UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 0252

September Term, 2015

BRUCE P. WARFIELD

v.

RICHARD A. LASH, ET AL.
SUBSTITUTE TRUSTEES

Wright,
Nazarian,
Raker, Irma S.
(Retired, Specially Assigned),

JJ.

Opinion by Raker, J.

Filed: March 22, 2016

Appellant Bruce P. Warfield appeals from the Order of the Circuit Court for Carroll County denying his exceptions to a foreclosure sale and ratifying the foreclosure sale. Appellant raises the following question for our review, which we have rephrased:

> Did the Circuit Court for Carroll County err when it failed to grant appellant's exceptions which appellant claims showed that the lender committed fraud against him and that he was not served with the notice of the foreclosure sale?

We shall hold that the circuit court did not err in dismissing appellant's exceptions, or in denying his request for a stay of the foreclosure sale. Hence, we shall affirm.

I.

This case arises from an action to foreclose on property owned by appellant. In April 2006, appellant executed a deed of trust on his home at 2014 East Mayberry Road, Westminster, Maryland, in favor of Emigrant Mortgage Company, Inc., (hereinafter "Emigrant"), and executed a promissory note payable to Emigrant for an original principal sum of $210,000. Appellant alleges that Emigrant assured him that, despite appellant's low income and low credit score, Emigrant would approve a high interest rate "cash out"[1] loan

[1]A "cash out" loan is a refinancing of an existing mortgage loan, where a new mortgage loan for an amount greater than the amount owed on the existing mortgage loan replaces the existing mortgage loan, and the borrower takes the difference between the two loans in cash, essentially converting some of the equity built up in the home into cash.

for him, and then refinance the loan after one year to lower the interest rate. Appellant accepted the high interest rate "cash out" loan.

Appellant defaulted on the promissory note by non-payment in November 2007 after he spent the proceeds of the "cash out" loan. He received two loan modifications from Emigrant between November 2007 and Spring 2011, and defaulted on both. In the first modification, in June 2008, appellant paid Emigrant $10,000 to forestall a foreclosure, and he agreed to a repayment plan that increased his monthly payments from $2,300 to $3,400. He could not keep current with his payments and defaulted soon thereafter. In the Spring of 2009, again facing foreclosure, appellant agreed to pay Emigrant $20,000 to stop a foreclosure sale and agreed to a third repayment plan that raised his monthly payment to $3,800—an additional $1,500 a month. Appellant defaulted again.

In Spring 2011, appellant sought a third loan modification from Emigrant, purportedly to enable him to build an addition to his home. Appellant alleges that he received assurances Emigrant would consider his modification request. Appellant proceeded with the $50,000 home modification before Emigrant decided on the third loan modification request. After appellant completed the addition to his home in late 2011, Emigrant notified appellant that his request was denied.

The foreclosure action that gives rise to this appeal was filed on August 7, 2013, on behalf of Emigrant as the note holder. Appellant was served personally with a Notice of

Foreclosure Action and a Preliminary Loss Mitigation Affidavit on August 18, 2013. He filed "correspondence" with the circuit court requesting a stay of the foreclosure sale on October 7, 2014, the scheduled date of the foreclosure sale. He alleged in his correspondence to the trial court that his mail was delivered often to another similar address, that he did not receive the Final Loss Mitigation Affidavit and the Request for Foreclosure Mediation form, and that he did not receive the Notice of Sale until October 4, 2014. Appellant does not refute that he received actual notice before the foreclosure sale. The circuit court denied appellant's request to stay the sale and the sale proceeded. Appellees filed a Report of Sale in the circuit court on October 28, 2014.

Appellant filed exceptions in the circuit court on December 1, 2014, contesting the foreclosure sale. He alleged that Emigrant fraudulently induced him—that Emigrant gave him assurances that his third loan modification would be considered—and that he had not received notice of the final loss mitigation affidavit, the request for mediation and the final notice of sale.

The circuit court held a hearing on the exceptions on March 16, 2015. The court denied the exceptions to the foreclosure sale, finding that the exceptions were not valid post-sale exceptions that can be raised after a foreclosure sale. The court reasoned that post-sale exceptions can only contest irregularities in the foreclosure sale itself, not matters that pertain

to the foreclosure proceedings before the sale, which must be raised before the sale. The circuit court ratified the foreclosure sale on March 25, 2015.

This timely appeal followed.

II.

Before this Court, appellant argues that the circuit court erred when it failed to grant his exceptions to the foreclosure sale. Before the lower court, appellant alleged that Emigrant committed fraud against him which infected the foreclosure sale. Appellant contends that Emigrant assured him that Emigrant would consider granting him a third loan modification, which fraudulently induced him to believe that Emigrant would in-fact approve the third loan modification. He asserts that such fraud should fall within an exception to the general rule that only irregularities in the sale itself may be the subject of post-sale exceptions. Appellant argues that the circuit court abused its discretion in rejecting his request for a stay of the foreclosure sale, as a stay of thirty days would not have prejudiced the lender, but the court's refusal to grant a stay caused appellant great harm.

Appellees argue that the circuit court did not err is denying appellant's exceptions to the foreclosure sale because they are barred from consideration on the grounds that appellant does not raise one of the two types of fraud that may be considered as an exception. Appellees contend that appellant has not raised (1) an instance where the deed of trust was

the product of fraud (usually forgery) and therefore the sale was invalid and incapable of passing title, nor (2) a misrepresentation by the lender that would lead the borrower to sit on his rights (a kind of fraud which appellant does not raise). Appellees further argue that appellant failed to introduce evidence at the exceptions hearing before the circuit court of any procedural irregularity, including the alleged failure of notice, which would be sufficient to substantiate an exception to the foreclosure sale. Appellees note appellant's concession that notice of the foreclosure sale was sent in accordance with the applicable statute, and that appellant received actual notice of the foreclosure sale before the sale.

III.

We address first whether appellant's fraud allegation exception was of a kind that can be raised in the circuit court *after* the foreclosure sale. When a lender secures a loan by a deed of trust or a mortgage on property, the lender's recourse for the borrower's default is to foreclose on the property that is subject to the deed of trust or mortgage. A borrower may raise different challenges to the proceedings before and after the foreclosure sale. During the foreclosure proceedings but before the sale, the borrower can file a motion to stay the sale and dismiss the foreclosure action under Rule 14-211. After a hearing, the court may dismiss the foreclosure action if "the lien or the lien instrument is invalid or that the plaintiff has no

right to foreclose in the pending action." *Id.* At this point, the borrower is required to state the following:

> "[S]tate 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."

Rule 14-211(a)(3)(B). Challenges to the legitimacy of a foreclosure action that are knowable and ripe before the sale should be raised by a motion under Rule 14-211. *Bates v. Cohn*, 417 Md. 309, 328 (2010).

The means by which a borrower may challenge a completed foreclosure sale before ratification are different and more limited inasmuch as relief would require undoing the sale. A borrower may raise exceptions to a foreclosure sale within 30 days after a report of the sale is entered. Rule 14-305(d)(1) lays out the circumstances under which such exceptions are appropriate:

> "(d) Exceptions to Sale.
>
> (1) How Taken. A party, and, in an action to foreclose a lien, the holder of a subordinate interest in the property subject to the lien, may file exceptions to the sale. Exceptions shall be in writing, shall set forth the alleged irregularity with particularity, and shall be filed within 30 days after the date of a notice issued pursuant to section (c) of this Rule or the filing of the report of sale if no notice is issued. Any matter not specifically set forth in the exceptions is waived unless the court finds that justice requires otherwise."

In *Greenbriar Condominium, Phase I Council of Unit Owners, Inc. v. Brooks*, 387 Md. 683, 688 (2005), the Court of Appeals stressed that an attack on the propriety of a foreclosure should be pre-sale, noting that challenges made after a foreclosure sale takes place are necessarily limited. Ordinarily a borrower must assert *known and ripe* defenses to a foreclosure prior to the sale, rather than in post-sale exceptions, and that the permissible scope of post-sale exceptions is limited to "irregularities" in the sale itself. *Thomas v. Nadel*, 427 Md. 441, 445 (2012). Irregularities that may be considered as post-sale exceptions include allegations that the advertisement of sale was insufficient or misdescribed the property, allegations that the creditor committed a fraud by preventing someone from bidding or by chilling the bidding, challenging the price as unconscionable, or challenges to the creditor's exact statement of debt. *Greenbriar*, 387 Md. at 741.

Appellant raises an exception to the sale based on his allegation of fraud. The Court of Appeals has several times touched on the question of whether an exception to fraud in the underlying mortgage or deed of trust can be raised after the foreclosure sale. In its discussions of permitted exceptions after a foreclosure sale, the Court has addressed primarily the kinds of irregularities which may be raised as post-sale exceptions while apparently avoiding the issue of whether fraud in the underlying loan can be heard as a post-sale exception, instead deciding such cases on other grounds. *Thomas v. Nadel*, 427 Md. 441 (2012); *Bates v. Cohn*, 417 Md. 309 (2010).

In *Greenbriar*, the Court reasoned that post-sale exceptions may challenge only procedural irregularities at the sale or the statement of indebtedness. 387 Md. at 741-42. The Court described the kinds of irregularities that a debtor might raise, including "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 741. Appellant does not raise these kinds of irregularities from the foreclosure sale.

In *Bates*, the Court of Appeals considered the question of whether an allegation of lender fraud is valid as a post-sale exception. First, the *Bates* Court restated the purpose of post-sale exceptions, stating as follows:

> "We reaffirm the conclusion in *Greenbriar* that Rule 14-305 is not an open portal through which any and all pre-sale objections may be filed as exceptions, without regard to the nature of the objection or when the operative basis underlying the objection arose and was known to the borrower. As we stated in *Greenbriar*, after a foreclosure sale, 'the debtor's later filing of exceptions . . . may challenge only procedural irregularities at the sale or . . . the statement of indebtedness.' *Id.*"

Bates, 417 Md. at 327. The Court found that the facts of the case in *Bates* did not warrant a decision on the fraud question; thus the Court of Appeals did not rule on "whether a homeowner may raise under [Rule] 14-305, as a post-sale exception, allegations that a deed of trust was the product of fraud, and, therefore, the sale was invalid and *incapable* of passing title." *Id.* at 327-28. If follows that the underlying fraud must have an effect on the

validity of the sale itself to qualify for consideration as a post-sale exception. The Court held that given the limitations of Rule 14-305, and in light of *Greenbriar*, "a homeowner/borrower ordinarily must assert known and ripe defenses to the conduct of a foreclosure sale *prior* to the sale, rather than in post-sale exceptions." *Id.* at 328.

The Court of Appeals again approached what it acknowledged was a "'distinct question' left open in *Bates*—whether fraud infecting the underlying mortgage or deed may be raised by a borrower in a post-sale exception." *Thomas*, 427 Md. at 454. The borrowers in *Thomas* raised exceptions to a foreclosure sale alleging "certain defects in the chain of title to the note evidencing their debt" that constituted a "fraud on the judicial system." *Id.* at 443. The Court again deferred the task of answering how fraud in the underlying instrument might be allowed as a post-sale exception, writing that "[t]he definitive answer to that question must await another day," *id.* at 454, but did affirm the lower court denying the borrower's exception. The Court held that "the facts alleged do not amount to the kind of fraud that might induce this Court to qualify the general rule limiting the nature of post-sale exceptions." *Id.* at 450.

This Court contemplated the question of whether a post-sale exception is an appropriate vehicle to challenge the entire foreclosure proceeding itself in *Devan v. Bomar*, 225 Md. App. 258 (2015), but did not answer the question. Judge Charles E. Moylan, Jr., writing for this Court, acknowledging the gap in foreclosure law left by *Bates* and *Thomas*,

nonetheless applied the *Thomas* holding that improprieties in the larger foreclosure process that occur before the sale, and are known to the homeowner prior to the sale, *must be raised pre-sale*. *Id.* at 268. Still, this Court refrained in *Devan* from venturing past the threshold to answer the "is fraud an exception to the rule" question. In expounding on the question without answering it, Judge Moylan reasoned that not all kinds of fraud are the same, and that some varieties of fraud in foreclosure actions should likely be treated differently from others, taking into consideration factors such as "society's interest in finality and repose." *Id.* at 277. The holding in *Devan* did not depend on answering the still open question.

We arrive at the same conclusion here—the facts presented in the case *sub judice* do not present a need to fill the doctrinal gap. Again, the facts appellant alleges do not amount to the kind of fraud that might induce this Court to qualify the general rule limiting the nature of post-sale exceptions. Appellant raises a "fraud in the inducement" allegation that is hardly fraud at all.[2] Appellant does not point to a false representation by Emigrant that might

[2]"The elements of civil fraud based on affirmative misrepresentation are that:

> (1) the defendant made a false representation to the plaintiff,
> (2) the falsity of the representation was either known to the defendant or the representation was made with reckless indifference to its truth,
> (3) the misrepresentation was made for the purpose of defrauding the plaintiff,
> (4) the plaintiff relied on the misrepresentation and had the right to rely on it, and
> (5) the plaintiff suffered compensable injury as a result of the misrepresentation."

(continued...)

support a claim of fraud; he asserts only that Emigrant made assurances to him that it would consider his request. Moreover, appellant offers no evidence that Emigrant failed to consider his request. These factual allegations are not sufficient to satisfy the first element of fraud in the inducement, let alone support a viable claim that might merit consideration as a post-sale exception.

Appellant had sufficient notice of the terms of the loan he undertook, and had ample time to challenge the validity of the loan before the foreclosure sale happened—an event, the pendency of which, appellant first was notified of over a year before the sale. Even if appellant raised a valid claim of fraud, which he has not, it is not an appropriate basis for a post-sale exception under Rule 14-305(d)(1).

IV.

We turn next to appellant's contention that the circuit court erred in not granting a stay of the foreclosure sale because he did not receive final notice of the foreclosure sale. The requirements for notice of a pending foreclosure sale to the record owner of the property under Rule 14-210 and by Real Property Article § 7-105.9, set out a procedure that when

(...continued)
Rozen v. Greenberg, 165 Md. App. 665, 674-75 (2005) (quoting *Hoffman v. Stamper*, 385 Md. 1, 28 (2005)).

properly executed, complies with the requirements of procedural due process. *Griffin v. Bierman*, 403 Md. 186, 200 (2008). Rule 14-210 states, in pertinent part:

> "Before selling the property subject to the lien, the individual authorized to make the sale shall also send notice of the time, place, and terms of sale (1) by certified mail and by first-class mail to (A) the borrower, (B) the record owner of the property, and (C) the holder of any subordinate interest in the property subject to the lien and (2) by first-class mail to 'All Occupants' at the address of the property. . . . The mailings shall be sent not more than 30 days and not less than ten days before the date of the sale."

Md. Rule 14-210(b); *see also* Real Property § 7-105.2 (requiring notice be *sent* to record owner of property not more than thirty days and not less than ten days prior to foreclosure sale by first class mail and certified mail). Sending notice by both certified and first-class mail is "calculated reasonably to inform interested parties of the pending foreclosure action." *Griffin*, 403 Md. at 212; *see also Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 319 (1950).

A borrower may request a stay of the foreclosure sale on limited grounds. Before a foreclosure sale takes place, "the defaulting borrower may file a motion to 'stay the sale of the property and dismiss the foreclosure action.'" *Bates v. Cohn*, 417 Md. 309, 319 (2010) (quoting Md. Rule 14-211(a)(1)). To merit a stay, the borrower should present to the court a challenge to the "the validity of the lien or . . . the right of the [lender] to foreclose in the pending action." Md. Rule 14-211(a)(3)(B).

The denial of injunctive relief in a property foreclosure action lies generally within the sound discretion of the trial court, and accordingly, we review the circuit court's denial for an abuse of discretion. *Svrcek v. Rosenberg*, 203 Md. App. 705, 720 (2012). We will not disturb the decision of the circuit court unless we determine that "no reasonable person would take the view adopted by the [trial] court." *Aventis Pasteur, Inc. v. Skevofilax*, 396 Md. 405, 418 (2007).

Appellees complied with the notice statute, and moreover, appellant had actual notice. The letter appellant filed with the circuit court was clear evidence that appellees complied with the statute in sending notice to appellant. Appellant agrees that the notice was timely sent, and does not contest that he received it before the date of the sale. Appellees later filed an affidavit noting their compliance with the notice requirements in the statute and rules. At the time the circuit court considered appellant's request for a stay, the evidence before the court established that notice was properly mailed—appellant's letter indicated clearly that appellees had complied with the statute—and that appellant had received actual notice. The circuit court did not err in denying appellant's request for a stay of the foreclosure sale on the grounds that appellant received actual notice only a few days before the sale itself.

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