Circuit Court for Prince George's County
Case No. CAEF17-37000

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1686

September Term, 2019

DANCING MARLBORO, LLC

v.

COUNCIL, BARADEL, KOSMERL & NOLAN, P.A.

Berger,
Reed,
Friedman,

JJ.

Opinion by Berger, J.

Filed: January 7, 2021

This case is before us on appeal from an Order of the Circuit Court for Prince George's County granting a motion to compel settlement, or in the alternative, a motion to resell. Dancing Marlboro, LLC ("Foreclosure Purchaser") bought property located in Prince George's County, Maryland for $401,000.00 from Council, Baradel, Kosmerl & Nolan, P.A. ("Substitute Trustee"). At the time of the sale, Foreclosure Purchaser tendered a deposit of $65,500.00. The Terms of Sale in the Memorandum of Purchase provided that if Foreclosure Purchaser did not pay the remaining balance and settle within ten days of the ratification of the sale, the deposit may be forfeited, and the property resold at the expense of the Foreclosure Purchaser. Foreclosure Purchaser failed to settle within the required ten days.

Foreclosure Purchaser presents three issue for our consideration on appeal,[1] which we have rephrased as follows:

[1] Foreclosure Purchaser's questions presented are as follows:

> 1. Did the trial court err as a matter of law in denying Foreclosure Purchaser's request to set aside the sale and instead granted the Substitute Trustee's Motion to Compel Settlement, or in the alternative Resell Property ("Motion to Compel") where the plain language of County Code Sec. 2-162.01 holds that it applies to "all contracts for the sale of real property in this County" and extrinsic evidence did not support any of the trial court's interpretations of the statute?
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> 2. Did the trial court err by *sua sponte* raising the defense of preemption on behalf of the Substitute Trustee and still ruling in favor of the Substitute Trustee even though the Substitute Trustee did not raise the

I. Whether the trial court erred as a matter of law in denying Foreclosure Purchaser's request to set aside the sale and instead granted the Substitute Trustee's Motion to Compel Settlement, or in the alternative Resell Property ("Motion to Compel") in violation of County Code § 2-162.01 which requires a particular disclosure for all contracts for sale of real property in Prince George's County.

II. Whether the trial court erred by *sua sponte* raising the defense of preemption on behalf of the Substitute Trustee and ruling in favor of the Substitute Trustee on the issues of preemption and marketable title.

III. Whether the trial court erred as a matter of law by enforcing an illegal contract.

Substitute Trustee filed a Motion to Dismiss, alleging that the Order from the trial court was not an appealable, final judgment. For the reasons stated herein, we agree that the circuit court's order was not final or otherwise appealable. We, therefore, grant Substitute Trustee's Motion to Dismiss.

FACTS AND PROCECURAL HISTORY

On July 23, 2018, Foreclosure Purchaser attended a foreclosure auction presided by the Substitute Trustee. Foreclosure Purchaser was the prevailing bidder for real property located at 5510 Old Crain Highway, Upper Marlboro, Maryland, 20772 (the "Property").

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preemption defense or provide evidence to prove preemption, and also ruling in favor of the Substitute Trustee on the issue of marketable title even though the Substitute Trustee's own witness failed to render any opinion in favor of the Substitute Trustee?

3. Did the trial court err as a matter of law by enforcing an illegal contract?

Pursuant to the Terms of Sale in the Contract of Sale, Foreclosure Purchaser posted a $65,500.00 deposit that same day as a portion of the $401,000.00 purchase price. The Terms of Sale in the Contract of Sale provided, in relevant part:

> A deposit of $65,500.00 will be required of the purchaser . . . Balance of the purchase price is to be paid in cash within ten (10) days of the final ratification of sale by the Circuit Court for Prince George's County. If payment of the balance does not take place within ten (10) days of ratification, the deposit may be forfeited and property may be resold at the risk and expense of the defaulting purchaser.

On the day of the auction, Foreclosure Purchaser signed the Contract of Sale containing these terms. Substitute Trustee filed the Report of Sale and the other required documents to report the sale to the circuit court on August 13, 2018. On February 8, 2019, the trial court entered the Order of Final Ratification of Sale and Referral to the Auditor.

Foreclosure Purchaser forwarded information on the Property to a title company to review the title work in anticipation of closing. Foreclosure Purchaser was unable to obtain insurable title. After consulting with counsel, Foreclosure Purchaser learned that the Property was affected by condemnation proceedings from two different state agencies.

On April 22, 2019, Substitute Trustee filed a Motion to Compel, alleging that the Property's title was marketable, and that Foreclosure Purchaser failed to timely proceed to settlement. Alternatively, Substitute Trustee requested the ability to resell the Property in the event of Foreclosure Purchaser's refusal to close. On May 13, 2019, Foreclosure Purchaser filed a Motion to Intervene to Rescind Sale and Oppose Motion to Compel ("Motion to Rescind"). In its motion, Foreclosure Purchaser alleged that the title to the

Property was unmarketable and that Substitute Trustee failed to include a required disclosure under County Code § 2-162.01(a), thereby invoking the remedy of rescission. Substitute Trustee filed a Reply to Opposition to Motion to Compel and Consent to Motion to Intervene (the "Reply"). In its motion, Substitute Trustee asserted that County Code § 2-162.01 only applies to consumers.

On June 24, 2019, the trial court granted Foreclosure Purchaser's request for intervention, but struck Foreclosure Purchaser's request to rescind the sale and refund its deposit. The trial court set a hearing for July 9, 2019 for all pending matters, which was continued to July 30, 2019 after a request from the parties. On July 29, 2019, the trial court entered a Memorandum continuing the hearing to August 28, 2019. In its Memorandum, the trial court also requested that the parties address Rule 2-535(b) and its potential application to the case at issue. On August 14, 2019, Substitute Trustee filed a Line asserting that Rule 2-535(b) was not applicable to the case. On August 15, 2019, Foreclosure Purchaser filed a Response to the trial court's July 29, 2019 Memorandum concurring with Substitute Trustee's position that Rule 2-535(b) did not apply. Alternatively, Foreclosure Purchaser argued that if Rule 2-535(b) applied, it should apply against Substitute Trustee because the irregularity or mistake in the Contract of Sale was due to Substitute Trustee's failure to include the required County Code § 2-162.01(a) disclosure.

On August 23, 2019, the trial court forwarded an email to all parties asking, "in the absence of a grant of authority, what is PG County's authority to enact the local law at

issue in this case respect to a Foreclosure instituted under the RP Article and the Maryland Rules?" On August 27, 2019, Foreclosure Purchaser directly responded to the trial court's email.

On August 29, 2019, the trial court held a hearing. At the hearing, Foreclosure Purchaser offered testimony of the owner of the Foreclosure Purchaser and of Samuel Dean, a Prince George's County Council (the "Council") Member. During his time on the Council, Mr. Dean worked on amendments to County Code § 2-162.01.[2] Substitute Trustee did not present any testimony from a member of the Council, or anyone else, to refute Mr. Dean's testimony.

On September 9, 2019, the trial court issued an Order finding in favor of Substitute Trustee. First, the trial court granted Substitute Trustee's Motion to Compel, ordering Foreclosure Purchaser to close on the purchase of the Property within thirty days of the Order. Additionally, the trial court ordered that if Foreclosure Purchaser failed to close within thirty days, Substitute Trustee would be free to re-advertise and resell the Property at a subsequent foreclosure sale. Finally, the trial court ordered that it would "conduct a subsequent evidentiary hearing to determine what, if any, damages [Substitute Trustee] has sustained, including but not limited to forfeiture of the deposit of $65,000.00."[3]

[2] We leave for another day whether testimony is admissible to prove the Council's legislative intent or whether it was offered for some other purpose. *Montgomery Cnty. v. Schooley*, 97 Md. App. 107, 124 (1993) ("The legislative intent of the Council cannot be established by the intent of its individual members.").

[3] In the Order, the trial judge indicated that Foreclosure Purchaser's deposit was $65,000.00. This amount is incorrect. Foreclosure Purchaser paid a deposit of $65,500.00.

On December 3, 2019, Substitute Trustee held a resale auction. Bidding was opened at $250,000.00. No person or entity bid on the Property, and, thereafter, the original lender bought back the Property at the $250,000.00 opening price.

DISCUSSION

Standard of Review

This Court must dismiss an appeal, on motion or on its own, if the appeal is not allowed by law or if the notice of appeal was not timely filed. Md. Rule 8-602(b). "The requirement that a party appeal from only a final judgment is a jurisdictional requirement." *Balt. Home All., LLC v. Geesing*, 218 Md. App. 375, 381 (2014) (citing *Waters v. Whiting*, 113 Md. App. 464, 470 (1997)). "Whether a judgment is final, and thus whether this Court has jurisdiction to review that judgment, is a question of law to be reviewed *de novo*." *Id.* (citing *Shofer v. Stuart Hack Co.*, 107 Md. App. 585, 591 (1996)).

I. Foreclosure Purchaser's appeal is not from a final judgment because the trial court's Order dated September 9, 2019 did not determine and conclude the rights of the parties.

By statute, a party may appeal from a final judgment entered by the circuit court. Md. Code (1973, 2020 Repl. Vol.), § 12-301 of the Courts and Judicial Proceedings Article ("CJP"). Generally, an order is not a final judgment unless it fully adjudicates all claims in the case by and against all parties to the case. *See* Md. Rule 2-602(a). It must "determine and *conclude* the rights involved or . . . deny the appellant the means of further prosecuting or defending his or her rights and interests in the subject matter of the proceeding." *Rohrbeck v. Rohrbeck*, 318 Md. 28, 41 (1989) (emphasis included). "Moreover, the ruling

must 'leave nothing more to be done in order to effectuate the court's disposition of the matter.'" *Remson v. Krausen*, 206 Md. App. 53, 72 (quoting *Rohrbeck*, *supra*, 318 Md. at 41)). "Such an order has been described as one that has the effect of 'put[ting] the [party] out of court.'" *Metro Maint. Sys. S., Inc. v. Milburn*, 442 Md. 289, 299 (2015) (quoting *McCormick v. St. Francis de Sales Church*, 219 Md. 422, 426–27 (1959)).

In contrast, an order "that adjudicates less than an entire claim, or that adjudicates the rights and liabilities of fewer than all the parties to the action . . . is not a final judgment[.]" *Geesing*, *supra*, 218 Md. App. at 381 (quoting Md. Rule 2-602(a)). "If the record suggests that it remains for the trial court to take some action to dispose of the case, an order is not final." Judge Kevin F. Arthur, *Finality of Judgments and Other Appellate Trigger Issues* § 4, at 5 (The Maryland State Bar Association ed., 3d ed. 2018). The Order in this case "neither determined the rights of the parties, nor did the Order 'leave nothing more to be done in order to effectuate the [trial] court's disposition of the matter.'" *Geesing*, *supra*, 218 Md. App. at 381 (quoting *Remson*, *supra*, 206 Md. App. at 72)).

The Order did not determine the rights of the parties in this case because the fate of the deposit is unclear. Whether the deposit will actually be forfeited is uncertain, and Foreclosure Purchaser will have the opportunity to assert its rights regarding the deposit at the evidentiary hearing to be held by the trial court at a later date. In *Geesing*, the appellant purchased property from the appellees at a foreclosure sale and signed a Memorandum of Purchase containing nearly identical terms as the Contract of Sale in the instant case. *Id.*

at 379.[4] The sale was ratified, and the appellant refused to attend the closing, resulting in the appellees filing suit in the circuit court. *Id.* The trial court ordered that "the deposit . . . paid by the defaulting purchaser . . . shall be forfeited and the subject property may be resold at the risk and expense of the defaulting purchaser." *Id.* at 380. On appeal, this Court held that the trial court order in *Geesing* was not a final judgment because although the deposit was ordered to be "forfeited," the meaning of "forfeit" was unclear as it was not fully determined how the deposit would be used. *Id.* at 381–83.[5]

[4] The Terms of Sale in the Memorandum of Purchase in *Geesing* provided:

> If the purchaser fails to settle within 10 days of ratification, the Sub[stitute] Trustees may file a motion to resell the property. If Purchaser defaults under these terms, deposit shall be forfeited. The Sub[stitute] Trustees may then resell the property at the risk and cost of the defaulting purchaser.

Geesing, *supra*, 218 Md. App. at 379.

[5] This Court entertained a similar issue on appeal in *Huertas v. Ward*, ___ Md. App. ___, No. 2929, Sept. Term, 2018 (Ct. of Spec. App. Oct. 27, 2020). In *Huertas*, the appellees contended that the order appellant appealed from was not a final judgment because "he needed to wait until after the court entered the order ratifying the auditor's report." *Huertas*, *supra*, Slip Op. at 8. This Court noted that an appeal before a trial court has ratified a foreclosure sale is premature as there would be no final judgment. *Id.* at 13 (citing *McLaughlin v. Ward*, 240 Md. App. 76, 83–84 (2019)). This Court, referencing dicta from *McLaughlin*, noted there is "a possibility that, in some circumstances, a final judgment might not come into being until the court has adjudicated exceptions to an auditor's report, if exceptions are filed." *Id.*

We held that "[t]he process of referring [a] case to an auditor and resolving any exceptions to the auditor's report is collateral to the foreclosure proceeding, and thus it does not affect the finality of an order ratifying the foreclosure sale." *Id.* at 14–15. Here, Foreclosure Purchaser is appealing from an Order that creates responsibilities and actions to be taken *in addition to* an auditor's report. The instant Order requires a subsequent

Indeed, the fate of the deposit in the instant case is more uncertain than that of the deposit in *Geesing*. *See id.* at 380–82. Here, the trial court has not made a determination as to the fate of Foreclosure Purchaser's deposit.[6] Rather, the trial court held that it will conduct a *subsequent* evidentiary hearing to make such a determination of damages. If the appellant's deposit in *Geesing*, which was explicitly ordered to be "forfeited" has an unclear fate, so too does Foreclosure Purchaser's deposit in the instant case. *See id.* at 380.[7] Notably, "the final rights and obligations of both parties with regard to the deposit have not yet been determined." *Id.* at 382.[8]

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evidentiary hearing to be held to determine damages. Thus, the instant case is similar to *Geesing*, not *Huertas*, and the Order in this case is not an appealable final judgment.

[6] Foreclosure Purchaser argued during oral argument that because the original sale of the Property was for $401,000.00 and the purchase price at the second sale was only $250,000.00, there is no doubt that Foreclosure Purchaser's deposit will be forfeited. This does not affect our decision. The trial court's Order left the determination of the fate of the deposit up for consideration at a later date in a subsequent hearing. Despite Foreclosure Purchaser's insistence that the deposit is certain to be forfeited, this is for the trial court to decide at the evidentiary hearing. Accordingly, the Order left more for the trial court to do and is not an appealable, final judgment. *Geesing, supra*, 218 Md. App. at 380–82.

[7] Additionally, the Order from the trial court is an interlocutory order, which is always subject to revision by the trial court. *Geesing, supra*, 218 Md. App. at 382 n.4 (citing *Banegura v. Taylor*, 312 Md. 609, 618–19 (1988)). Interlocutory orders are "subject to revision within the general discretion of the trial court until a final judgment [is] entered on the claim." *Banegura, supra*, 312 Md. at 618–19. Thus, the trial court would not be bound to follow any position posited by this Order. *See Geesing, supra*, 218 Md. App. at 382 n.4.

[8] Foreclosure Purchaser contends that *Geesing* is not applicable because it is arguing the contract between itself and Substitute Trustee was illegal. We disagree. Foreclosure Purchaser is appealing from the trial court's September 9, 2019 Order. For the reasons stated above, this Order is not a final judgment which can be appealed. *See supra* Section I.

Rather than "leav[ing] nothing more to be done in order to effectuate the court's disposition of the matter," the Order created additional responsibilities for the parties and the court. *Remson*, *supra*, 206 Md. App. at 72. The trial court ordered for Foreclosure Purchaser to close on the purchase or for the Property to be resold if Foreclosure Purchaser failed to settle within thirty days of the date of the Order. Additionally, the trial court ordered that it would hold a subsequent evidentiary hearing to determine the fate of the deposit and other damages sustained by Substitute Trustee. "Consequently, the Order created further steps to be completed prior to disposition of the matter." *Geesing*, *supra*, 218 Md. App. at 383. Accordingly, because of the continuing rights and responsibilities of the parties and the unclear fate of the deposit, coupled with the requirement that a subsequent evidentiary will be held, the Order at issue is not final. *See* Md. Rule 2-602(a) (providing that an order that adjudicates less than an entire claim is not final). Therefore, we do not have jurisdiction to review the merits of Foreclosure Purchaser's appeal of the Order. *See* CJP § 12-301.

Pursuant to CJP § 12-303, there are certain interlocutory orders which fall in the statutory exception as appealable despite not being a final judgment. Md. Code (1973, 2020 Repl. Vol.) § 12-303 of the CJP Article; *In re Samone H.*, 385 Md. 282, 298 (2005). Two sections of CJP § 12-303 are relevant to the issue before us. First, CJP § 12-303(3)(v) allows a party to appeal from an interlocutory order that orders "the sale, conveyance, or

Accordingly, the illegality of the contract is an issue we cannot address absent jurisdiction. *See Smith v. Taylor*, 285 Md. 143, 147 (1979) ("[T]his Court will dismiss an appeal . . . when it notices that appellate jurisdiction is lacking.")

delivery of real or personal property . . . ." If a trial court orders the resale of property under provisions "which, on their face, [are] self-executing without the need for further involvement by the court, the order is [immediately] appealable under [CJP] § 12-303(3)(v) . . . ." *Winkler Constr. Co. v. Jerome*, 355 Md. 231, 245 (1999). Here, the trial court's order "authorized the resale of the Property, but the court's involvement with the Property and parties were not complete upon" issuance of the Order. *Geesing*, *supra*, 218 Md. App. at 383 n.6. Rather, even after the resale of the Property, the trial court must hold an evidentiary hearing to rule on damages and act to ratify the new foreclosure sale. Thus, the trial court's Order did not terminate the court's involvement in the action and CJP § 12-303(3)(v) is inapplicable.[9]

CJP § 12-303(3)(vi) provides that a party may appeal from an order entered by a circuit court in a civil case if such order "[d]etermin[es] a question of right between the parties and direct[s] an account to be stated on the principle of such determination." Here, the trial court's Order did not direct an account, nor did it determine the rights of the parties.

[9] Foreclosure purchaser argued during oral argument that *Geesing* is merely persuasive authority and not binding on this Court. This argument has no merit. Once an appellate court rules on a question of law raised on appeal, lower courts are bound by that ruling. *Holloway v. State*, 232 Md. App. 272, 279 (2017). Critically, "'decisions rendered by a prior appellate panel will generally govern the second appeal at the same appellate level as well, unless the previous decision is incorrect because it is out of keeping with controlling principles announced by a higher court and following the decision would result in manifest injustice.'" *Id.* (quoting *Scott v. State*, 379 Md. 170, 183 (2004)). Further, there is no authority supporting Foreclosure's purchaser's contention that a decision must be *en banc* to be binding. There has been no holding by the Court of Appeals rendering the reasoning in *Geesing* incorrect. Therefore, we will follow the holding of *Geesing* as it is binding on this Court.

The trial court made no determination as to the fate of Foreclosure Purchaser's deposit. *See Geesing*, *supra*, 218 Md. App. at 383. Rather, the trial court ordered that it would hold a subsequent hearing to determine the forfeiture of the deposit. Moreover, the Property was sold for a lower amount at the resale than the price Foreclosure Purchaser paid. Accordingly, it is unclear what damages were sustained by Substitute Trustees, and, further, what damages the trial court would order Foreclosure Purchaser to pay at the evidentiary hearing. The Order did not determine the rights of the parties or direct an account to be stated. Therefore, we hold that the trial court's Order is not appealable under CJP § 12-303(3)(vi).[10]

The trial court has not yet held its "subsequent evidentiary hearing" as provided in the Order. Once a determination is made as to Foreclosure Purchaser's deposit and Substitute Trustee's damages, the rights of the parties will have been resolved. Until then, we lack jurisdiction to entertain the merits of Foreclosure Purchaser's appeal. Accordingly, the trial court's Order is not a final judgment.

APPELLEE'S MOTION TO DISMISS GRANTED. APPEAL DISMISSED AS PREMATURE, WITHOUT PREJUDICE

[10] "Collateral orders may also be permitted as interlocutory appeals." *Geesing*, *supra*, 218 Md. App. at 384 n.6 (citing *Anne Arundel Cty. v. Cambridge Commons*, 167 Md. App. 219, 228 (2005)). We hold that the collateral order doctrine does not apply in this case. To qualify as a collateral order, an order must "(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) [ ] be effectively unreviewable on appeal from a final judgment." *Nnoli v. Nnoli*, 389 Md. 315, 329 (2005) (citing *Dawkins v. Balt. City Police Dep't*, 376 Md. 53, 58 (2003)). The trial court's Order made no determination as to Foreclosure Purchaser's deposit, nor did it decide a "completely separate" issue from the merits. *Id.* Accordingly, the collateral order doctrine does not apply.

TO THE RIGHT OF ANY PARTY TO NOTE AN APPEAL FROM A FINAL JUDGMENT OR OTHER APPEALABLE ORDER. CASE REMANDED TO THE CIRCUIT COURT FOR PRINCE GEORGE'S COUNTY FOR FURTHER PROCEEDINGS. COSTS TO BE PAID BY APPELLANT.