UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 0441

September Term, 2015

SANDRA S. FORQUER, *et al.*

v.

JOHN E. DRISCOLL, III, *et al.*
SUBSTITUTE TRUSTEES

Kehoe,
Leahy,
Davis, Arrie W.
(Retired, Specially Assigned),

JJ.

Opinion by Kehoe, J.

Filed: May 25, 2016

This is an appeal from a judgment of the Circuit Court for Harford County ratifying the foreclosure sale of a Bel Air home formerly owned by appellant, Sandra S. Forquer. The appellees are the substitute trustees. Appellant raises four issues, which we have consolidated into two for purposes of analysis:

(1) Did the circuit court err when it denied Ms. Forquer's Md. Rule 14-211 motion to stay the foreclosure sale and dismiss the foreclosure action?

(2) Did the circuit court err when it denied Ms. Forquer's Md. Rule 14-305 motion to set the foreclosure sale aside on the basis that the sale was fraudulent?[1]

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[1]In her brief, Ms. Forquer articulates the issues thus:

1. Was Appellant denied Substantive and Procedural Due Process, including but not limited to:
   a. Denial of Appellant's request for a trial by jury, or at least a hearing, on issues raised in the Motion to Dismiss/Memorandum of Law in Support?
   b. When the Circuit Court did not rule on Appellant's Motion to Vacate Order and Motion to Dismiss, Motion to Strike Affidavit Certifying Ownership of Debt Instrument and Accuracy of Note Submitted Herewith, Motion for Evidentiary Hearing and Stay the Foreclosure Sale Pending Resolution of Legal Questions, that were held in abeyance?
   c. When the Circuit Court denied Appellants Motion to Compel Production of Evidence, Motion for TRO and Affidavit of Facts, and refused to compel the Appellees to provide evidence of the alleged loan, and allowed them to proceed with the fraudulent foreclosure sale?
2. Did the Circuit Court err once [it] lost jurisdiction and allowed Appellees to continue with the fraudulent foreclosure without standing as the real party of interest per MD Rule 2-201, and carry the burden of proving their case with admissible evidence, beyond naked affidavits signed by persons with no firsthand knowledge, and with no evidence of an injured party?
3. Did the Circuit Court err in ratifying the alleged sale of the real property once Appellants signature on the Note was cancelled, and with no evidence

(continued...)

We will affirm the circuit court's judgment.

Background

Ms. Forquer was the owner of a residence (the "Property"), located in Bel Air. In 2005, she refinanced the Property and executed a note in the principal amount of $202,000 to GSF Mortgage Corporation. To secure the loan, Ms. Forquer executed a deed of trust. GSF Mortgage Corporation and Mortgage Electronic Registration Systems, Inc. ("MERS") were identified as the secured parties. The deed of trust provided that MERS was "a nominee for Lender and Lender's successors and assigns." GSF transferred the note by endorsement to MortgageIT, Inc. which, in turn, endorsed the note to Wells Fargo Bank, N.A., which acted as loan servicer for the Federal Home Loan Mortgage Corporation.[2] MERS also assigned its interests in the deed of trust to Wells Fargo. (Ms. Forquer contends that the record does not adequately support Wells Fargo's contention that it has the right to enforce the note and the deed of trust.)

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[1](...continued)
of an alleged loan to Appellant?

4. Was collusion involved in the alleged fraudulent sale of Appellant's property?

[2]At the time the loan was made to Ms. Forquer, the FHLMC acted as one of the clearinghouses for residential mortgages, that is, it purchased individual loans from institutional lenders and re-selling the loans in packages to investors. The FHLMC also retained some loans for its own account. The agency hired financial institutions such as Wells Fargo to act as "loan servicers," that is, to collect and transmit monthly payments, to make sure that escrow payments for taxes and insurance were in fact paid, and, when a loan went into default, to authorize foreclosure and other collections procedures.

In December, 2009, Ms. Forquer transferred the Property to her mother, Barbara S. Forquer.[3] Appellees do not contest Ms. Forquer's standing to challenge the validity of the underlying debt or the sales price because she remains personally liable under the note for any deficiency. Ms. Forquer stopped making payments on the note in May, 2010. In February, 2013, appellees filed the present action. The parties then undertook mortgage mediation, but without success. On September 9, 2013, the circuit court gave permission for the appellees to schedule a sale. Ms. Forquer filed a motion to stay the sale and dismiss the foreclosure action, which the court denied on November 6, 2013. Ms. Forquer then filed bankruptcy. In the bankruptcy proceeding, appellees filed a proof of claim for the amount then due under the note, $255,325.33. Ms. Forquer did not object to the proof of claim and it was therefore deemed to be allowed as a matter of law. *See* 11 U.S.C. § 502(a).[4] The bankruptcy stay was lifted on November 4, 2014, and the Property was sold on January 21, 2015. In due course, appellees filed a report of sale. Ms. Forquer filed exceptions and objections to ratification, which the circuit court

[3]Barbara Forquer was a party to the foreclosure action but is not a party to this appeal.

[4] 11 U.S.C. § 502 reads in pertinent part:

§ 502. Allowance of claims or interests

(a) A claim or interest, proof of which is filed under section 501 of this title, is deemed allowed, unless a party in interest, including a creditor of a general partner in a partnership that is a debtor in a case under chapter 7 of this title, objects.

denied. On July 13, 2015, the court entered a final order ratifying the auditor's report, bringing the foreclosure action to a close. Ms. Forquer filed a timely notice of appeal. We turn to Ms. Forquer's contentions.

(1) The Rule 14-211 Motion

Prior to sale, Ms. Forquer filed a timely motion to stay the foreclosure sale and dismiss the foreclosure action pursuant to Md. Rule 14-211. The substitute trustees filed an opposition and Ms. Forquer filed a response to the opposition. The circuit court denied the motion without a hearing.

Rule 14-211 provides that the court may deny the motion without a hearing if the motion and supporting documents do not set out a valid defense to the mortgage debt, the mortgage lien or the right of the plaintiff to foreclose. *See* Rule 14-211(b)(1)(c). In her motion, Ms. Forquer presented several arguments as to why Wells Fargo, as the purported loan servicer, did not have the authority to enforce the note because: the indorsements were inadequate;[5] Md. Code Commercial Law Article § 3-501(b) gave her the right to demand production of the original note;[6] the affidavit of the foreclosing

[5]The note was endorsed GSF Mortgage Corporation, the original lender, to MortgageIT, which then endorsed the note to Wells Fargo.

[6]Comm. Law Article § 3-501 sets out the general rule that a party can demand to see the original of the note when a demand for payment is made. But Maryland has established a different rule for foreclosure proceedings. Md. Code Real Property Article § 7-5105.1(e)(2) provides that a foreclosure proceeding may be initiated by "a copy of (continued...)

party's right to enforce the note failed to state the basis of the affiant's conclusions and was therefore inadequate as a matter of law;[7] and, finally, the actual owner of the note was the Federal Home Loan Mortgage Corporation, which was not a party to the foreclosure proceeding.[8] The circuit court concluded that none of these contentions presented a valid defense. We agree with the court but, assuming, strictly for the purposes of analysis, that we did not, any error was harmless as we will now explain.

After the circuit court denied Ms. Forquer's Rule 14-211 motion, she filed for bankruptcy. In that action, Wells Fargo filed a claim asserting that she owed it $255,325.33. The claim included copies of the deed of trust and the note. Ms. Forquer did not object to this claim. Section 502(a) of the Bankruptcy Code provides that a claim by a creditor is "allowed," that is, is treated as enforceable, unless the debtor objects. Because she, in effect, conceded that she owed the debt in Bankruptcy Court, there was

[6](...continued)
the debt instrument accompanied by an affidavit certifying ownership of the of the debt instrument."

[7]Neither Real Property Article § 7-105.1 nor Rule 14-207(b)(2) prescribe any particular format for such affidavits.

[8]The FHLMC is not required to be a party. The deed of trust signed by Ms. Forquer provided that the trustees named in the instrument, as well as substitute trustees if any were appointed, could file a foreclosure action. Additionally, as holder of the note, Wells Fargo was authorized to begin the foreclosure process. *See* Commercial Law Article § 3-301 ("A person may be entitled to enforce the instrument even though the person is not the owner of the instrument[.])."

no longer a basis for the circuit court to allow her to maintain an inconsistent position in the foreclosure action. *See Dashiell v. Meeks*, 396 Md. 149, 170 (2006) (A party may not take "a position in a subsequent action inconsistent with a position taken by him or her in a previous action." (citation and quotation marks omitted)). There is no basis for us to reverse the circuit court's decision to deny Ms. Forquer's Rule 14-211 motion.

In her brief, Ms. Forquer raises some additional reasons why the court erred.

The first is that the circuit court violated her procedural and substantive due process rights because it failed to grant her an evidentiary hearing. We do not agree. First, there is nothing in Rule 14-211 that requires a hearing unless the motion sets out a valid defense to the action. As we have explained, we agree with the circuit court that Ms. Forquer's motion failed in that regard. Second, we do not believe that her due process rights were violated and, even if the circuit court should have granted a hearing, any such error was harmless for the reason that we have previously explained. Finally, the court was not obligated to consider her subsequent motions that reiterated or elaborated upon the contentions set out in her original motion. Rule 14-211 requires that a party present all defenses to the debt and the plaintiff's right to foreclose that are known to the defendant at the time. *See Thomas v. Nadel*, 427 Md. 441, 445 (2012); *Bates v. Cohn*, 417 Md. 309, 328 (2010). With that said, we will address briefly her remaining contentions.

Revocation — Ms. Forquer asserts that she revoked her signature on the note and therefore the note became unenforceable. But parties to contracts do not have the unilateral right to revoke the contract, especially when, as here, the party seeking to revoke is in default.

Replevin — Ms. Forquer filed a motion for a writ of replevin, seeking the return of her property, that is, the note. A person who signs a promissory note is not its owner and Ms. Forquer had no right to possess it.

Lack of Subject Matter Jurisdiction — Ms. Forquer asserts that the circuit court lacked subject matter jurisdiction because Wells Fargo was guilty of fraud. To support this contention she cites to cases from other jurisdiction which, she asserts, concluded that Wells Fargo or its agents acted fraudulently *in those cases.* But there is nothing in the record of this case that supports the conclusion that Wells Fargo, or anyone else for that matter, acted fraudulently *in this case.*

Prior Liens — In her brief, Ms. Forquer asserts that she:

> has a valid lien on the title and property known as 452 East Broadway, Bel Air, Maryland, as evidenced by the recorded Preferred Lien Filing # 140005457223 Filed - 4/28/2014 3:43:53 PM (E.70) and Preferred Lien Amendment Filing # 150006612823 Filed - 5/24/2015 2:57:02 PM (E.71) in the amount of $891,000.00.

Ms. Forquer filed notice of these purported liens after the foreclosure action was filed, and filed them in Wisconsin, not in the land records of Harford County.

Vapor Money — Ms. Forquer asserts that GFS Mortgage Corporation did not lend its money to her but rather *her* money to her:

> The Appellant's note and credit, not the bank, funded the whole transaction (E.55, E.56). The bank never put one cent at risk, and the purported "contract" fails for lack of consideration in violation of Md. Comm. Law §3-303(b). The bank suffered no "injury" as a condition precedent to commence a non-judicial foreclosure, therefore the court lacked subject matter jurisdiction and should have stopped all case proceedings.

The so-called "vapor money" theory of finance is not a valid defense to a foreclosure action. *See Anderson v. O'Sullivan,* 224 Md. App. 501, 510-11 (2015).

(2) The Exceptions to the Sale

The Property was sold at auction to Dominion Rental Holdings, LLC for $169,000, which Ms. Forquer states was "significantly lower than . . . the market value of the Property (approximately $295,000.00 – $300,000.00 — lowest possible market price based on similar homes in the neighborhood)." Ms. Forquer filed exceptions to the sale, which the court denied. Ms. Forquer raised several grounds in her exceptions and asserts to this Court that the circuit court erred by failing to grant two of them.

First, Ms. Forquer asserted that the purchaser was linked to Wells Fargo because an affiliate of Dominion was a co-joint venturer with Wells Fargo in a home mortgage company. She contends that Wells Fargo and Dominion colluded to hold down the purchase price.

An identity of interest between the secured party and the purchaser at auction is not, by itself, a basis to set a sale aside because secured parties unquestionably have the right to bid at auction and, if successful, to purchase the property in question. *Fagnani v. Fisher*, 418 Md. 371, 394–95 (2011). Instead, such a sale is subject to more rigorous scrutiny, and the sale will be set aside if "the mortgagee 'attempted to prevent others from bidding, or that the property sold for less than it should have brought.'" *Id.* at 394 (quoting *Heighe v. Evans*, 164 Md. 259, 268 (1933)). Ms. Forquer did not assert that the appellees discouraged anyone from bidding, or that the advertisements for the auction were in any way inadequate or misleading—her contention was that the sale price was inadequate. She asserts that, based on sales of other properties in the neighborhood, the Property was worth about $300,000. She did not, however, indicate whether the Property was in good condition, which is, of course, a significant factor in determining market value, nor did she provide any specific data to support her conclusion. That the successful bid was substantially less than Ms. Forquer's opinion as to fair market value is the Property is not enough, by itself, to set the sale aside. *Fagnani*, 418 Md. at 394 ("'[N]o exceptant to a sale is entitled to obtain the aid of a court of equity unless he offers to pay a higher price for the property, or at least gives assurance that some other person would be likely to do so, even though there may be some irregularity in the conduct of the sale.'" (quoting *Preske v. Carroll*, 178 Md. 543, 550 (1940)). Instead:

> The test is: Was the property sold under such conditions and terms as to advertisement and otherwise, as a prudent and careful man would employ, seeking to obtain the best price for his own property.

Pizza v. Walter, 345 Md. 664, 677–78 (1997) (quoting *Waters v. Prettyman*, 165 Md. 70, 74 (1933).

Second, Ms. Forquer asserted that no money actually changed hands at the settlement between the substitute trustees and Dominion. To substantiate this contention, she attached to her exceptions a copy of the HUD settlement sheet between Dominion and the substitute trustees. The information contained on the settlement sheet provides no support for this contention.

The circuit court did not err in denying the exceptions. The exceptions failed to address any of the factors necessary to set a sale aside, for example: was the sale conducted in a way that discouraged bidders; were there actual persons who were able and willing to bid more for the property who were improperly prevented from doing so; was the advertisement of sale inadequate or confusing; and were the terms of sale unreasonable.[9]

[9]In her exceptions, Ms. Forquer also reiterated several contentions from her Rule 14-211 motion. On appeal, she does not contend that any of these were a proper basis to set the sale aside. *See Hood v. Driscoll*, ____ Md. ____ No. 856, September Term 2015, slip op. at 5 filed April 28, 2016 ("The focus of the exceptions is on the conduct of the sale, not whether the trustee had a right to have the property sold.").

Because we have affirmed the circuit court's judgment, we will deny, as moot, Ms. Forquer's Emergency Motion to Stay Further Proceeding in Circuit Court Pending Appeal and Injunction, and her Motion for Replevin, both of which are currently pending in this Court.

THE JUDGMENT OF THE CIRCUIT COURT FOR HARFORD COUNTY IS AFFIRMED. APPELLANT TO PAY COSTS.