UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 0105

September Term, 2015

THELMA RANDALL-SIMMS

v.

JEFFREY FISHER

Wright,
Nazarian,
Serrette, Cathy Hollenberg
(Specially Assigned),

JJ.

Opinion by Serrette, J.

Filed: August 26, 2016

The Circuit Court for Baltimore County denied the motion of appellant, Thelma Randall-Simms, Personal Representative of the Estate of Amos E. Simms, to stay and dismiss the foreclosure proceedings instituted by Jeffery B. Fisher, Doreen A. Strothman, Virginia S. Inzer, William K. Smart, and Carletta M. Grier, substitute trustees, against residential property that had been owned by Amos E. Simms, the late husband of Thelma Randall-Simms. Appellant noted an appeal raising three issues,[1] which we have rephrased slightly as follows:

I. Whether the Circuit Court of Baltimore County erred in failing to order pre-foreclosure mediation;

II. Whether the appellees had standing to initiate foreclosure proceedings;

III. Whether the power of sale provision in the deed of trust was enforceable.

For the reasons set forth below, we shall affirm the judgment of the Circuit Court for Baltimore County.

[1] The issues, as stated in appellant's brief, are as follows:

I. Whether the Circuit Court for Baltimore County erred when it failed to require that parties engage in pre-foreclosure mediation?

II. Whether the Circuit Court for Baltimore County erred when it permitted Appellees to maintain this action even though they lack standing to maintain it?

III. Whether the Circuit Court of Baltimore County erred when it failed to overrule the foreclosure sale because the power of sale in the deed of trust is unenforceable?

BACKGROUND[2]

On or about November 17, 2009, Amos E. Simms, the sole owner of the subject residential property in Catonsville, Maryland, refinanced the property. Generation Mortgage Company (hereinafter referred to as "GMC") issued Mr. Simms a home equity conversion deed of trust (commonly referred to as a "reverse mortgage") which provided, *inter alia*, "Lender may require immediate payment in full of all sums secured by this Security Instrument if: (i) A Borrower dies and the Property is not the principal residence of at least one surviving Borrower…" The deed of trust securing the note named Genuine Title, LLC, as trustee and provided that the lender, at its option, may from time to time remove and appoint successor trustees. The deed of trust was recorded among the Land Records of Baltimore County on or about November 17, 2009.

Mr. Simms, the sole borrower on the loan, died on January 4, 2012. He devised a life estate in the property to his wife, Thelma Randall-Simms, who was also named as the Personal Representative of Mr. Simms' estate. GMC accelerated the loan and sent a notice of default to the subject property on or about February 20, 2013, demanding immediate payment of the principal amount of $227,347.33. On April 17, 2013, a deed of appointment of substitute trustees was executed by the note holder, GMC, appointing the

[2] This matter came before the circuit court on November 6, 2013, on appellant's motion to stay and dismiss foreclosure action and emergency motion for temporary stay of foreclosure sale. The circuit court announced, "Counsel, I am ready to hear any argument or evidence that you wish to present." Following argument, the court took the matter under advisement. On November 8, 2013, the circuit court issued an order, which provided, "Having considered the relevant paper and arguments of counsel the [c]ourt finds that the Defendant's [Appellant's] Motions were not timely filed as required by Md. Rule 14-211(a)(2). Additionally, the content of the Motion failed to comply with Md. Rule 14-211(a)(3)." The motions were denied. No additional factual findings were included in the order.

appellees as substitute trustees under the deed of trust in place and stead of the trustee originally named therein. On April 26, 2013, the appellees signed a statement electing not to participate in prefile mediation. On April 30, 2013, the appellees filed an order to docket and a final loss mitigation affidavit, which were served on appellant as Personal Representative of the Estate of Amos E. Simms on June 4, 2013.[3] The affidavit stated that no loss mitigation analysis had been conducted because, "[t]his is a reverse mortgage and thus there are no monthly payments to modify and the borrower is deceased."[4] Appellant filed a motion to stay or dismiss the foreclosure case on June 26, 2013, and on July 26, 2013, an emergency motion to stay foreclosure sale. The "Declaration" attached to the June 26, 2013 motion to stay or dismiss was unexecuted. The motion to stay or dismiss, which was filed six days late,[5] did not explain why it had not been timely filed.

[3] Appellant's brief indicated that service was effectuated on or about June 7, 2013. The affidavit of service indicated that service had been effectuated on June 4, 2013.

[4] The Notice of Foreclosure Action identified the property as "Not Owner-Occupied." Appellant claimed that she had been residing in the property and had been devised a life estate in the property. Appellant had not recorded her interest in the property in the land records of Baltimore County.

[5] Md. Rule 14-211(a)(2) provides:

Time for Filing.

> (A) Owner-Occupied Residential Property. In an action to foreclose a lien on owner-occupied residential property, a motion by a borrower to stay the sale and dismiss the action shall be filed no later than 15 days after the last to occur of: (i) the date the final loss mitigation affidavit is filed; (ii) the date a motion to strike postfile mediation is granted; or (iii) if postfile mediation was requested and the request was not stricken, the first to occur of:

(continued…)

On July 29, 2013, appellant filed a response to the appellees' opposition to the motion to stay or dismiss, appending an executed copy of the Declaration. Appellant asserted that she had inadvertently filed the unexecuted Declaration and that her financial circumstances had hampered her ability to timely file the motion to stay or dismiss. The circuit court granted a temporary stay on August 2, 2013, and a hearing was held on appellant's motion to stay or dismiss on November 6, 2013.

Appellant argued: 1) that the appellees lacked standing to foreclose; 2) that the power of sale in the deed of trust was unenforceable because it named a corporate entity as trustee; and 3) that the appellees had violated the Maryland Rules by failing to join a necessary party. The circuit court denied appellant's motion based on the failure to timely file and failure to comply with Maryland Rule 14-211(a)(3). The subject property was sold at a foreclosure sale on December 9, 2014. Appellant filed exceptions to the sale on January 6, 2015, which were overruled on February 4, 2015. The sale was ratified on March 9, 2015.[6] This timely appeal followed.

> (a) the date the postfile mediation was held;
>
> (b) the date the Office of Administrative Hearings files with the court a report stating that no postfile mediation was held; or
>
> (c) the expiration of 60 days after transmittal of the borrower's request for postfile mediation or, if the Office of Administrative Hearings extended the time to complete the postfile mediation, the expiration of the period of the extension.

[6] The circuit court awarded possession of the property to the appellees following ratification of the sale. Appellant's motion to set aside and vacate the order was granted on August 13, 2015, and the May 28, 2015 order granting possession to the appellees was stricken.

Additional facts are incorporated below as relevant to each issue.

DISCUSSION

Standard of Review

"The grant or denial of injunctive relief in a property foreclosure action lies generally within the sound discretion of the trial court." *Anderson v. Burson*, 424 Md. 232, 243 (2011) (citing *Wincopia Farm, LP v. Goozman,* 188 Md.App. 519, 528 (2009)). The circuit court's legal conclusions are reviewed *de novo*. *Burson v. Capps*, 440 Md. 328, 342 (2014), *reconsideration denied* (Nov. 19, 2014).

Mediation

Relying on Md. Code (1974, 2010 Repl. Vol.), Real Prop. ("R.P.")§ 7-105.1(j) and citing Md. Rule 14-212, appellant argues that the circuit court erred by failing to require the parties to engage in pre-foreclosure mediation.[7]

R.P. § 7-105.1(j) provides, in pertinent part:

Requests for post-file mediation

(j)(1)(i) This paragraph applies to a mortgagor or grantor who:

1. Has not participated in prefile mediation; or

[7] Md. Rule 14-211 provides: "To the extent permitted in Rule 14-212, the motion [to stay and dismiss] may include a request for referral to alternative dispute resolution pursuant to Rule 14-212." Appellant failed to request mediation in the prayer for relief in the motion to stay and dismiss foreclosure action. However, under the heading "Plaintiffs Have Violated The Maryland Rules by Failing to Join a Party," appellant asserted, "Furthermore, plaintiffs (sic) not only failed to name her as a party but plaintiffs have designated the property as "Not Owner Occupied" thus denying any party to this action their opportunity to face to face mediation as mandated by Maryland State law." Subsequently, in response to the timeliness argument in the opposition to the motion, appellant argued, "the Defendant should have been offered an opportunity to request mediation, thus extending the time to file her Motion to Stay or Dismiss until the conclusion of the mediation."

2. Has participated in prefile mediation that resulted in a prefile mediation agreement that gives the mortgagor or grantor the right to participate in postfile mediation.

Md. Rule 14-212 provides:

> **(a) Applicability.** This Rule applies to actions that are ineligible for foreclosure mediation under Code, Real Property Article, § 7-105.1.
>
> **(b) Referral to Alternative Dispute Resolution.** In an action in which a motion to stay the sale and dismiss the action has been filed, and was not denied pursuant to Rule 14-211 (b)(1), the court at any time before a sale of the property subject to the lien may refer a matter to mediation or another appropriate form of alternative dispute resolution, subject to the provisions of Rule 17-201, and may require that individuals with authority to settle the matter be present or readily available for consultation.

Appellant acknowledged that Ms. Randall-Simms is neither a mortgagor nor a grantor as provided for in R.P. § 7-105.1.[8] Alternatively, appellant asserted that the circuit court had authority under Md. Rule 14-212 to refer the case to mediation and that the Court of Special Appeals "should correct that error."

Appellant may be correct that the trial court could have referred the parties to mediation prior to denying the motion to stay and dismiss. During the course of these proceedings, the appellant has been afforded the opportunity to mediate and was unable to resolve the issues raised on appeal at the alternative dispute resolution session. More importantly for this appeal, appellant was not covered by the mediation provision of R.P. § 7-105.1(j), and the circuit court did not abuse its discretion in failing to refer the parties to mediation pursuant to Md. Rule 14-212. Even assuming, *arguendo*, that the circuit court erred in failing to refer the parties to mediation, appellant failed to demonstrate that

[8] Ms. Randall-Simms is not a party in her individual capacity. The failure to name her as such was not raised on appeal.

the error was prejudicial. *See Harris v. David S. Harris, P.A.*, 310 Md. 310, 319 (1987)("[W]e start with the premise that the appellate courts of this State will not reverse a lower court judgment for harmless error: the complaining party must show *prejudice* as well as *error*. . . . The harmless error doctrine is based on the policy that a new trial should not be granted because of an error that inflicted no harm.") (citation omitted).

Standing

Appellant next argued that the appellees lacked standing to institute the foreclosure proceedings and enforce the deed of trust, insofar as no validly executed assignment of the deed of trust from the original lender, GMC, to Ginnie Mae,[9] the owner of the note, had been recorded in the Land Records of Baltimore County.

The unchallenged combined affidavit filed by the appellees *sub judice* affirmed that GMC was the holder of the debt instrument secured by the recorded deed of trust, that the appellees were substituted as trustees under the deed of trust with the right to foreclose, and that Ginnie Mae c/o GMC was the owner of the note held by GMC for purposes of foreclosure. The notice of intent identified Ginnie Mae c/o GMC as the secured party, GMC as the loan servicer, and GMC as the mortgage lender. The deed of trust provided for the appointment of substitute trustees at the option of the lender. A deed of appointment of substitute trustees was executed on April 17, 2013, appointing the appellees as substitute trustees under the recorded deed of trust granted by Mr. Simms.

[9] Appellees assert that the owner of the debt is Ginnie Mae, the Government National Mortgage Association, which was mistyped as "Gannie Mae". "Ginnie Mae", rather than "Gannie Mae" will be used in this opinion.

It is well established that once a note is transferred, the right to enforce the note is transferred as well. *Le Brun v. Prosise,* 197 Md. 466, 474–75(1951). A "deed of trust cannot be transferred like a mortgage; rather, the corresponding note may be transferred, and carries with it the security provided by the deed of trust." *Anderson,* at 246 (2011).

> [The] deed of trust secures a negotiable note, whoever may be the holder. The deed of trust need not and properly speaking cannot be assigned like a mortgage, *cf. Jones on Mortgages,* § 1222; *Glenn on Mortgages,* § 338, but the note can be transferred freely, and, when transferred, carries with it the security, if any, of the deed of trust, which was true of a mortgage note before the Act of 1892, ch. 392, amended by Acts of 1910, ch. 719, now section 26. *Demuth v. Old Town Bank,* 85 Md. 315, 37 A. 266 [(1897)]. "The note and the mortgage are inseparable; the former as essential, the latter as an incident. An assignment of the note carries the mortgage with it, while an assignment of the latter alone is a nullity."

Le Brun v. Prosise, 197 Md. at 474–75 (1951) (other citations omitted).

"The trustee not only represents the holder of the note secured by the deed of trust, but also the owners of the property who would be entitled to any surplus remaining after the payment of expenses and the note secured by the deed of trust." *Waters v. Prettyman*, 165 Md. 70, 75 (1933). "The deed of appointment of substitute trustees is not a conveyance of an interest in property, but merely serves to appoint new trustees to exercise the lender's power under the deed of trust to foreclose the right of redemption, subject to the mortgagor's equitable right to redeem the property prior to the sale." *Svrcek v. Rosenberg*, 203 Md. App. 705, 729 (2012). Substitute trustees have standing to foreclose on deed of trust, where the original deed of trust provides for substitution of trustees. *Anderson v. O'Sullivan*, 224 Md.App.501, 513–14(2015).

Cognizant of the foregoing, appellant argued that the November 11, 2011 report of the Permanent Editorial Board for the Uniform Commercial Code (UCC) and the enactment of Md. Code (1975, 2013 Repl. Vol.), Commercial Law article ("C.L.") § 9-607(b) nonetheless support the contention that recordation of the assignment of a deed of trust is a precondition to foreclosure. The report, entitled "Application of the Uniform Commercial Code to Selected Issues Relating to Mortgage Notes," indicated that § 9-607(b) of the UCC, enacted in Maryland as Md. Code (1975, 2013 Repl. Vol.), Commercial Law article ("C.L.") § 9-607(b), enables the buyer of a mortgage note or creditor to whom a security interest in the note has been granted to record its interest in the land records, given that in some states, a party without a recorded interest in a mortgage may be unable to enforce the mortgage non-judicially. Appellant asserted that enactment of C.L. § 9-607(b) would have been unnecessary had recordation of the assignment of deeds of trust not been required.

C.L. § 9-607(b) provides:

> If necessary to enable a secured party to exercise under subsection (a)(3) the right of a debtor to enforce a mortgage nonjudicially, the secured party may record in the office in which a record of the mortgage is recorded:
>
> (1) A copy of the security agreement that creates or provides for a security interest in the obligation secured by the mortgage; and
>
> (2) The secured party's sworn affidavit in recordable form stating that:
>
> (A) A default has occurred with respect to the obligation secured by the mortgage; and
>
> (B) The secured party is entitled to enforce the mortgage nonjudicially.

Nothing therein divests the appellees of standing. The appellees had standing to proceed.

Substituted Trustees

Lastly, appellant argued that the power of sale in the deed of trust was unenforceable insofar as it named a corporate entity, Genuine Title, LLC, as trustee. On April 17, 2013, GMC, the note holder, appointed the appellees, five individuals, as substitute trustees. Appellant asserted that the deed of trust was void *ab initio*, and could not be cured by naming the appellees as trustees.

Acknowledging that the Court had addressed and rejected similar assertions in *Svrcek v. Rosenberg*, 203 Md. App. 705 (2012), appellant distinguished her claim by relying on federal rather than Maryland constitutional grounds. In short, appellant contended that retroactive application of R.P. § 7-105, as amended, violates the Contracts Clause of the United States Constitution.

As in *Svrcek*, Mr. Simms agreed to a power of sale in the deed of trust, the deed of trust allowed for a substitution of the trustee, and the original trustee was not an individual.

In 2009 when Mr. Simms executed the deed of trust, as when Svrcek had executed a deed of trust, R.P. § 7-105(a) provided:

> (a) *Power of sale or assent to decree for sale.*—A provision may be inserted in a mortgage or deed of trust authorizing any *natural person* named in the instrument, including the secured party, to sell the property or declaring the borrower's assent to the passing of a decree for the sale of the property, on default in a condition on which the mortgage or deed of trust provides that a sale may be made.

(Emphasis added).

In 2010, R.P. § 7-105 was amended, to provide, in pertinent part:

> (a) In this section, "individual" means a natural person.

Power of sale or assent to decree for sale

> (b)(1) A mortgage or deed of trust may authorize the sale of the property or declare the borrower's assent to the passing of a decree for the sale of the property, on default in a condition on which the mortgage or deed of trust provides that a sale may be made.
>
> (2) A power of sale or assent to decree authorized in a mortgage or deed of trust may be exercised only by an individual.
>
> (3) The individual selling the property under a power of sale need not be named in the mortgage or deed of trust.
>
> (4) An error or omission in a mortgage or deed of trust concerning the designation of the trustee or the individual authorized to exercise a power of sale does not invalidate the instrument or the ability of the mortgagee or beneficiary of the deed of trust to appoint an individual to exercise the power of sale.
>
> (5) If a mortgage or deed of trust allows for the appointment or substitution of a trustee or an Individual authorized to exercise a power of sale, the holder of the mortgage or deed of trust may make the appointments or substitutions from time to time.

In *Svreck*, this Court examined whether the retroactive application of a curative statute that allowed for the appointment of an individual as a substitute trustee was constitutionally permissible. It held that it was, finding "no basis for Svrcek's argument that allowing the appointment of a substitute trustee in any way abrogates his rights in the property." *Id*. at 737. Given that Svreck had voluntarily agreed to the potential substitution of trustees and to the grant of power of sale to a trustee, the curative legislation allowing for the appointment or substitution of a trustee was deemed not to infringe upon any vested property right. *Id.*

The Contract Clause of the U.S. Constitution renders the deed of trust no less enforceable. Article 1, section 10 of the U.S. Constitution provides: "No State shall . . .

pass any . . . Law impairing the Obligation of Contracts." The U.S. Supreme Court set forth the framework for analyzing a Contract Clause claim in *Allied Structural Steel Co. v. Spannaus*, 438 U.S. 234, 244–45 (1978), in which it explained:

> [T]he first inquiry must be whether the state law has, in fact, operated as a substantial impairment of a contractual relationship. The severity of the impairment measures the height of the hurdle the state legislation must clear. Minimal alteration of contractual obligations may end the inquiry at its first stage. Severe impairment, on the other hand, will push the inquiry to a careful examination of the nature and purpose of the state legislation. (Footnotes omitted).

The retroactive application of a curative statute that permits the holder of a deed of trust to substitute trustees from time to time cannot reasonably be deemed to substantially impair the contractual relationship of those whose contract provides that the lender, at its option, may from time to time remove and appoint a successor trustee. If the parties' contractual obligations were altered at all as a result of the amendment of R.P. § 7-105, the alteration was minimal.

The Contract Clause of the U.S. Constitution does not preclude enforcement of the power of sale provision in the subject deed of trust.

CONCLUSION

As this Court recognized in *Granados v. Nadel*, 220 Md. App. 482, 486 (2014):

> "Foreclosures are a constant reminder of the not-so distant financial crisis and the significantly more recent economic downturn known as the Great Recession. In an effort to stem the surge of foreclosures in Maryland, the General Assembly enacted laws obligating lenders to give borrowers information regarding opportunities to avoid foreclosure."

In a similar vein, the federal government passed legislation to safeguard elderly homeowners, while protecting lenders against the risks of reverse mortgages. In *Bennett*

v. Donovan, 703 F.3d 582, 584–85 (D.C. Cir. 2013) the U.S. Court of Appeals for the District of Columbia Circuit explained:

> A "reverse mortgage" is a form of equity release in which a mortgage lender (typically, a bank) makes payments to a borrower based on the borrower's accumulated equity in his or her home. Unlike a traditional mortgage, in which the borrower receives a lump sum and steadily repays the balance over time, the borrower in a reverse mortgage receives periodic payments (or a lump sum) and need not repay the outstanding loan balance until certain triggering events occur (like the death of the borrower or the sale of the home). Because repayment can usually be deferred until death, reverse mortgages function as a means for elderly homeowners to receive funds based on their home equity.
>
> Reverse mortgages are generally non-recourse loans, meaning that if a borrower fails to repay the loan when due, and if the sale of the home is insufficient to cover the balance, then the lender has no recourse to any of the borrower's other assets. This feature is, of course, favorable to borrowers but introduces significant risk for lenders—if regular disbursements are chosen, they can continue until the death of the borrower (like a life annuity), and the loan balance will increase over time, making it less and less likely that the borrower will be able to cover the full amount. If a borrower lives substantially longer than expected, lenders could face a major loss.
>
> Congress, concerned that this risk was deterring lenders from offering reverse mortgages, authorized HUD to administer a mortgage-insurance program, which would provide assurance to lenders that, if certain conditions were met, HUD would provide compensation for any outstanding balance not repaid by the borrower or covered by the sale of the home. The Housing and Community Development Act of 1987 set out those conditions. The particular provision at issue in this case states:
>
> > The Secretary may not insure a home equity conversion mortgage under this section unless such mortgage provides that the homeowner's obligation to satisfy the loan obligation is deferred until the homeowner's death, the sale of the home, or the occurrence of other events specified in regulations of the Secretary. *For*

> *purposes of this subsection, the term "homeowner" includes the spouse of a homeowner.* 12 U.S.C. § 1715z–20(j) (emphasis added).

The deed of trust in the instant matter does not reflect the foregoing and the implications of 12 U.S.C. § 1715z–20(j), if any, were not raised at the circuit court. As noted in *Granados,* at 499–500 (2014):

> The appellate court is not an advocate tasked with searching for each party's winning argument. Rather, the appellate court is limited ordinarily to issues preserved by the parties. *Fraternal Order of Police, Montgomery Cnty., Lodge 35 v. Montgomery Cnty.,* 437 Md. 618, 630 (2014) (quoting Frank M. Coffin, *The Ways of a Judge: Reflections from the Federal Appellate Bench* 52 (Houghton Mifflin 1980)) ("Deciding an appeal is not a matter of approaching the problem as if for the first time. It is determining whether another, earlier, carefully structured decision should be upheld."); *see also Troxel v. Iguana Cantina, LLC,* 201 Md.App. 476, 511 (2011) (declining to address an issue when the trial court neither ruled on it, nor based any portion of its decision, oral or written, on it).

Having determined that the appellees have standing to maintain this action, that the power of sale in the deed of trust is enforceable, that the circuit court did not abuse its discretion in failing to refer the parties to mediation, and that the appellant was not prejudiced by its failure to do so, we affirm the judgment of the circuit court.

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