UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1812

September Term, 2014

DAVID MSHANA

v.

JOHN S. BURSON, *et al.*,
SUBSTITUTE TRUSTEES

Woodward,
**Zarnoch,
Friedman,

JJ.

Opinion by Zarnoch, J.

Filed: September 30, 2015

**Zarnoch, Robert A., J., participated in the conference of this case while an active member of this Court; he participated in the adoption of this opinion as a retired, specially assigned member of this Court.

This is an appeal from a judgment granting possession to Federal Home Loan Mortgage Corporation ("Freddie Mac") in a foreclosure action originally brought by JPMorgan Chase Bank, NA and substitute trustees John S. Burson, William M. Savage, Gregory N. Britto, Jason Murphy, Kristine D. Brown, and Erik W. Yoder (collectively "JPMorgan Chase," "Trustees," or "Appellees") against Appellant David Mshana in the Circuit Court for Baltimore City on a condominium located in the Reservoir Hill neighborhood of the City. Almost four years after the ratification of the sale of the property, Freddie Mac moved for possession. Mshana opposed the motion for possession, arguing that JPMorgan Chase did not have the right to foreclose on the property. The circuit court granted the motion for judgment awarding possession. Mshana then filed an emergency motion to stay writ of possession and a motion to vacate foreclosure, which the court denied in several orders, the last of which was entered on September 22, 2014. Mshana noted his appeal on October 22, 2014, and presents the following question for our review:

> "Whether the Court erred in denying the Amended Emergency Motion to Stay Writ of Possession and Motion to Vacate Foreclosure?"

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

BACKGROUND

On December 3, 2007, Washington Mutual Bank, FA ("Washington Mutual") issued a note to David Mshana in the amount $230,000, secured by a deed of trust on Mshana's Baltimore property. The note contained a blank endorsement by Cynthia Riley, Vice President of Washington Mutual. Less than a year later in late summer of

2008 at the height of the financial crisis, the Office of Thrift Supervision, fearing the insolvency of Washington Mutual, seized the bank and placed it into receivership with the Federal Deposit Insurance Corporation ("FDIC"). FDIC then sold Washington Mutual's assets, including mortgage notes, to JPMorgan Chase.

Mshana defaulted on his mortgage loan on November 2, 2009, and Washington Mutual (then owned by JPMorgan Chase) sent a notice of intent to foreclose on January 20, 2009. Trustees filed an order to docket foreclosure in the Circuit Court for Baltimore City on June 26, 2009. Attached to the order to docket was the deed of trust, the mortgage note, and an affidavit of note ownership, which stated that JPMorgan Chase was the holder of the note. Mshana did not answer the order to docket, and Trustees sold the property in a foreclosure sale on January 21, 2010 to Freddie Mac. On the same date, they submitted a certification to the court that JPMorgan Chase had assigned the note to Freddie Mac. The circuit court ratified the sale on June 2, 2010, and confirmed the auditor's report on September 10, 2010.

Freddie Mac moved for judgment awarding possession of the property on January 17, 2014. The circuit court denied the motion, finding that Freddie Mac had failed to conduct a reasonable inquiry into the occupancy status of the property required by Maryland Rule 14-102(a)(3).[1] On June 5, 2014, after submitting evidence and affidavits

[1] Rule 14-102(a)(3) provides:

> If the movant's right to possession arises from a foreclosure sale of a dwelling or residential property, the motion shall include averments, based on a reasonable inquiry into the occupancy status of the (continued…)

concerning the occupancy of the property, Freddie Mac renewed its motion for judgment awarding possession. In a one-page letter filed on July 10, 2014, Mshana objected to Freddie Mac's motion and asserted that "the chain of title has been corrupt in accordance with, but not limited to, the Sarbanes and Oxley Act," and that Trustees could not show proof of a valid assignment of the mortgage note.

On July 22, 2014, the circuit court entered an order awarding possession to Freddie Mac, subject to Freddie Mac's compliance with Maryland Rule 14-102(e).[2] Freddie Mac filed affidavits evidencing compliance, and the clerk of the circuit court issued a writ of possession on August 4, 2014.

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property and made to the best of the movant's knowledge, information, and belief, establishing either that the person in actual possession is not a bona fide tenant having rights under the Federal Protecting Tenants at Foreclosure Act of 2009 (P.L. 111-22) or Code, Real Property Article, § 7-105.6 or, if the person in possession is such a bona fide tenant, that the notice required under these laws has been given and that the tenant has no further right to possession. If a notice pursuant to the Federal Act or Code Real Property Article, § 7-105.6 is required, the movant shall state the date the notice was given and attach a copy of the notice as an exhibit to the motion.

[2] Rule 14-102(e) states:

After entry of a judgment awarding possession of residential property as defined in Rule 14-202 (q), but before executing on the judgment, the purchaser shall:

(1) send by first-class mail the notice required by Code, Real Property Article, § 7-105.9 (d) addressed to "All Occupants" at the address of the property; and

(2) file an affidavit that the notice was sent.

On August 8, August 13, and September 5, 2014, Mshana filed motions to stay the writ of possession and vacate the foreclosure sale. Freddie Mac filed an opposition to the motions on September 11, 2014, and the circuit court denied Mshana's motions in orders entered on September 19 and 22, 2014. Mshana filed his notice of appeal on October 22, 2014.

DISCUSSION

Mshana argues that the circuit court abused its discretion by denying his motions to stay writ of possession and vacate the foreclosure sale because, pursuant to Maryland Rule 2-535(b), he presented evidence sufficient to allow the court to reopen the judgment because the note was fraudulently endorsed and JPMorgan Chase fraudulently instituted the foreclosure action. Neither JPMorgan Chase nor Freddie Mac filed an appellee's brief.

We review the denial of a motion to vacate for abuse of discretion. *Jones v. Rosenberg*, 178 Md. App. 54, 72 (2008) (citing *Mullaney v. Aude*, 126 Md. App. 639, 666 (1999)). The allegations made by Mshana are commonplace in foreclosure cases heard by this Court. Two opinions, *Jones v. Rosenberg*, 178 Md. App. 54 (2008), and *Thomas v. Nadel*, 427 Md. 441 (2012), have addressed the issues Mshana raises and, consequently, control the outcome of this case.

Prior to the foreclosure sale, a mortgagor may challenge the validity of the lien, the lien instrument, the right of the plaintiff to foreclose because, for example, the trustees failed to comply with Maryland foreclosure law or because the lender does not, in fact possess the note. *See* Md. Rule 14-211. However, after the foreclosure sale, the

mortgagor "may challenge *only* procedural irregularities at the sale or ... the statement of indebtedness...." *Bates v. Cohn*, 417 Md. 309, 320 (2010) (quoting *Greenbriar Condo., Phase I Council of Unit Owners, Inc. v. Brooks*, 387 Md. 683, 740-41 (2005)) (Internal quotation marks omitted). Challenges to the sale 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." *Id.* at 321 (Internal quotation marks omitted).

Accordingly,

> [t]he effect of a final ratification of sale is *res judicata* as to the validity of such sale, except in the case of fraud or illegality. The burden of proof in establishing fraud, mistake, or irregularity is clear and convincing evidence. To establish fraud under Rule 2–535(b), a movant must show extrinsic fraud, not intrinsic fraud.

Jones, 178 Md. App. at 72 (Internal citations omitted).

This Court explained the distinction between intrinsic fraud and extrinsic fraud in *Billingsley v. Lawson*:

> [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."

43 Md. App. 713, 719 (1979) (quoting *Schwartz v. Merchs. Mortgage Co.*, 272 Md. 305, 308-09 (1974)).

Fraud is extrinsic when "it actually prevents an adversarial trial but is intrinsic when it is employed during the course of the hearing which provides the forum for the truth to appear, albeit, the truth was distorted by the complained of fraud." *Manigan v. Burson*, 160 Md. App. 114, 121 (2004) (quoting *Billingsley*, 43 Md. App. at 719). Similarly, the Court of Appeals characterized extrinsic fraud as:

> Where the unsuccessful party has been prevented from exhibiting fully his case, by fraud or deception practiced on him by his opponent, as by keeping him away from court, a false promise of a compromise; or where the defendant never had knowledge of the suit, being kept in ignorance by the acts of the plaintiff; or where an attorney fraudulently or without authority assumes to represent a party and connives at his defeat; or where the attorney regularly employed corruptly sells out his client's interest to the other side,-these, and similar cases which show that there has never been a real contest in the trial or hearing of the case, are reasons for which a new suit may be sustained to set aside and annul the former judgment or decree, and open the case for a new and a fair hearing.

Schwartz, 272 Md. at 309 (quoting *United States v. Throckmorton*, 98 U.S. 61, 65-66 (1878)).

In his motion to vacate foreclosure, Mshana made general allegations that JPMorgan Chase did not actually possess the note, and thus, was not able to initiate the foreclosure action. Mshana attached a transcript of a deposition—from a proceeding in Florida pertaining to a mortgage loan that is unrelated to this case—in which a JPMorgan Chase employee (and former Washington Mutual employee) stated that he was not aware of a master schedule that purportedly transferred all mortgage loans owned by Washington Mutual to JPMorgan Chase after Washington Mutual went into receivership

and implied that the schedule actually does not exist. Mshana argues that JPMorgan Chase was aware that the schedule of loans did not exist, and because of that awareness, JPMorgan Chase also knew that it could not initiate a valid foreclosure action. Therefore, because JPMorgan Chase ultimately did foreclose on the property, JPMorgan Chase committed fraud in doing so. Separately, Mshana argues that the mortgage note, dated December 3, 2007, was fraudulently endorsed by Cynthia Riley in her role as Vice President of Washington Mutual because Ms. Riley later stated that she was laid off by Washington Mutual in November 2006. Finally, Mshana argues that gaps in the chain of title for the note, irrespective of any fraudulent intent, should result in the foreclosure being vacated.

Mshana's arguments suffer from several flaws. Briefly on the merits: Mshana presented no evidence of JPMorgan Chase's knowledge or fraudulent intent to initiate the foreclosure; the allegation that JPMorgan Chase knew that it did not possess the note when the Trustees docketed the foreclosure is just that, an allegation. The Trustees filed a copy of the deed of trust and mortgage note endorsed in blank, and filed an affidavit of note ownership, which stated that JPMorgan Chase held the note. Mshana's citation to a deposition in an unrelated Florida case and without a supporting affidavit—alleging that the entire portfolio of Washington Mutual loans was never assigned to JPMorgan Chase—has little bearing on this case. Under Maryland law, JPMorgan Chase, as the holder of a note endorsed in blank, was entitled to enforce it, and was therefore entitled to foreclose on the property after Mshana defaulted. *Cf. Thomas v. Nadel*, 427 Md. 441, 449-53 (2012) (holding that possible gaps in the chain of title did not constitute fraud that

would allow a mortgagor to challenge a foreclosure post-sale). Stated differently, there need not have been a specific assignment of the loan from Washington Mutual to JPMorgan Chase. The means by which JPMorgan Chase came into possession of the note do not matter. Mshana only presented evidence showing a potential dispute concerning the assignment of the note; he has not presented evidence disputing that JPMorgan Chase was the holder of the note.

Mshana also presented no supporting documentation—much less evidence supporting an inference of fraudulent intent—of Cynthia Riley's deposition in which she allegedly said that she was not employed by Washington Mutual in 2007. In sum, the meager proof that Mshana presented does not amount to clear and convincing evidence of fraud.

However, even if Mshana had produced evidence of fraud, his allegations amounted to intrinsic fraud. Each of the above issues could have been raised and litigated within the context of the foreclosure case. *See* Md. Rule 14-211 (describing the pre-sale procedure allowing a mortgagor to contest the validity of the lien or the lien instrument or to the right of the plaintiff to foreclose). Mshana could have investigated the validity of the assignment of the loan or its endorsement well before the sale. This is not a case where JPMorgan Chase or Trustees prevented Mshana "from exhibiting fully his case, by fraud or deception practiced on him by his opponent, as by keeping him away from court, a false promise of a compromise; or where the defendant never had knowledge of the suit, being kept in ignorance by the acts of" JPMorgan Chase. *See Schwartz*, 272 Md. at 309 (quoting *Throckmorton*, 98 U.S. at 65-66).

For the above reasons, we hold that the circuit court did not abuse its discretion in denying Mshana's motion to stay writ of possession and motion to vacate the foreclosure.

JUDGMENT OF THE CIRCUIT COURT FOR BALTIMORE CITY AFFIRMED. COSTS TO BE PAID BY THE APPELLANT.