UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 0230

September Term, 2015

MARVIN A. VAN DEN HEUVEL,
ET AL.

v.

THOMAS P. DORE, ET AL.,
SUBSTITUTE TRUSTEES

Wright,
Arthur,
Salmon, James P.
(Retired, Specially Assigned),

JJ.

Opinion by Wright, J.

Filed: February 11, 2016

On June 21, 2012, appellees, Thomas P. Dore, Mark S. Devan, Gerard F. Miles, Jr., Shannon Menapace, and Erin Gloth (collectively, "appellees"), as substitute trustees, brought this action in the Circuit Court for Cecil County, to foreclose on real property owned by appellants, Martin A. Van Den Heuvel and Terry L. Van Den Heuvel, located at 650 Shady Beach Road, North East, Maryland 21901 ("Property"). On July 25, 2014, after twice mediating the dispute, the Van Den Heuvels filed an Emergency Motion to Stay and/or Dismiss Foreclosure and for Specific Performance of Agreement. Thereafter, the circuit court granted a temporary stay pending a hearing scheduled for November 17, 2014. Then, on March 13, 2015, the court issued an opinion and order denying the Van Den Heuvels' motion in its entirety.

On April 8, 2015, the Van Den Heuvels timely filed this appeal, asking us to determine whether the circuit court abused its discretion in denying their motion.[1] For the reasons that follow, we affirm the circuit court's judgment.

Facts

On September 23, 2003, the Van Den Heuvels executed a promissory note in the amount of $440,000.00, secured by a Deed of Trust on the Property, in favor of Farmers

[1] We have worded the question based on the applicable standard of review, as the Van Den Heuvels did not present any questions for our review, but only asserted the following:

> [I]. The lower court was clearly erroneous in their ruling by failing to give proper weight to the evidence presented.
>
> [II.] The lower court erred in their interpretation of the case law and statutes presented in the motion and hearing.

& Mechanics Bank, which later merged into PNC Bank, N.A. ("PNC"). Thereafter, the Van Den Heuvels defaulted on their payment obligations.[2] As such, appellees, as substitute trustees, instituted this foreclosure action on June 21, 2012.

Two foreclosure mediations were held on September 5, 2012 and October 24, 2012, and an agreement ("Mediation Agreement") was reached on the latter date.[3] The Mediation Agreement contemplated a partial release, which was contingent on PNC's internal approval and which required the Van Den Heuvels to provide PNC with all requested and required information.[4] The parties thereafter discussed a possible partial

[2] According to the Van Den Heuvels, PNC informed them that it could approve a four-month forbearance agreement "to invest the money in a start-up," if the Van Den Heuvels could provide documentation of their plans along with a business plan. Aside from a vague allegation by Mr. Van Den Heuvel that "in January 2012 [PNC] acknowledged having all necessary documents," there is nothing in the record to indicate that the Van Den Heuvels did, in fact, send the required documentation. It is undisputed, however, that the Van Den Heuvels did not make any payments during that four-month period.

[3] In their brief, the Van Den Heuvels allege, without citation to the record, that an agreement was also reached on September 5, 2012, wherein:

> Mr. Van Den Heuvel would cash in his General Motors retirement fund which was not enough after taxes to bring [the] mortgage current. [The Van Den Heuvels] agreed to pay half of the amount owed in cash and the other half would be spread over the next 14 months and the mortgage payment would increase to cover the remaining arrears balance . . . .
>
> After agreeing to this arrangement in mediation [a]ppellees changed their minds a few days later and refused [to] honor it.

[4] According to the Van Den Heuvels, the appellees agreed to allow them to sub-divide a portion of the land, sell it, and use the proceeds to pay for the mortgage. Again, without citation to the record, the Van Den Heuvels allege that "[t]he property was under contract for sale and . . . PNC failed to honor the mediation agreement" and, as a result, the Van Den Heuvels "lost the buyer."

release on multiple occasions, but no partial release ever occurred. In two letters dated March 20, 2013 and November 21, 2013, PNC informed the Van Den Heuvels that it had "not received the required information to complete the processing of your Partial Release of Mortgage. We will now close your file."

The Van Den Heuvels also made at least two loan modification requests through the Home Affordable Modification Program ("HAMP").[5] On May 8, 2012, PNC notified the Van Den Heuvels that they were denied hardship assistance because the request "was not approved by all required investors." On August 23, 2013, after another review by PNC, the Van Den Heuvels were denied hardship assistance because PNC could not reduce their principal and interest payments consistent with the requirements of applicable loan modification guidelines. Although they were allowed to submit a written request "in order to dispute this denial," the Van Den Heuvels never did so.

On November 7, 2013, the Van Den Heuvels and PNC entered into a forbearance agreement ("Forbearance Agreement"), whereby PNC agreed to temporarily halt

[5] HAMP is an "Official Program of the U.S. Department of the Treasury & the U.S. Department of Housing and Urban Development" that is "designed to lower . . . monthly mortgage payments, making them more affordable and sustainable for the long-term." Making Home Affordable, https://www.makinghomeaffordable.gov/steps/pages/step-2-program-hamp.aspx (last visited Feb. 5, 2016). When applying for mortgage assistance, applicants are required to "provide [their] mortgage company with information about [their] mortgage and finances," which could include information about "income, expenses, assets, debt and hardship." Making Home Affordable, https://www.makinghomeaffordable.gov/steps/Pages/step-3-prepare.aspx (last visited Feb. 5, 2016).

foreclosure proceedings in exchange for six monthly payments through April 1, 2014, totaling $6,003.52. The Forbearance Agreement expressly provided that "[a]ll outstanding payments and fees will be due in their entirety upon completion of this Agreement" and that the Van Den Heuvels "remain responsible for payment in accordance with the terms of their Note and Deed of Trust." During the hearing on the motion, Mr. Van Den Heuvel testified in pertinent part:

> that he received notification from a PNC representative Mary Parrish that despite the terms of the mediation agreement requiring PNC to provide a partial release of mortgage to allow the sale of the lot, PNC would no longer do so. He testified that the PNC representative advised that the bank no longer had a policy of providing partial releases. He testified that he paid mortgage payments in accordance with the forbearance agreement. He testified that because of issues with the County, his subdivision was approved after the time frame that had been expected. He testified that once the subdivision was approved his attorney asked PNC for a thirty day extension of the mediation agreement and it was denied by PNC. He testified that all payments which he had made pursuant to the forbearance agreement were returned to him and foreclosure proceedings were commenced.

On July 25, 2014, the eve of the scheduled foreclosure sale, the Van Den Heuvels filed their emergency motion, pursuant to Md. Rule 14-211, asking that the circuit court stay and dismiss the foreclosure, order specific performance of the Mediation Agreement, hold that appellees have no right to foreclose, determine that the Van Den Heuvels were improperly denied loss mitigation, and find that PNC has unclean hands. On August 11, 2014, appellees opposed the motion, arguing that: it was improper because it did not contest the validity of the deed of trust or the right of the trustees to foreclose; the Van Den Heuvels were not eligible for loss mitigation; the claims for specific performance

were procedurally and substantively improper; and the doctrine of unclean hands did not apply.

The circuit court heard the matter on November 17, 2014, at which time Mr. Van Den Heuvel again requested that the foreclosure be stayed and/or dismissed and that PNC be required to comply with the terms and conditions of the Mediation Agreement. According to the Van Den Heuvels, PNC had "unclean hands" and failed to properly approve them for the HAMP program.

On March 13, 2015, the circuit court issued its opinion and order denying the Van Den Heuvels's motion. In so doing, the court found that "no testimony was offered [to show] that the lien or lien instrument was invalid," and it concluded that the Van Den Heuvels "fail[ed] to meet their burden of persuasion that PNC failed to comply with its duty to pursue loss mitigation." The court continued to explain that it could not "find that PNC failed to provide a partial release upon proper demand, that [PNC] failed to review documents or failed to respond to documents," or that "based on the testimony offered, that PNC should be prohibited from pursuing foreclosure because of unclean hands." Finally, as to the Van Den Heuvels's claim for specific performance of the Mediation Agreement, the circuit court stated that "after considering the testimony offered, [it was] unable to conclude that PNC failed to comply with the terms of the [M]ediation [A[greement."

Additional facts will be included below as they become relevant to our discussion.

Standard of Review

Pursuant to Md. Rule 14-211(a)(1), a borrower "may petition the court for injunctive relief, challenging the validity of the lien or . . . the right of the [lender] to foreclose in the pending action." *Svrcek v. Rosenberg*, 203 Md. App. 705, 720 (2012) (citation omitted). When a party files a motion to stay, Md. Rule 14-211(b) provides:

> (1) *Denial of motion*. The court shall deny the motion, with or without a hearing, if the court concludes from the record before it that the motion:
>
> > (A) was not timely filed and does not show good cause for excusing non-compliance . . . ;
> >
> > (B) does not substantially comply with the requirements of this Rule; or
> >
> > (C) *does not on its face state a valid defense to the validity of the lien or the lien instrument or to the right of the plaintiff to foreclose in the pending action*.

(Emphasis added). "The grant or denial of an injunction [to stop a foreclosure sale] lies within the sound discretion of the trial court, and on appeal, we review the trial court's decision for an abuse of discretion." *Jones v. Rosenberg*, 178 Md. App. 54, 65 (2008) (citation omitted); *accord Svrcek*, 203 Md. App. at 720.

Discussion

The Van Den Heuvels first argue that the circuit court erred in its ruling because it "fail[ed] to give proper weight to evidence presented." In support of their argument, the Van Den Heuvels point to a provision in the Mediation Agreement that stated: "In the event that the Lender's Portfolio Manager approves the partial release and the borrower complies wi[th] all of the Lender's request for information and requirements, the Lender

agrees to a forbearance agreement for a six-month period." The Van Den Heuvels assert that, because they were eventually approved for the six-month forbearance, then it follows that they had already been approved for the partial release.

As we previously explained, the circuit court *must* deny a motion to stay or dismiss a foreclosure if the moving party fails to "state a valid defense 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(b)(1)(C). In this case, the Van Den Heuvels did not meet their burden. Rather, as appellees point out, the Van Den Heuvels make "a feigned attempt to allege a breach of contract claim against PNC, which is not a party to the foreclosure."

The case cited by the circuit court in its opinion, *Wells Fargo Home Mortgage, Inc. v. Neal*, 398 Md. 705 (2007), is instructive.[6] There, the Court of Appeals held that, while a borrower could pursue a pre-foreclosure sale injunction based on a failure of the lender to allow loss mitigation, the borrower may not pursue, as an affirmative cause of action, a state law contract claim allegedly arising from violations of federal regulations. *Id.* at 711. Here, the Van Den Heuvels are attempting to advance a claim that PNC breached the Mediation Agreement, but they have not filed an action against PNC; nor have they attempted to make PNC a party to this foreclosure case.

[6] By contrast, the case relied upon by the Van Den Heuvels, *Currie v. Wells Fargo Bank, N.A.*, 950 F. Supp. 2d 788 (D. Md. 2013), is distinguishable. Whereas *Currie* involved a federal lawsuit in which a plaintiff borrower asserted claims against a defendant lender, *Neal* involves a motion for injunctive relief in a property foreclosure action brought pursuant to Md. Rule 14-211.

Moreover, we agree with appellees that the circuit court's decision was supported by the evidence presented. Through a letter dated March 20, 2013, PNC informed the Van Den Heuvels that it had "not received the required information to complete the processing of [their] Partial Release of Mortgage." Although the Van Den Heuvels and PNC entered into a Forbearance Agreement on November 7, 2013, PNC made clear through another letter dated November 21, 2013, that it still had "not received the required information to complete the processing of [their] Partial Release of Mortgage" and that it would "now close [their] file." This second letter directly contradicts the Van Den Heuvels's primary claim on appeal and dispels their contention that appellees had "unclean hands." *See Adams v. Manown*, 328 Md. 463, 476 (1992) ("It is only when the plaintiff's improper conduct is the source, or part of the source, of his equitable claim, that he is to be barred because of this conduct.") (Citation omitted).

Next, the Van Den Heuvels aver that PNC's loan modification review "was incorrect and the [Van Den Heuvels] were arbitrarily denied a HAMP modification." We need not address this argument, however, because the Van Den Heuvels never availed themselves of the written denial and dispute procedures. Mr. Van Den Heuvel even acknowledged as such during the circuit court hearing.

But, even if we were to reach the merits, we agree with appellees that the Van Den Heuvels did not demonstrate that PNC failed to comply with its duty to pursue loss mitigation. On at least two occasions, May 8, 2012 and August 23, 2013, PNC notified the Van Den Heuvels that they were denied hardship assistance either because the request

"was not approved by all required investors" or because PNC could not reduce their principal and interest payments consistent with the requirements of applicable loan modification guidelines. The letters indicate that PNC continuously pursued loss mitigation on behalf of the Van Den Heuvels, despite not being required to extend a loan modification under the relevant statute. *See* 12 C.F.R. § 1024.41(a) ("Nothing in § 1024.41 imposes a duty on a servicer to provide any borrower with any specific loss mitigation option.").

For all of the foregoing reasons, we affirm the circuit court's denial of the Van Den Heuvels's Motion to Stay and/or Dismiss Foreclosure and for Specific Performance of Agreement.

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