UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 0028

September Term, 2015

SPURGEON MONTGOMERY, *et ux.*

v.

KRISTINE D. BROWN, *et al.*
SUBSTITUTE TRUSTEES

Woodward,
Friedman,
Zarnoch, Robert A.
(Retired, Specially Assigned),

JJ.

Opinion by Zarnoch, J.

Filed: February 29, 2016

This is an appeal in a foreclosure action brought by Wells Fargo and substitute trustees Kristine Brown, William Savage, Gregory Britto, Lila Stitely, Brett Callahan, and Heather Roberts, (collectively "Wells Fargo," "Trustees," or "Appellees") against Appellants Spurgeon and Tia Montgomery in the Circuit Court for Charles County, on their residence located at 8856 Marble Arch Court in White Plains, Charles County.[1] After Wells Fargo foreclosed on the property in May 2014, the circuit court awarded possession to the new owner in February 2015. The Montgomerys appealed from the judgment awarding possession and now present one question for our review, which we have rephrased as follows:

> Did the circuit court err failing to reopen the judgment of foreclosure due to fraud, and in awarding possession to Wells Fargo because Wells Fargo did not have the right to foreclosure?

For the following reasons, we affirm the judgment of the circuit court.

BACKGROUND

The Montgomerys obtained a purchase money loan in the amount of $343,660.00 from Prospect Mortgage, LLC on October 9, 2009. The loan was evidenced by a note and secured by a deed of trust recorded against the Montgomerys' real property in the White Planes, with Prospect Mortgage listed as the trustee. The deed of trust designated MERS

[1] The Montgomerys have proceeded *pro se* throughout the foreclosure litigation, including in this appeal. Because they are proceeding *pro se*, we will liberally construe the Montgomerys' arguments. *See Simms v. State*, 409 Md. 722, 732 (2009) (adopting federal practice to construe liberally court filings that are prepared by *pro se* prisoners). This does not, however, excuse the Montgomerys from complying with Maryland rules and statutes. *See Jones v. Rosenberg*, 178 Md. App. 54, 74 (2008).

(Mortgage Electronic Registration Systems Inc.) as the nominee of Prospect Mortgage and its successors and assignees as the beneficiaries under the instrument. On July 30, 2012, MERS, in its capacity as nominee for Prospect Mortgage, assigned the deed of trust to Wells Fargo Bank, NA, and recorded it in the Charles County land records the following day. Additionally, Prospect Mortgage indorsed the note to Wells Fargo Bank at some point before May 14, 2013.

On September 2, 2012, the Montgomerys defaulted on the note. The servicer sent the Montgomerys a notice of intent to foreclose ("NOI") on January 18, 2013, which listed the secured party as Wells Fargo Bank and apprised the Montgomerys of the procedure and timeline for foreclosure in Maryland. The NOI also included a list of non-profit organizations in the HOPE Housing Counselors Network that assist homeowners who are dealing with a potential foreclosure and who could help the Montgomerys navigate the foreclosure and mediation process.[2]

Wells Fargo, as the holder of the note, appointed Kristine Brown, William Savage, Gregory Britto, Lila Stitely, and Brett Callahan, and Heather Roberts as substitute trustees under the deed of trust on January 28, 2013 (recorded May 14, 2013).

[2] The HOPE Housing Counselors Network is part of the Home Owners Preserving Equity ("HOPE") Initiative, supported by the Maryland Department of Housing and Community Development ("DHCD"). "DHCD supports a statewide network of 31 nonprofit agencies that provide foreclosure prevention assistance. DHCD provides financial support and training to these agencies. These counselors are the critical link in assisting individuals facing foreclosures, acting as a resource to negotiate reasonable terms with mortgage servicers, and advising citizens on the best actions to take to save their homes." *See* Counselors, Maryland HOPE Initiative, DHCD, http://mdhope.dhcd.maryland.gov/Counseling/Pages/default.aspx.

On May 22, 2013, Trustees filed an order to docket foreclosure action in the Circuit Court for Charles County. In the order to docket, Trustees certified that they complied with the requirements of Maryland Code (1974, 2010 Repl. Vol., 2012 Supp.), Real Property Article ("R.P.") § 7-105.1, which required Trustees to verify the accuracy of the contents of the order to docket, and affirm that loss mitigation information was included with the order to docket. The Montgomerys were served by posting to the foreclosure property on July 1, 2013, which included, among other things, a copy of a notice of foreclosure action, a form to request foreclosure mediation, a preliminary loss mitigation affidavit, and a copy of the order to docket along with all other papers filed with it. The above documents were also sent to the Montgomerys by first class and certified mail.

Wells Fargo filed a final loss mitigation affidavit on February 28, 2014, affirming that the Montgomerys did not qualify for the loss mitigation program because they had failed to provide the requested proof of their income, bank statements and other documentation required to perform loan modification. Pursuant to Maryland Rule 14-211, the Montgomerys had until March 15, 2014, 15 days after the final loss mitigation affidavit was filed, to file a motion to stay or dismiss foreclosure. The Montgomerys did not file a motion to stay within this time. Consequently, Trustees scheduled a foreclosure sale for May 6, 2014, advertised the sale in the Washington Post, and sent the requisite notices via mail to the Montgomerys.

On May 5, the Montgomerys filed a motion to stay foreclosure sale, arguing that a stay was proper because they were not aware of the deadlines for requesting mediation and did not receive requests from Wells Fargo to provide documentation for a loss mitigation program.[3] Wells Fargo filed an opposition to the Montgomerys' motion on May 6, 2014, averring that Trustees mailed all applicable notices and contending that the Montgomerys' motion was untimely, did not demonstrate good cause for late filing, and did not comply with Rule 14-211, which required that the Montgomerys "state with particularity the factual and legal basis of each defense that the moving party has to the validity of the lien or the lien instrument or to the right of the plaintiff to foreclose in the pending action." Md. Rule 14-211(a)(3)(B).

The court did not immediately act on the motion for a stay, and the foreclosure sale proceeded on May 6, 2014, with Wells Fargo purchasing the property for $274,120. Eight days later, on May 14, the court issued an order denying the stay. On May 22, 2014, the Montgomerys filed a motion for reconsideration to which they appended a "forensic audit" of the mortgage. According to the Montgomerys, the audit raised questions about Wells Fargo's rights to foreclose on the property. Trustees, in their opposition to the motion for reconsideration, argued that the Montgomerys did not

[3] The Montgomerys initially filed their request for mediation on May 5; however, they did not pay the $50 filing fee at that time. Later, on May 16, they returned to the court to pay the fee, and it was on this date that their request for mediation was officially filed. Pursuant to R.P. § 7-105.1(j)(1)(ii)(2), the Montgomerys were required to file their request for mediation no later than March 24, 25 days after the mailing of the final loss mitigation affidavit on February 26, 2014.

provide facts sufficient to support their motion, and further, that they did not allege irregularities or misconduct at the sale. Agreeing with Trustees, the court denied the motion for reconsideration and ratified the sale on June 24, 2014.

After giving the Montgomerys notice to vacate the premises on July 11, Wells Fargo moved for judgment awarding possession of the property on November 9, 2014. On February 4, 2015, the Montgomerys filed a motion for extension of time. On February 19, 2015, the court issued an order granting judgment for possession of the property to Wells Fargo. The Montgomerys noted their appeal on March 11, 2015.

DISCUSSION

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)).

The Montgomerys make general allegations that Prospect Mortgage did not assign the deed of trust to Wells Fargo and that Wells Fargo did not actually possess the note. For these reasons, they contend, Wells Fargo should not have been able to initiate the foreclosure action. Although the Montgomerys do not explicitly describe their argument in this manner, we will construe it in the following manner: "because Wells Fargo ultimately did foreclose on the property even though it knew that it did not have the right to, it committed fraud in doing so." The Montgomerys also argue that gaps in the chain of title for the note, irrespective of any fraudulent intent, should result in the foreclosure being vacated.[4] Wells Fargo responds that the Montgomerys have not shown evidence of fraud, mistake, or irregularity sufficient to reopen the judgment, and that the

[4] Although the Montgomerys allude to other claims, such as violations of the Fair Debt Collection Practices Act, 15 U.S.C. § 1692 *et seq.*, they do not provide factual or legal arguments to support their allegations. Further, these claims were not raised in the circuit court, and, therefore, we will not decide them. Md. Rule 8-131.

Montgomerys have not otherwise argued that the judgment awarding possession was in error.

Here and before the circuit court, the Montgomerys have presented no evidence of Wells Fargo's knowledge or fraudulent intent to initiate the foreclosure; the allegation that Wells Fargo knew that it did not possess the note when Trustees docketed the foreclosure is not supported by evidence. The Montgomerys also allege that even if Wells Fargo was the holder of the note, the appointment of the substitute trustees was invalid because it was not executed by Wells Fargo. However, this charge is belied by words on the second page of the appointment document, which states "HOLDER: Wells Fargo Bank, N.A." and is signed by Tomeka Keyes, Vice President of Loan Documentation at Wells Fargo. Moreover, with the order to docket foreclosure, Trustees filed a copy of the deed of trust and mortgage note endorsed to Wells Fargo, and they filed an affidavit of note ownership, which stated that Wells Fargo owned and held the note. The assignment of the deed of trust to Wells Fargo was recorded on July 31, 2012, nine months before the order to docket foreclosure was filed.

Under Maryland law, Wells Fargo, as the holder of a note, was entitled to enforce it, and was therefore entitled to foreclose on the property after the Montgomerys defaulted. *See* Md. Code (1975, 2013 Repl. Vol.), Commercial Law Art. § 3-301 (describing a person entitled to enforce an instrument as the "holder of the instrument"); *Deutsche Bank Nat. Trust Co. v. Brock*, 430 Md. 714, 727 (2013) (Holder of note entitled to enforce through foreclosure). The Montgomerys also presented no documentation—

much less evidence supporting an inference of fraudulent intent—to support their allegation that the assignment of the note was "bogus and fabricated." *See 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). In sum, the Montgomerys' arguments do not amount to clear and convincing evidence of fraud.

Even if the Montgomerys had produced evidence of fraud, their 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). The Montgomerys could have investigated the validity of the assignment of the loan or its endorsement well before the sale.[5] This is not a case where Wells Fargo or Trustees prevented the Montgomerys "from exhibiting fully [their] case, by fraud or deception practiced on [them] by [their] opponent, as by keeping [them] 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

[5] In fact, without deciding whether the "forensic audit" of the mortgage actually showed discrepancies in the assignment of the note, we note that the audit was prepared on November 28, 2013. Accordingly, if the Montgomerys believed that the audit provided a reason to stay or dismiss the foreclosure, that evidence existed several months before the March 15, 2014 to file a motion to stay or dismiss.

of" Wells Fargo. *See Schwartz*, 272 Md. at 309 (quoting *Throckmorton*, 98 U.S. at 65-66).

Aside from the above allegations of fraud, the Montgomerys do not allege any error in the circuit court's judgment awarding possession of the property. For the above reasons, we hold that the circuit court did not abuse its discretion in denying the Montgomerys' motion to extend time or in granting Wells Fargo's motion for judgment of possession.

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