 390 Md. at 106–07, 887 A.2d at 1037.

A. "the parties in the present litigation are the same *or in privity with* the parties to the earlier litigation"

In the foreclosure case, the parties were Cindy Diamond and Bruce Brown, as substitute trustees, and appellants. Diamond and Brown were acting to foreclose a Note then held by Citi Property Holdings, Inc. The Deed of Trust vested in the Note Holder the power to appoint Substitute Trustees, which occurred here on February 4, 2011.

In the "Counterclaim and Third-Party Complaint," appellants named as parties Diamond and Brown; Fay Servicing, LLC; Citigroup Global Markets Realty Corp.; and Citibank, N.A., Trustee for CMLTI Asset Trust.[20]

The parties to the Counterclaim and Third-Party Complaint were all either parties to the foreclosure suit (Diamond and Brown), or in privity with those parties. In their opposition to appellants' motion to stay sale of property and dismiss action to foreclose, appellees outlined the relevant chain of title of the Note and Deed of Trust from the time those documents were executed on May 4, 1990. The substitute trustees traced the chain from Home Savings of America, the original lender on the Note and beneficiary on the Deed

[20]They did not name Citi Property Holdings, Inc., the Note Holder at the time of foreclosure and the entity that actually had the power to, and did, foreclose, as attested to in the Affidavit of Default and Right to Foreclose, filed with the Order to Docket.

of Trust, through HSA's acquisition by Washington Mutual Bank in 1998, through Washington Mutual's 2006 assignment of the Note and Deed to Citigroup Global Markets Realty Corp. Citigroup Global Markets Realty Corp., in turn, assigned the Note and Deed of Trust to Citi Property Holdings, Inc., effective March 1, 2010. Citi Property Holdings assigned the Note and Deed of Trust to CMLTI Asset Trust, effective April 28, 2011.

Appellants do not contend that the foreclosing parties are not in privity with each other. The arguments appellants make here about the insufficiency of the assignments, and the accompanying lack of power of the substitute trustees to foreclose, were made in the motion to stay sale as well. That motion was denied on August 31, 2011. A motion to reconsider the denial of the motion to stay was denied on October 6, 2011. These arguments were made in the Exceptions. The Exceptions were denied on March 19, 2012. Appellants did not file an appeal of the denial of their Exceptions. Appellants' contention in this regard was finally litigated in the foreclosure proceedings. Plainly, the first element of *res judicata* is satisfied.

B. "the claim presented in the current action is identical to that determined or that which could have been raised and determined in the prior litigation"

In the "Counterclaim and Third-Party Complaint," appellants raise the same arguments about the validity of the assignments and the chain of title of the Note and Deed as they made in other filings in the foreclosure case, including the motion to stay and the Exceptions discussed above. In their brief, appellants argue that, as to these issues, "[i]t is far from clear that there has been a final judgment on the merits of *res judicata*." We

disagree. Appellants raised the issues they press in the "Counterclaim and Third-Party Complaint" in earlier motions that were denied, such as the motion to stay sale, the motion for reconsideration of the denial of that motion, and in their Exceptions. Denial of Exceptions is a judgment on the merits.

Furthermore, the ratification of the foreclosure sale "'is *res judicata* as to the validity of such sale, except in case of fraud or illegality, and hence its regularity cannot be attacked in collateral proceedings.'" *Bank of New York Mellon v. Nagaraj*, 220 Md. App. 698, 707 (2014) (quoting *Ed Jacobsen, Jr., Inc. v. Barrick*, 252 Md. 507, 511 (1969)). In *Bates v. Cohn*, 417 Md. 309, 318-19 (2010), the Court of Appeals noted the proper order of objections a homeowner may pursue relative to a foreclosure:

> Before a foreclosure sale takes place, the defaulting borrower may file a motion to "stay the sale of the property and dismiss the foreclosure action." Md. Rule 14–211(a)(1). The borrower, in other words, may petition the court for injunctive relief, challenging "the validity of the lien or . . . the right of the [lender] to foreclose in the pending action." Md. Rule 14–211(a)(3)(B).
>
> * * *
>
> Once the property is sold at foreclosure, the borrower may file a claim pursuant to Rule 14–305 only as to "exceptions to the sale." (Emphasis added.) In doing so, he or she must "set forth the alleged irregularity with particularity. . . ."

In *Johnson v. Nadel*, 217 Md. App. 455, 466 (2014), we discussed some of the "irregularities" that are raised in Exceptions, noting:

> This Court has spoken to the nature of "procedural irregularities" which are the focus of Rule 14–305(d) exceptions:
>
> > The procedural irregularities might include: "allegations such as the advertisement of sale was insufficient or misdescribed the

> property, the creditor committed a fraud by preventing someone from bidding or by chilling the bidding, challenging the price as unconscionable, etc." . . . There is a presumption in favor of the validity of a judicial sale, and the burden is on the exceptant to establish to the contrary.

Jones v. Rosenberg, 178 Md. App. at 69, 940 A.2d 1109 (citation omitted). "Rule 14–305 is not an open portal through which any and all pre-sale objections may be filed as exceptions, without regard to the nature of the objection or when the operative basis underlying the objection arose and was known to the borrower." *Bates v. Cohn*, 417 Md. 309, 327, 9 A.3d 846 (2010). See *Thomas v. Nadel*, 427 Md. 441, 449, 48 A.3d 276 (2012).

C. there was a final judgment on the merits in the prior litigation

Ratification of a foreclosure sale is a final judgment on the merits. In *Manigan v. Burson*, 160 Md. App. 114 (2004), we said:

> "'[T]he law is firmly established in Maryland that the final ratification of the sale of property in foreclosure is *res judicata* as to the validity of such sale, except in case of fraud or illegality, and hence its regularity cannot be attacked in collateral proceedings.'" *Ed Jacobsen, Jr., Inc. v. Barrick*, 252 Md. 507, 511, 250 A.2d 646, 648 (1969) (citation omitted). *See* generally GORDON ON MARYLAND FORECLOSURES, supra, § 24.3. "After the hearing on exceptions and the sale is ratified, Maryland Rule 2-535 . . . would apply." *Id*., § 27.44 at 1150. That is, "[o]n 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." *Id*. (quoting Md. Rule 2-535(b)) (emphasis supplied by Gordon). It is well established that "a litigant seeking to set aside an enrolled decree must prove extrinsic fraud and not intrinsic fraud." *Billingsley*, 43 Md. App. at 718-19, 406 A.2d at 951.
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> > [A]n enrolled decree will not be vacated even though obtained by the use of forged documents, perjured testimony, or any other frauds which are "intrinsic" to the trial of the case itself. Underlying this long settled rule is the principle that, once parties have had the opportunity to present before a court a matter for investigation and determination, and once the decision has been rendered and the litigants, if they so choose, have exhausted every means of reviewing it, the public policy of this State demands that there be an end to that litigation. . . .

> This policy favoring finality and conclusiveness can be outweighed only by a showing "that the jurisdiction of the court has been imposed upon, or that the prevailing party, by some extrinsic or collateral fraud, has prevented a fair submission of the controversy."
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> *Id*. at 719, 406 A.2d at 951 (citation omitted). Put simply, "[f]raud is extrinsic when it actually prevents an adversarial trial but it is intrinsic when it is employed during the course of the hearing which provides the forum for the truth to appear, albeit, that truth was distorted by the complained of fraud." *Id.*, 406 A.2d at 951.

See also Kline v. Chase Manhattan Bank, N.A., 43 Md. App. 133 (1979), in which we spoke of "the clear rule that a ratified foreclosure proceeding may not be collaterally assailed," and of the fact that, "[a]bsent fraud, mistake, or irregularity in the foreclosure sale, the ratification by the court wraps the proceeding in the armor of *Res judicata* so that the foreclosure may not be collaterally attacked for inadequacy of the price obtained at sale." *Id*. at 143.

In the "Counterclaim and Third-Party Complaint," appellants attempt to collaterally attack the foreclosure sale by listing a variety of accusations regarding the ineffective assignments of the Note and Deed of Trust, the validity of the appointment of substitute trustees, the specter of "false affidavits" and "sham documents," and the lack of power of the Note Holder to foreclose. All of appellants' arguments attacking the foreclosure proceedings had been previously made in various pleadings filed in the foreclosure case. As a consequence of the denial of those motions, and the ratification of the foreclosure sale, the circuit court properly held that *res judicata* precludes further litigation of these issues. Therefore, appellees' motion to dismiss the "Counterclaim and Third-Party Complaint" was properly granted.

III. Appellants' question 3

Finally, appellants' question 3 asks:

> While Maryland permissive counterclaim rule was created so that the grounds asserted in the counterclaim could have been a good defense to the foreclosure and Appellants have repeatedly raised their defense. Was the lower court erroneous when it disallowed Appellants to file their counterclaim within the foreclosure action and before the foreclosure hearing for ratification of sale?

In this argument, appellants contend that they actually tried to file their "Counterclaim and Third-Party Complaint" on June 8, 2012 — before ratification of the sale on October 25, 2012 — but, although "[t]he Clerk received the papers," the Clerk "did not allow the filing. The Clerk clearly was instructed not to docket the complaint." There is nothing in the record to support this statement. The docket entries for Case No. 371979-V begin on January 4, 2013, with the filing of the "Counterclaim and Third-Party Complaint" at issue in this appeal. Appellants argue in their brief that "the lower court abused its discretion by holding off the right of the Appellant[s] to file their counterclaim when Md. Rule 2-331(a) provides permissive counterclaim and that Maryland has no compulsory counterclaim." As noted above, appellants have failed to back up their bald assertion that the Clerk refused their filing as early as June 8, 2012. If that happened, however, the appropriate remedy would have been to seek the aid of a judge by filing a motion *in that case* or *appealing that case*. It appears appellants did neither. Consequently, the issue was not preserved for appellate review.

JUDGMENT OF THE CIRCUIT COURT FOR MONTGOMERY COUNTY AFFIRMED. COSTS TO BE PAID BY APPELLANTS.