Circuit Court for Prince George's County
Case No. CAEF1814792

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1537

September Term, 2019

BALTIMORE HOME WHOLESALERS, LLC,

v.

MICHAEL V. KUHN, *et al.*, SUBSTITUTE TRUSTEES

Leahy,
Nazarian,
Wells,
JJ.

Opinion by Wells, J.

Filed: March 25, 2021

BP Fisher Law Group, LLC ("BP Fisher") employed Appellee, Michael V. Kuhn, as an associate attorney. BP Fisher represented Select Portfolio Servicing, Inc. ("Select Portfolio Servicing"), noteholders on a mortgage that Lajuan Poole and Costella Tyler had on their home. During his employment at BP Fisher, Kuhn signed documents that made himself, along with three other BP Fisher associates,[1] a substitute trustee on the loan. In December 2018, Appellant Baltimore Home Wholesalers, LLC ("Baltimore Home Wholesalers") purchased the property from Select Portfolio Servicing after the latter foreclosed on Poole and Tyler's home. A $32,000.00 deposit was made payable to BP Fisher.

Less than one month after the sale, Kuhn was fired from his position at BP Fisher. Later, in June 2019, Baltimore Home Wholesalers brought suit against BP Fisher after discovering that the firm was insolvent. During the proceedings against BP Fisher, Kuhn filed a motion asking that he be removed as a substitute trustee. After reviewing arguments from Kuhn and Baltimore Home Wholesalers, the Circuit Court for Prince George's County removed Kuhn as a substitute trustee. Baltimore Home Wholesalers now appeals. While this appeal is pending, the foreclosure case is still ongoing in the circuit court, as no final judgment has been entered.

Before this Court, Baltimore Home Wholesalers raises two issues for our review,

[1] The three other BP Fisher associates who became substitute trustees along with Kuhn are Caitlin Shultz, William K. Smart, and Tracey D. Jean-Charles. Collectively, we refer to Kuhn, Schultz, Smart, and Jean-Charles as "Substitute Trustees."

which we have rearranged as two separate questions:[2]

1. Is the circuit court's order removing Kuhn as a substitute trustee appealable prior to the circuit court entering a final judgment?
2. Should the circuit court have removed Kuhn as a substitute trustee?

For the reasons that follow, we hold that Baltimore Home Wholesalers' appeal is untimely. As such, we must dismiss the appeal. Consequently, we decline to answer the second question.

FACTUAL AND PROCEDURAL BACKGROUND

A. Parties Involved

Lajuan Poole and Costella Tyler formerly owned a home at 5813 Dewey Street, Cheverly, Maryland ("the property"). The couple granted a deed of trust to Encore Credit Corporation in 2005. More than a decade later, when this controversy arose, U.S. Bank National Association ("US Bank") was the trustee and Select Portfolio Servicing was the holder of the note on the property.[3] Michael V. Kuhn, Caitlin Schultz, William K. Smart, and Tracey D. Jean-Charles became substitute trustees on the loan in December 2018. At

[2] Although Baltimore Home Wholesalers makes two main arguments, it phrased one question for our review that encompasses its two arguments. Baltimore Home Wholesalers' verbatim question reads: "Whether the Circuit Court should have allowed Mr. Kuhn to be removed as Substitute Trustee when the sale deposit of the Appellant had been misappropriated while he was acting as Substitute Trustee, failed to post the required foreclosure bonds, and failed to supervise the escrow account into which the Appellant's money was deposited."

[3] Neither U.S. Bank, Select Portfolio Servicing, Encore Credit Corporation, nor Poole and Tyler, are parties to this appeal.

the time that the Substitute Trustees came into their positions, they were all employees of the law firm, BP Fisher. The noteholder, Select Portfolio Servicing, was a client of BP Fisher.

B. Foreclosure and Purchase of Property

By May 2018, Poole and Tyler had defaulted on their home loan. US Bank thereafter commenced foreclosure proceedings in the Circuit Court for Prince George's County. At the December 2018 foreclosure sale, the property was sold to Baltimore Home Wholesalers for $235,000. Baltimore Home Wholesalers paid a $32,000.00 sales deposit. On behalf of BP Fisher, Kuhn signed the Report of Sale regarding the transfer of the property to Baltimore Home Wholesalers on January 11, 2019.

C. Termination of Kuhn's Employment and Sale of Law Firm

On January 11, 2019, the same day that Kuhn signed the Report of Sale, Kuhn was terminated from his employment at BP Fisher. Four days later, Select Portfolio filed suit against BP Fisher, alleging that BP Fisher's escrow account was overdrawn by millions of dollars. BP Fisher filed for bankruptcy the same day.

Upon learning of BP Fisher's bankruptcy, on June 26, 2019, Baltimore Home Wholesalers filed a Motion to Vacate its December 2018 purchase of the property at issue. The following month, after a hearing, a circuit court judge ordered the sale vacated. Baltimore Wholesalers demanded the substitute trustees return the $32,000.00 deposit.

D. Kuhn's Removal as Substitute Trustee

Kuhn filed a motion to revise in which he argued that he should be removed as a substitute trustee. Before the circuit court, Kuhn advanced three main points. First, Kuhn

argued that because he was fired from BP Fisher less than a month after becoming a substitute trustee and because he never had any control of nor signing authority of the funds at issue, he should not have to remain a substitute trustee. Second, he asserted that as an "innocent trustee," he cannot be liable to Baltimore Home Wholesalers. Finally, Kuhn contended that his termination of employment from BP Fisher meant that he was no longer responsible to return the $32,000.00 sales deposit.

Baltimore Home Wholesalers contended that as a substitute trustee, Kuhn has continuing fiduciary duty regardless of his employment status. Baltimore Home Wholesalers asserts that "[w]hatever Mr. Kuhn's employment circumstance [may be], he cannot just walk away from this case having taken [Baltimore Home Wholesalers'] deposit money and not assured the safekeeping of it."

After considering the arguments from both parties, the circuit court entered an order in favor of Kuhn and removed him as a substitute trustee. On the same day, the circuit court also removed Kuhn as the attorney of record. Baltimore Home Wholesalers filed this appeal.

DISCUSSION

I. THE CIRCUIT COURT'S REMOVAL OF KUHN AS A SUBSTITUTE TRUSTEE WAS NOT TIMELY APPEALED

A. The Parties' Contentions

Baltimore Home Wholesalers and Kuhn both address the appealability of the circuit court's order in their briefs, with, predictably, Baltimore Home Wholesalers contending that the order is currently appealable and Kuhn contending that it is not.

Baltimore Home Wholesalers argues that this Court has jurisdiction to hear this appeal because the circuit court's order is a collateral order and confers jurisdiction to this Court under the collateral order doctrine. Specifically, Baltimore Home Wholesalers views the circuit court's order as a "complete adjudication for its return by [] Substitute Trustees . . . which falls within the Collateral Order Doctrine." Baltimore Home Wholesalers argues the requirements for the collateral order doctrine are met because the circuit court's order:

> (1) conclusively determined the question of the return of the Appellant's deposit and those responsible for its return; (2) resolved the important issue as to who should return the deposit; (3) resolved an issue completely separate from the merits of the foreclosure action; and (4) would be effectively unreviewable on appeal from a final judgment disposing of the foreclosure action itself inasmuch as [Kuhn] has no standing to participate further in it given the vacating of the sale.

Aside from this assertion and its citation to *St. Joseph Med. Ctr., Inc. v. Cardiac Surgery Assocs., P.A.*, 392 Md. 75, 84 (2006), Baltimore Home Wholesalers provides no further explanation of how the circuit court's order is appealable under the collateral order doctrine.

Kuhn first notes that the circuit court's order removing him as a substitute trustee was granted without prejudice. Second, Kuhn notes that only he, and not the three remaining Substitute Trustees, were served with a copy of Baltimore Home Wholesalers' Motion for Judgment Against Substitute Trustees. Kuhn anticipates that upon conclusion of this appeal, the remaining Substitute Trustees will oppose the motion "based upon Maryland case law and the principles regarding an innocent trustee." Finally, Kuhn claims:

> [T]here has been no conclusive determination nor complete adjudication of the issues regarding the ultimate, legal responsibility for the repayment of the deposit, nor has the important issue been resolved regarding

> who should return the deposit, as required by *St. Joseph Med. Ctr., Inc.* [], 392 Md. 75, 86 [], before the Collateral Order Doctrine can be said to apply.

Like Baltimore Home Wholesalers, Kuhn fails to further explain his belief that the collateral order doctrine is not satisfied.

B. Standard of Review

The order on which Baltimore Home Wholesalers appeals comes from Kuhn's Motion to Revise Order of the Court. In ruling on the motion, the circuit court revised its judgment and removed Kuhn as a substitute trustee. Accordingly, one court order effectively replaced the prior order. *Yarema v. Exxon Corp.*, 305 Md. 219, 240 (1986). Because the alleged error of the circuit court was one of law, "we accord no deference to the lower courts' decisions here" and review the questions presented *de novo*. *Beall v. Holloway-Johnson*, 446 Md. 48, 76 (2016) (citing *White v. Pines Cmty. Improvement Ass'n, Inc.*, 403 Md. 13, 31 (2008) and *Gebhardt & Smith LLP v. Md. Port Admin.*, 188 Md. App. 532, 564 (2009)).

C. Analysis

1. Collateral Order Doctrine

Parties "may appeal from a final judgment entered in a civil or criminal case by a circuit court" to this Court. Maryland Code Annotated, (1973, 2013 Repl. Vol.), Courts and Judicial Proceedings Article ("CJP Article") § 12-301. The key term from this section is that appeals may come from a *final judgment*. Regarding final judgments, the Court of Appeals has opined:

> If a ruling of the court is to constitute a final judgment, it must have at least three attributes: (1) it must be intended by the court as an unqualified,

> final disposition of the matter in controversy, (2) unless the court properly acts pursuant to Md. Rule 2-602(b), it must adjudicate or complete the adjudication of all claims against all parties, and (3) the clerk must make a proper record of it in accordance with Md. Rule 2-601.

Rohrbeck v. Rohrbeck, 318 Md. 28, 41 (1989), cited with approval in *Metro Maint. Sys. S. Inc. v. Milburn*, 442 Md. 289, 298 (2015). We refer to this finality requirement as the "final judgment rule." Indeed, the Maryland Rules set out how Maryland's appellate courts should tackle judgments that do not dispose of a final action. Maryland Rule 2-602 provides in full:

> **(a) Generally.** Except as provided in section (b) of this Rule, an order or other form of decision, however designated, that adjudicates fewer than all of the claims in an action (whether raised by original claim, counterclaim, cross-claim, or third-party claim), or that adjudicates less than an entire claim, or that adjudicates the rights and liabilities of fewer than all the parties to the action:
>
> (1) is not a final judgment;
>
> (2) does not terminate the action as to any of the claims or any of the parties; and
>
> (3) is subject to revision at any time before the entry of a judgment that adjudicates all of the claims by and against all of the parties.
>
> **(b) When Allowed.** If the court expressly determines in a written order that there is no just reason for delay, it may direct in the order the entry of a final judgment:
>
> (1) as to one or more but fewer than all of the claims or parties; or
>
> (2) pursuant to Rule 2-501 (f)(3), for some but less than all of the amount requested in a claim seeking money relief only.

Md. R. 2-602 (emphasis in original).

In contrast to a final judgment is an interlocutory order. Until a final judgment is issued, "under Rule 2-602, all prior rulings remain[] interlocutory and subject to revision." *Rohrbeck*, 318 Md. at 44. Interlocutory rulings "may be revised at any time before the entry of a final judgment" by the circuit court. *Gertz v. Anne Arundel Cty.*, 339 Md. 261, 272-73 (1995). Because interlocutory orders are not final judgments and may be revised at any time prior to issuance of a final judgment, interlocutory rulings by definition do not meet the final judgment rule and therefore are typically not appealable until a final judgment has been rendered.

A very limited exception to the final judgment rule is the collateral order doctrine. *See Cty. Comm'rs for St. Mary's Cty. v. Lacer*, 393 Md. 415, 428 (2006) (quoting *Pittsburgh Corning v. James*, 353 Md. 657, 660 (1999)); *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541, 545-47 (1949). In actuality, the collateral order doctrine is not an exception to the final judgment rule but rather a doctrine for identifying collateral orders, which "are immediately appealable as 'final judgments' without regard to the posture of the case." *Harris v. David S. Harris, P.A.*, 310 Md. 310, 315 (1987). The "reprieve from the final judgment, however, is a 'very narrow exception'" to the final judgment rule. *Lacer*, 393 Md. at 428 (quoting *Pittsburgh Corning*, 353 Md. at 660). Although treated as final judgments, the collateral order doctrine "is based upon a judicially created fiction, under which certain interlocutory orders are considered to be final judgments, even though such orders clearly are *not* final judgments." *Dawkins v. Balt. City Police Dep't*, 376 Md. 53, 64 (2003) (emphasis in original).

Maryland courts follow a specific and well-delineated test to determine whether an

order is a collateral order. To be appealable as a collateral order, it is required that the order in question "(1) conclusively determines the disputed question, (2) resolves an important issue, (3) resolves an issue that is completely separate from the merits of the action, and (4) would be effectively unreviewable if the appeal had to await the entry of a judgment." *Ehrlich v. Grove*, 496 Md. 550, 563 (2007) (citing *Pittsburgh Corning Corp.*, 353 Md. at 660-61). Importantly, not just one, but all of the above elements must be met "in order for a prejudgment order to be appealable and to fall within this [collateral order doctrine] exception to the ordinary operation of the final judgment [rule]." *Ehrlich*, 396 Md. at 563 (quoting *In re Franklin P.*, 366 Md. 306, 327 (2001)).

Maryland case law well establishes the rigidness of the above four requirements for when an order may be considered an appealable collateral order as Maryland policy strongly disfavors this Court hearing appeals prior to a final judgment. "Requiring cases to have reached final judgment before permitting appeal reflects Maryland's long-established policy against piecemeal appeals." *Waterkeeper All., Inc. v. Md. Dep't of Agric.*, 439 Md. 262, 278 (2014) (citations omitted).

One reason premature appeals are disfavored is judicial economy:

> The purpose of Rule 2-602(a) is to prevent piecemeal appeals, which, beyond being inefficient and costly, can create significant delays, hardship, and procedural problems. The appellate court may be faced with having the same issues presented to it multiple times; the parties may be forced to assemble records, file briefs and record extracts, and prepare and appear for oral argument on multiple occasions; resolution of the claims remaining in the trial court may be delayed while the partial appeal proceeds, to the detriment of one or more parties and the orderly operation of the trial court; and partial rulings by the appellate court may do more to confuse than clarify the unresolved issues.

Smith v. Lead Indus. Ass'n, Inc., 386 Md. 12, 25-26 (2005). In addition to being inefficient and costly, piecemeal appeals "can create significant delays, hardship, and procedural problems." *Miller Metal Fabrication, Inc. v. Wall*, 415 Md. 210, 227 (2010) (internal quotation omitted). For these reasons, the exceptions found in Rule 2-602(b) ensure that appeals without a final judgment are only "reserved for the 'infrequent harsh case[.]'" *Id.* (citing *Planning Bd. v. Mortimer*, 310 Md. 639, 647 (1987) and *Wilde v. Swanson*, 314 Md. 80, 87 (1988)).

Maryland appellate courts have consistently "reinforce[d] the theme of limiting interlocutory appeals and increasing judicial efficiency[.]" *Waterkeeper All., Inc.*, 439 Md. at 288. Accordingly, the universe of orders that are not final but qualify for immediate appellate review are limited to a "'small class' of prejudgment orders[.]"[4] *Harris*, 310 Md. at 315-16 (quoting *Cohen*, 337 U.S. at 545-47). Indeed, appeals claiming application of

[4] This small class consists of (1) denials of motions to dismiss on double jeopardy grounds (*Scriber v. State*, 437 Md. 399, 406 (2014)), (2) issues related to current and former high-level government officials (*see Mandel v. O'Hara*, 320 Md. 103, 134 (1990); *Ehrlich*, 496 Md. at 563; *Montgomery Cty. v. Stevens*, 337 Md. 471, 479 (1995); *Md. Bd. of Physicians v. Grier*, 225 Md. App. 114, 135-38 (2015)), (3) denials of petitions to stay arbitration (*Town of Chesapeake Beach v. Pessoa Constr. Co.*, 330 Md. 744, 754-56 (1993)), (4) a court's refusal to accept a dismissal stipulation signed by all parties (*Milburn v. Milburn*, 142 Md. App. 518, 530-31 (2002)), (5) rulings that require defendants to provide plaintiffs with the names of potential class members in a class action lawsuit (*Anne Arundel Cty. v. Cambridge Commons*, 167 Md. App. 219, 231 (2005), *cert. denied*, 393 Md. 242 (2006)), (6) denial of motions to enforce plea agreements (*Falero v. State*, 212 Md. App. 572, 579 n.2 (2013)), (7) denial of motions to enforce settlement agreements (*Clark v. Elza*, 286 Md. 208, 213 (1979)), (8) denial of motions to withdraw as counsel when a client is alleged to have not paid attorney bills (*In re Frederick R. Franke*, 207 Md. App. 679, 685-86 (2012)), and (9) rulings that a plea agreement did not bar a subsequent indictment (*Buzbee v. State*, 199 Md. App. 678, 686-87 (2011)). Judge Kevin F. Arthur, *Finality of Judgments and Other Appellate Trigger Issues*,51-54 (3d ed. 2018).

the collateral orders doctrine will "be entertained only in extraordinary circumstances." *In re Foley*, 373 Md. 627, 634 (2003) (citations omitted). And, "Maryland courts may be as strict as any other courts in the country in enforcing [the] policy" of a very narrow collateral order doctrine. Judge Kevin F. Arthur, *Finality of Judgments and Other Appellate Trigger Issues*, 50 (3d ed. 2018).

2. Applicability of the Collateral Order Doctrine

Although the parties do not place the collateral order doctrine at the center of the arguments in their briefs, we think it resolves this appeal. At the outset, we understand Baltimore Home Wholesalers to concede that there is no final judgment on the merits. Rather than arguing that the order here is appealable as a final judgment, Baltimore Home Wholesalers instead contends that the order is appealable as a collateral order: "The matter of the refund of the Appellant's deposit is collateral to the main foreclosure action. The Order for the return of the Appellant's deposit was a complete adjudication of the duty for its return by the Substitute Trustees. This falls within the Collateral Order Doctrine[.]" To determine whether the order here qualifies as collateral, all four elements of the collateral order doctrine must be met. Does the order: "(1) conclusively determine the disputed question, (2) resolve an important issue, (3) resolve an issue that is completely separate from the merits of the action, and (4) would the order be effectively unreviewable if the appeal had to await the entry of a judgment." *Ehrlich*, 396 Md. at 563 (citing *Pittsburgh Corning Corp.*, 353 Md. at 660-61).

Addressing the first element, Baltimore Home Wholesalers argues that the order "conclusively determined the question of the return of the Appellant's deposit and those

responsible for its return[.]" We agree. The disputed question before the circuit court was whether Kuhn should remain or be removed as a substitute trustee. The circuit court's order removed Kuhn as a substitute trustee. Therefore, the element of whether the order "conclusively determines the disputed question" is met. *See Ehrlich*, 396 Md. at 563.

Second, we also agree with Baltimore Home Wholesalers that the circuit court's order resolved an important issue. In the litigation, Baltimore Home Wholesalers seeks the return of a $32,000.00 sales deposit that it paid in its purchase of the foreclosed property. Whether Kuhn remains or is removed as a substitute trustee has obvious implications for both Baltimore Home Wholesalers and Kuhn. For Baltimore Home Wholesalers, this issue will determine whether they can collect payment from Kuhn. Having one less substitute trustee who is liable makes it less likely that Baltimore Home Wholesalers will be able to collect any judgment owed. The issue is important for Kuhn for the same reasons. If he remains a substitute trustee, he can be held liable for the $32,000.00 should the circuit court agree that Baltimore Home Wholesalers is owed that amount. On the other hand, if Kuhn is removed, such a judgment by the circuit court would make Kuhn unaccountable to Baltimore Home Wholesalers for any payment they are awarded. Accordingly, we agree with Baltimore Home Wholesalers that the circuit court's removing of Kuhn as a substitute trustee "resolves an important issue[.]" *See Ehrlich*, 396 Md. at 563.

But we are unpersuaded that removing Kuhn as substitute trustee amounts to "an issue that is completely separate from the merits of the action[.]" *Id.* Baltimore Home Wholesalers provides no justification in its brief as to how this third element is met. Instead

it only baldly states that the order "resolved an issue completely separate from the merits of the main foreclosure action[.]" As we see it, however, Kuhn's position as substitute trustee is not completely separate from the merits of the action but rather an inseparable piece of the foreclosure action. Baltimore Home Wholesalers' stated purpose for its lawsuit is to seek "the vacating of the sale and an order for the return of the Appellant's $32,000.00 sale deposit to it" from Substitute Trustees, which includes Kuhn. The circuit court's order removing Kuhn as a substitute trustee cannot be "completely separate" from an action in which Baltimore Home Wholesalers specifically asks for Kuhn and the other substitute trustees to return the $32,000.00 sales deposit. In sum, we see no way to interpret how the removal of Kuhn as a substitute trustee is "an issue that is completely separate from the merits of the action." And Baltimore Home Wholesalers provides us with no basis as to how we can reach that conclusion. Accordingly, as the order is not a final judgment, and as Baltimore Home Wholesalers fails to meet the third element of the collateral order doctrine, this appeal must be dismissed.

Nonetheless, we conclude that Baltimore Home Wholesalers also fails to satisfy the fourth element of the collateral order doctrine. In other words, we do not believe that the order "would be effectively unreviewable if the appeal had to await the entry of a judgment." *Ehrlich*, 396 Md. at 563. Once again, Baltimore Home Wholesalers offers a conclusory assertion that the fourth element is met, stating only that the order "would be effectively unreviewable on appeal from a final judgment disposing of the foreclosure action itself inasmuch as the Appellant has no standing to participate further in it given the vacating of the sale." Yet, Baltimore Home Wholesalers fails to provide any justification

for how the element is met or why it would not have standing.

We disagree. There is nothing that would preclude this Court from reviewing Kuhn's removal as a substitute trustee upon a final judgment from the circuit court. Indeed, "[i]n applying the collateral order doctrine, often the most decisive element is the last one—whether the order is effectively reviewable on appeal from a final judgment on the merits." The Hon. Kevin F. Arthur, *Finality of Judgments and Other Appellate Trigger Issues*,51 (3d ed. 2018). While all of the four elements to the collateral order doctrine are applied strictly, "[i]n particular, the fourth prong, unreviewability on appeal, 'is not satisfied except in extraordinary situations.'" *Nnoli v. Nnoli*, 389 Md. 315, 329 (2005) (citing *Shoemaker v. Smith*, 353 Md. 143, 170 (1999) (internal quotation omitted)). This is not a situation akin to double jeopardy, for instance, the classic example of when unreviewability exists and the fourth element of the collateral order doctrine is satisfied due to double jeopardy's "'right' to avoid the trial itself[.]" *Bunting v. State*, 312 Md. 472, 481-82 (1988).

Because we would not be precluded from reviewing the circuit court's removal of Kuhn as a substitute trustee after the circuit court issues a final judgment, Baltimore Home Wholesalers fails to meet the fourth element of the collateral order doctrine. Accordingly, the appeal is dismissed.

APPEAL DISMISSED. APPELLANT TO PAY THE COSTS.