UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 0285

September Term, 2015

HAROLD ANDREWS, ET UX.

v.

KRISTINE BROWN

Meredith,
Leahy,
Moylan, Charles E., Jr.
(Retired, Specially Assigned),

JJ.

Opinion by Moylan, J.

Filed: May 26, 2016

In this mortgage foreclosure case, the appellants, Harold Andrews and Melanie D. Andrews, husband and wife, on March 20, 2006, purchased a fee simple property at 7605 Franklin Avenue in Severn, Anne Arundel County, Maryland. To secure the purchase money, the appellants borrowed $646,000 from the Severn Savings Bank, FSB. The appellants executed a Promissory Note to the Severn Bank and secured it with a Deed of Trust on the property.

The Promissory Note and the Deed of Trust ultimately ended up in the hands of the HSBC Bank USA, National Association ("HSBC") and the Wells Fargo Bank is the servicing agent for HSBC. The appellants defaulted by failing to make payments on the Promissory Note on June 2, 2012. The appellees, Kristine D. Brown, William M. Savage, Gregory N. Britto, Heather S. Roberts, Lila Z. Stitely, and Brett A. Callahan, were appointed as substitute trustees on January 23, 2013. The Substitute Trustees filed an Order to Docket Foreclosure on February 20, 2013.

The foreclosure proceedings were put on hold in December of 2013 when the appellants filed a Chapter 13 Bankruptcy Petition in the United States Bankruptcy Court for the District of Maryland. On October 29, 2014, the Substitute Trustees notified the circuit court that the appellants had been released from bankruptcy on September 15, 2014, and that the Substitute Trustees would be continuing with the foreclosure proceeding.

As necessary preliminaries for proceeding with the sale of the property, the Substitute Trustees had initially filed a Preliminary Loss Mitigation Affidavit with their

Order to Docket the Foreclosure. A Final Loss Mitigation Affidavit was filed on May 8, 2013. The appellants did not file any request for post-filing mediation pursuant to Maryland Rule 14-209.1(c)(2). Nor did the appellants file a Motion for the Stay of the Sale or for a Dismissal of the Action within the time limits prescribed by Maryland Rule 14-211(a)(2).

Notwithstanding the clear failure of the appellants to make a timely filing of their Motion For a Stay or For a Dismissal of the Action, on December 13, 2014, Judge Ronald A. Silkworth in the Circuit Court for Anne Arundel County directed the Clerk to schedule a hearing on the Motion to Stay or Dismiss. Accordingly, a full hearing was conducted before Judge Paul G. Goetzke on January 27, 2015. At that hearing, the appellants presented no testimony and offered no evidence. Although the appellants raised the issue of final loss mitigation, the appellees pointed out that their Final Loss Mitigation Affidavit had been filed on May 8, 2013. At the end of the hearing Judge Goetzke ruled against the appellants on all issues except that of whether the substitute trustees had proper standing to bring the foreclosure action. On that issue, he directed that a further hearing be held on February 27, 2015, with respect to identifying the proper holder of the note.

At that January 27, 2015 hearing, the substitute trustees had informed Judge Goetzke that the original Promissory Note had been requested and had been received by them and could be made available at a later court date, if it were deemed necessary or desirable to do so. It was.

The future hearing which had been scheduled for February 27, 2015 was postponed until March 24, 2015 and was conducted before Judge J. Michael Wachs. At that hearing, the appellants again called no witnesses. At the conclusion of the hearing, Judge Wachs signed an order, filed on April 2, 2015, denying the appellants' Motion to Dismiss the Foreclosure. This appeal followed.

The Contentions

On this appeal, the appellants contend:

> "1. That the trial court erroneously failed to find that Wells Fargo's failure to offer loss mitigation was a valid defense to the foreclosure action; and[,]
>
> "2. That Judge Wachs abused his discretion in ruling that Wells Fargo and the substitute trustees had standing to proceed with the foreclosure."

Loss Mitigation

At the hearing before Judge Goetzke on January 27, 2015, the appellants did, to be sure, mention loss mitigation, but the mention was decidedly in a lower key. The dominant thrust of the hearing was the challenge to the standing of the plaintiffs to proceed with the foreclosure action. With respect to their secondary contention, however, the appellants now assert, on appeal, that the Substitute Trustees, by proceeding with the foreclosure "in the midst of the loan modification process was a violation of the CFPB (Consumer Financial Protection Bureau) rules." Neither before Judge Goetzke nor before us have the appellants

cited any specific CFPB rule or argued as to how such a rule was in any way violated. Nor do they point out how such rules applied to the circumstances of this case.

In assessing a challenge to the validity of a foreclosure order, such as the appellants are raising here, it behooves us to keep in the front of the mind the standard of appellate review of a trial judge's ruling on such a challenge, especially the allocation of the burden of proof. In Hobby v. Burson, 222 Md. App. 1, 13-14, 110 A.3d 796 (2015), Judge Berger articulately described the lens through which we must now review the proceeding:

> "In reviewing the circuit court's findings of fact, we are mindful that the exceptant to a foreclosure sale bears the burden of proving that the sale was invalid. *J. Ashley Corp. v. Burson*, 131 Md. App. 576, 582, 750 A.2d 618 (2000) (citing *Ten Hills Co. v. Ten Hills Corp.*, 176 Md. 444, 449, 5 A.2d 830 (1939)). The exceptant must also demonstrate that any irregularities caused 'actual prejudice.' *J. Ashley Corp.*, *supra*, 131 Md. App. at 586, 750 A.2d 618; *see also Harris v. David S. Harris, P.A.*, 310 Md. 310, 319, 529 A.2d 356 (1987) (stating, 'In civil cases, it is well established that the burden of demonstrating both error and prejudice is on the complaining party'). We conduct our review on the basis of the evidence introduced into the record."

(Emphasis supplied).

The initial flaw in the appellants' contention is that it has not been preserved for appellate review. The precise contention as set out by the appellants in their appellate brief is:

> "Wells Fargo's Failure to Offer Loss Mitigation is a Defense to the Right of the Plaintiffs to Foreclose."

That issue was, inter alia, before the trial court for determination at the January 27, 2015 hearing before Judge Goetzke on the appellants' Emergency Motion to Stay the Sale of the Property and Dismiss Foreclosure Action pursuant to Rule 14-211 and filed on December 2, 2014.

The argument in the appellants' appellate brief in support of the contention is limited to one and one-quarter page. The legal argument as to what, at that hearing, constituted reversible error is limited to the following:

> "The foreclosure by the Substitute Trustees in the midst of the loan modification process was a violation of the CFPB [Consumer Financial Protection Bureau] rules. ... Wells Fargo's failure to offer loss mitigation and violation of the CFPD rules is a defense to the foreclosure action and should have been considered by the trial court."

(Emphasis supplied).

Nowhere in the hearing of January 27, 2015, however, was there a citation to, nor a quotation of, any particular CFPB rule that was allegedly applicable and allegedly violated. Nowhere before us, moreover, has there been any citation to or quotation from the unnamed CFPB Rule that is ostensibly the basis for the urged reversal. What we have amounts to no more than a bald assertion. There is certainly no compliance with Rule 14-211(a)(3)(B)'s requirement that a party asserting a defense to the foreclosure must plead all elements of such defense with particularity. Buckingham v. Fisher, 223 Md. App. 82, 89, 115 A.3d 248 (2015). The appellants' Motion to Dismiss of December 2, 2014, it must also be noted,

contained no mention of the CFPB itself, let alone any citation to any of its rules. The CFPB is a phantom lurking in the shadows, and any allusion to it lacks substantiality and particularity.

The record itself shows that a Preliminary Loss Mitigation Affidavit was filed with the initial Order to Docket the Foreclosure papers and that a Final Loss Mitigation Affidavit was filed with the court on May 8, 2013. The appellants have offered no argument as to why or how that Final Loss Mitigation Affidavit failed to satisfy all legal requirements. Even with full opportunity to do so, moreover, pursuant to Maryland Rule 14-209.1(c) and Real Property Article, § 7-105.1(j)(1)(ii), the appellants failed to request any post-file mediation. The Consent Order which terminated the appellants' bankruptcy provided that the foreclosure would not go forward if the appellants cured their post-petition arrearages and then resumed their scheduled payments on the Promissory Note. It was when the appellants again failed to make payments that the foreclosure again went forward. The appellants have, in short, failed to allege or to establish any remote prejudice. Hobby v. Burson, 222 Md. App. 1, 12-13, 110 A.3d 796 (2015).

With respect to all issues other than the standing of the plaintiffs to bring the foreclosure action, Judge Goetzke found no merit in them.

> "[W]ith regard to all other issues, including the changes in law, the requirement that the trustee reissue some kind of notice of – another notice of intent to foreclosure and/or rescheduling of the sale and/or filing a whole new cause of action, I'm not persuaded by any of that, and I believe the

> homeowners to be wrong and deny their motion with regard to all issues other than the Anderson issue."

(Emphasis supplied).

We find no abuse of discretion in that ruling. Anderson v. Burson, 424 Md. 232, 243, 35 A.3d 452 (2011).

Standing to Bring Foreclosure Action

The appellant's primary contention is that it was never adequately established that Wells Fargo Bank, N.A., the ostensible servicing agent for the deed of trust, had the authority to appoint the substitute trustees and to proceed with the foreclosure. The hearing on the appellants' Motion to Dismiss, which resolved most of the issues in this case on January 27, 2015, was continued to March 24, 2015, to examine more closely this particular issue. At the conclusion of that hearing, Judge Wachs issued an Order, ruling that the appellants' motion would be denied, finding that, "This Court is convinced that the Substitute Trustees have presented proper evidence in accordance with Maryland Rule 14-207(b) and (c)."

It was undisputed that the original loan had been made to the appellants by the Severn Savings Bank, FSB, and that the Promissory Note, secured by the Deed of Trust, was executed by the appellants in favor of the Severn Savings Bank. At the March 24, 2015 hearing before Judge Wachs, the original of the Promissory Note was produced and received in evidence. Appearing below the signatures of the appellants on the face of the

Note were two endorsements. The first was from the Severn Savings Bank in favor of American Home Mortgage. The second was from American Home Mortgage in favor of Wells Fargo Bank, N.A. The overarching reality is that it was Wells Fargo Bank, N.A., that was the ultimate servicing agent whose standing is now being challenged. What the appellants appear to be asking is that the trail of endorsements should run out from Wells Fargo to some additional and independent entity from which it would then have to wend its way back to Wells Fargo a second time. Wells Fargo disdains that second trot around the track.

On the reverse side of the Promissory Note is a blank endorsement made by Wells Fargo Bank, N.A. At the hearing before Judge Wachs, Lila Stitely, one of the Substitute Trustees, testified that although she had no personal knowledge of when the endorsements had originally been placed on the Note, she did recall that when she received and looked at the copy of the Note before commencing the foreclosure proceeding, the Note contained all of the endorsements in question.

The appellants challenged the credibility of Ms. Stitely's testimony that the blank endorsement was on the back of the Note, but Judge Wachs credited that testimony. He was not clearly erroneous. Johnson v. Nadel, 217 Md. App. 455, 465, 94 A.3d 149 (2014).

As a holder in possession of the Note that contained a blank endorsement, either Wells Fargo as the servicing agent or any of the substitute trustees was empowered to

enforce the Note. Deutsche Bank v. Brock, 430 Md. 714, 732-33, 63 A.3d 40 (2013). The second of the specific endorsements, moreover, had been to Wells Fargo Bank, N.A., the very mortgage servicer which appointed the Substitute Trustees.

Although the appellants now challenge the status of Wells Fargo as the servicing agent, they acknowledge that at all relevant times, they made their mortgage payments to Wells Fargo as the servicing agent, received their mortgage account statements from Wells Fargo, and, indeed, requested loss mitigation from Wells Fargo. The appellants' effort to label the Wells Fargo Asset Securities Corporation, Mortgage Pass Through Certificates, Series 2007-14 as a distinct and independent entity is of no avail. It is simply a division of Wells Fargo Bank.

Judge Wachs did not abuse his discretion in denying the motion of the appellants' to dismiss the foreclosure proceeding.

JUDGMENT AFFIRMED; COSTS TO BE PAID BY APPELLANTS.