UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 0494

September Term, 2015

MARY G. STERRETT, *et vir.*

v.

THOMAS P. DORE, *et al.*

Wright,
Berger,
Friedman,

JJ.

Opinion by Friedman, J.

Filed: November 14, 2016

Mary G. Sterrett and Reid H. Sterrett Jr. (the "Sterretts") argue that the trial court erred in dismissing claims related to the foreclosure of their home and several post-sale exceptions to the sale of their home. We affirm the trial court.

BACKGROUND

In March 2007, the Sterretts obtained a mortgage for a home in Wicomico County, Maryland. When the Sterretts defaulted in March 2009, the lender appointed several trustees ("Substitute Trustees").[1] In April 2009, the Substitute Trustees filed a foreclosure action against the Sterretts in the Circuit Court for Wicomico County. That foreclosure was voluntarily dismissed without prejudice in December 2009.

The Sterretts remained in default and a second foreclosure action was filed in April 2010. The home was sold at a foreclosure sale in October 2010, but before the sale was ratified, the Substitute Trustees filed a Motion to Withdraw the Sale and Dismiss the Case. That motion was granted without prejudice in January 2011.

The Substitute Trustees filed a third foreclosure action in February 2012 because the Sterretts were still in default. The Sterretts filed a counterclaim and third-party complaint, seeking damages based on alleged fraudulent signatures in the first and second foreclosure affidavits. The counterclaim and third-party complaint included counts for: (1) a violation of the Maryland Mortgage Fraud Protection Act; (2) a violation of the Maryland Consumer Debt Collection Act; (3) unjust enrichment; (4) an action to quiet title; (5) several requests for declaratory relief; (6) and two respondeat superior counts. The trial

[1] Thomas Dore was one of the Substitute Trustees.

court dismissed all counts except the Maryland Consumer Debt Collection Act count. The trial court later granted summary judgment in favor of the Substitute Trustees on that remaining count. The foreclosure proceeded, the home was sold, and the sale was ratified in April 2015. The Sterretts noted this appeal.

DISCUSSION

The Sterretts first contend that the trial court erred in dismissing all but one count of their counterclaims and third-party complaint. Next, they assert the trial court erred in granting summary judgment on their remaining claim. And finally, the Sterretts argue the trial court erred in denying several post-sale exceptions.

I. Motion to Dismiss

The Sterretts contend that the trial court erred in dismissing nearly all of the counts in their counterclaim and third-party complaint. Specifically, they argue the trial court erred in dismissing: (1) a count for a violation of the Maryland Mortgage Fraud Protection Act; (2) a count for unjust enrichment; (3) several requests for declaratory relief; and (4) a count for respondeat superior. We will take each contention in turn.

In reviewing a motion to dismiss, we "must determine whether the trial court was legally correct, examining solely the sufficiency of the pleading." *O'Brien & Gere Engineers, Inc. v. City of Salisbury*, 447 Md. 394, 403 (2016) (citations omitted). "[W]e accept all well-pled facts in the complaint, and reasonable inferences drawn from them, in a light most favorable to the non-moving party." *Lipitz v. Hurwitz*, 435 Md. 273, 293 (2013) (citations and quotations omitted). "Dismissal is proper only if the alleged facts and

permissible inferences, so viewed, would, if proven, nonetheless fail to afford relief to the plaintiff." *O'Brien*, 447 Md. at 403-04 (citation and quotation omitted).

i. Maryland Mortgage Fraud Protection Act

The Sterretts assert the trial court erred in dismissing their claim brought under the Maryland Mortgage Fraud Protection Act ("MMFPA"). They alleged that the Substitute Trustees filed several documents in the first and second foreclosure actions (which, we reiterate, are not before us) that contained fraudulent signatures in violation of the MMFPA. The trial court found, because the foreclosure was not a part of the "mortgage lending process," that, therefore, this transaction was not covered by the MMFPA. Because we hold the Sterretts have failed to plead sufficient facts to establish a claim of fraud, we need not resolve whether the "mortgage lending process" under the MMPFA includes foreclosure.

The MMFPA defines "mortgage fraud" as the following:

> Mortgage fraud.—"Mortgage fraud" means any action by a person made with the intent to defraud that involves:
>
> (1) Knowingly making any deliberate misstatement, misrepresentation, or omission during the mortgage lending process with the intent that the misstatement, misrepresentation, or omission be relied on by a mortgage lender, borrower, or any other party to the mortgage lending process;
>
> (2) Knowingly creating or producing a document for use during the mortgage lending process that contains a deliberate misstatement, misrepresentation, or omission with the intent that the document containing the misstatement, misrepresentation, or omission be relied on by a mortgage

> lender, borrower, or any other party to the mortgage lending process;
>
> (3) Knowingly using or facilitating the use of any deliberate misstatement, misrepresentation, or omission during the mortgage lending process with the intent that the misstatement, misrepresentation, or omission be relied on by a mortgage lender, borrower, or any other party to the mortgage lending process.

Md. Code Ann., Real Prop. § 7-401.

The MMPFA does not state a standard for pleading a claim of fraud under the statute. "Maryland courts[, however,] have long found that fraud must be alleged with particularity." *Buckingham v. Fisher*, 223 Md. App. 82, 91 (2015). This "particularity" requirement:

> ordinarily means that a plaintiff must identify who made what false statement, when, and in what manner (i.e., orally, in writing, etc.); why the statement is false; and why a finder of fact would have reason to conclude that the defendant acted with scienter (i.e., that the defendant either knew that the statement was false or acted with reckless disregard for its truth) and with the intention to persuade others to rely on the false statement.

Id. (citations omitted). Further, "vague allegations fail to meet the standard of particularity." *Id.* (citations omitted).

Here, the Sterretts have failed to plead sufficient facts to establish a claim of fraud. The Sterretts assert that the Substitute Trustees fraudulently signed affidavits in the past—

specifically engaged in the "robo-signing" of documents[2]—and therefore they believe that it is certain that the Substitute Trustees used similar practices in the first two foreclosure action against them. In their complaint, the Sterretts allege that a number of documents were signed by employees of the Substitute Trustees rather than by the Trustees themselves. The Sterretts have not, however, pled facts that demonstrate that the Substitute Trustees had the requisite knowledge of falsity or intent to defraud. Moreover, it is not clear to us how a fraud in the first two foreclosure pleadings, if it occurred, is relevant to the third foreclosure action. Therefore, because the Sterretts have not adequately pled a claim of fraud, we affirm the dismissal of their MMFPA claim.

ii. Unjust Enrichment

The Sterretts next contend that their claim for unjust enrichment was improperly dismissed. In support, they claim that they unjust enriched the Substitute Trustees (or the party that the Trustees represent) when the first and second foreclosure actions were filed and dismissed. That is because, they believe, attorney's fee were assessed against them, and, as a result, their mortgage costs were increased. The Substitute Trustees argue that the Sterretts have not been charged nor paid any attorney's fees in relation to the first and second foreclosure.

To succeed on an "unjust enrichment" claim, a plaintiff must plead and prove:

1. A benefit conferred upon the defendant by the plaintiff;

[2] "Robo-signing" is a term that "most often refers to the process of mass-producing affidavits for foreclosures without having knowledge of or verifying the facts." *Attorney Grievance Comm'n of Maryland v. Geesing*, 436 Md. 56, 58 (2013) (citations omitted).

2. An appreciation or knowledge by the defendant of the benefit; and

3. The acceptance or retention by the defendant of the benefit under such circumstances as to make it inequitable for the defendant to retain the benefit without the payment of its value.

Hill v. Cross Country Settlements, LLC, 402 Md. 281, 295 (2007) (citations omitted). The purpose of an unjust enrichment claim is to "deprive the defendant of benefits that in equity and good conscience he ought not to keep, even though he may have received those benefits quite honestly in the first instance, and even though the plaintiff may have suffered no demonstrable losses." *Dep't of Hous. & Cmty. Dev. v. Mullen*, 165 Md. App. 624, 659 (2005) (citations omitted). "A person who receives a benefit by reason of an infringement of another person's interest, or of loss suffered by the other, owes restitution to him in the manner and amount necessary to prevent unjust enrichment." *Berry & Gould, P.A. v. Berry*, 360 Md. 142, 151 (2000) (citations omitted). "The restitution claim ... is not aimed at compensating the plaintiff, but at forcing the defendant to disgorge benefits that it would be unjust for him to keep." *Hill*, 402 Md. at 296 (quoting *Mass Transit Admin. v. Granite Const. Co.*, 57 Md. App. 766, 775 (1984)).

In their complaint, the Sterretts allege that the Substitute Trustees "charged and received fees for … fraudulent foreclosures." Assuming the Sterretts conferred any benefit to the lender or the Substitute Trustees, we find two problems with this claim: *first*, it necessarily requires a finding that fraudulent activity occurred in the first or second foreclosures, which, as we explained above, the Sterretts have failed to sufficiently plead.

See infra, section *i*. *Second*, even if the foreclosures were flawed procedurally, the Sterretts do not deny that the Substitute Trustees had a right to foreclose. Therefore, attorney's fees allegedly charged to the Sterretts for the first two unsuccessful foreclosures would not be unjust or inequitable.[3] As a result, we affirm the trial court's dismissal of the Sterretts' unjust enrichment claim.

iii. Declaratory Judgment

The Sterretts argue that the trial court erred in dismissing their request for a declaratory judgment. The Sterretts sought declarations that they owned the home and that the Substitute Trustees (or the party that the Trustees represent) had no right to use or possess the home. The trial court found that the Sterretts' declaratory judgment action incorrectly named the Substitute Trustees as parties in their individual capacities, and therefore dismissed the Sterretts' declaratory requests with leave to amend. The Sterretts declined to amend their complaint, concluding that "no amendment of their claims would or could make a difference on the Court's rational[e]."

"A court may grant a declaratory judgment … if it will serve to terminate the uncertainty or controversy giving rise to the proceeding." Md. Code Ann., Cts. & Jud. Proc. § 3-409. Dismissal is rarely appropriate in a declaratory judgment action. *See Glover v. Glendening*, 376 Md. 142, 155 (2003). When, however, "a declaratory judgment action is brought and the controversy is not appropriate for resolution by declaratory judgment, the

[3] If the Sterretts claim that the attorney fees charged from the two unsuccessful foreclosure actions were not authorized by their mortgage contract, the correct claim would be for breach of contract, not unjust enrichment.

trial court is neither compelled, nor expected, to enter a declaratory judgment." *Sprenger v. Pub. Serv. Comm'n of Maryland*, 400 Md. 1, 20-21 (2007) (citations omitted). Therefore, unlike the general standard of review for a motion to dismiss, "we … review a trial court's decision to grant or deny declaratory judgment under an abuse of discretion standard." *Id.* at 21.

In this case, the Sterretts' complaint alleged, and the trial court agreed, that the Substitute Trustees and the lender that the Trustees represent "each claim[ed] some form of title to the property." The trial court explained, however, that the Sterretts didn't "sue [the Substitute Trustees] as trustees, [they] sued them individually." The trial court further explained that the Substitute Trustees "may be liable personally for their actions as trustees, but that does not personally give them title to the property they … hold as a trustee." The trial court concluded that the Sterretts should separate the requests for declaratory judgment into two categories, one against the lender and another against the Substitute Trustees, so that judgment could adequately be rendered.

We do not believe the trial court's dismissal of the declaratory judgment with leave to amend was an abuse of discretion. The Sterretts filed a declaratory action against the Substitute Trustees in their individual capacities rather than as trustees. The Substitute Trustees in their individual capacities did not claim an interest in the home. Thus, a declaratory judgment action against them individually would have been inappropriate. The trial court, recognizing this problem, offered the Sterretts the opportunity to amend their

complaint. The Sterretts declined to do so. That failure is solely attributable to the Sterretts. Therefore, we find no abuse of discretion and affirm the trial court's decision.[4]

iv. Respondeat Superior

The Sterretts contend that the trial court improperly dismissed the respondeat superior claim against the lender who hired the Substitute Trustees. Respondeat superior "holds an employer vicariously liable … for the tortious conduct of an employee, where it has been shown that the employee was acting within the scope of the employment relationship at that time." *Barclay v. Ports Am. Baltimore, Inc.*, 198 Md. App. 569, 577-78 (2011) (citations omitted). Here, because the Sterretts' other causes of action fail to hold

[4] In addition to a declaration that they owned and had a right to possession of the home, the Sterretts sought declarations that the Substitute Trustees were not properly appointed, and for a determination of the amount of the Sterretts' debt. Because we find the trial court did not abuse its discretion in dismissing the Sterretts' declaratory action, we need not and decline to review the dismissal of these requests.

We feel compelled, however, to address the Sterretts' argument that the third foreclosure is precluded because the second foreclosure was dismissed on the merits. Maryland Rule 2-506 states that "a notice of dismissal operates as an adjudication upon the merits when filed by a party who has previously dismissed in any court … based on … the same claim." The Sterretts argue that the Substitute Trustees' motion to dismiss the second foreclosure was a notice of dismissal. Therefore, because the first foreclosure was dismissed through a notice of dismissal, the Sterretts' claim that dismissal of the second foreclosure action was on the merits and thus with prejudice, thereby precluding the third foreclosure action. Although the trial court declined to rule on this issue, the second foreclosure was not dismissed by a notice of dismissal. The Substitute Trustees filed and were granted by order a "Motion to Withdraw the Sale and Dismiss" in the second foreclosure without prejudice. Thus, the dismissal was not on the merits. Moreover, the Sterretts' argument would have the effects of permanently barring the Substitute Trustees from foreclosing on their home despite the Sterretts' failure to pay their mortgage. That result would not make sense.

the Substitute Trustees liable for any tortious conduct, their respondeat superior claim against the lender must also fail.

II. Summary Judgment

The Sterretts next argue that the trial court erred in granting summary judgment against them on their claim for a violation of the Maryland Consumer Debt Collection Act ("MCDCA"). The Sterretts alleged that the Substitute Trustees attempted to collect debt in violation of the MCDCA and that they suffered damages as a result. The Substitute Trustees argue that the Sterretts have not challenged their right to foreclose nor suffered damages, and the claim must therefore fail.

A trial court "shall enter judgment in favor of or against the moving party if the motion and response show that there is no genuine dispute as to any material fact and that the party in whose favor judgment is entered is entitled to judgment as a matter of law." Md. Rule 2-501(f). We apply a *de novo* standard of review in determining whether the trial court correctly entered summary judgment. *Roy v. Dackman*, 445 Md. 23, 39 (2015).

The MCDCA prohibits a number of practices "in collecting or attempting to collect an alleged debt." Md. Code Ann., Com. Law ("CL") § 14-202. Under the MCDCA, "a collector who violates any provision of [the MCDCA] is liable for any damages proximately caused by the violation." CL § 14-203. Here, the trial court found that there "was nothing before the Court to suggest that any of the Sterretts' allegations [were] true and that their [claim] must fail because they have not suffered any damages that can be linked to an alleged violation of the ... MCDCA." We agree. The Sterretts have not alleged

any act that the Substitute Trustees committed that could potentially have violated the MCDCA. Moreover, the Sterretts have not presented evidence admissible on a motion for summary judgment that they suffered damages as a result of any violations of the MCDCA. Therefore, we affirm the trial court's judgment in favor of the Substitute Trustees.

III. Exceptions

Prior to ratification of the sale of their home, the Sterretts raised several post-sale exceptions. These exceptions included (1) that the first two foreclosure proceedings contained false affidavits; (2) that the home was not sold at a fair price; and (3) that the advertisement for sale of the home contained an impermissible fee. The trial court denied the exceptions, finding that there was insufficient evidence that false documents were used in the Sterretts' foreclosure, that the sale price was fair, and that the fee was not improper. The Sterretts contend that the trial court erred in denying each of these exceptions.

We first note that "there is a presumption that the sale was fairly made and that the antecedent proceedings, if regular on the face of the record, were adequate and proper, and the burden is upon one attacking the sale to prove the contrary." *Hood v. Driscoll*, 227 Md. App. 689, 696-97 (2016) (quotations and citations omitted). Although not unlimited, trustees have general discretion in determining the manner and terms of a foreclosure. *101 Geneva v. Wynn*, 435 Md. 233, 251 (2013). A trustee has a duty "to protect the interest of all concerned persons to the foreclosure sale and to use reasonable diligence in producing the largest revenue possible for the mortgaged property." *Maddox v. Cohn*, 424 Md. 379, 395 (2012) (quotations and citations omitted). In reviewing a denial of a post-sale

exception, we "do not substitute our judgment for that of the trial court as to findings of fact unless we find them to be clearly erroneous." *Hood*, 227 Md. at 697 (citations omitted).

We hold that the trial court's findings were not clearly erroneous. Regarding allegations of false affidavits, post-sale exceptions was not the appropriate time to challenge the Substitute Trustees' right to foreclose. In *Bates v. Cohn*, the Court of Appeals of Maryland held that post-sale exceptions must be limited to challenges of the manner in which a sale is conducted, not the right to foreclose. 417 Md. 309, 328 (2010) ("[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."). Here, the Sterretts assert that the prior foreclosure documents contained fraudulent affidavits, which is a challenge to the right to foreclose rather than the manner in which the sale of their home was conducted. Thus, this challenge was improper and we affirm the trial court's ruling.

Regarding the sale price of the home, the trial court found that, although "the sale price was well below the mortgage value …[,] it is certainly not an unusual circumstance that property value came to be below the amount of debt against it." We agree and will not disturb that judgment.

The Sterretts' final post-sale exception contends that an impermissible fee was advertised to potential buyers. In this claim, they rely on *Maddox v. Cohn*. 424 Md. at 379. In *Maddox*, the Substitute Trustees there included in the sale advertisement a charge to potential buyers for reviewing documents, in addition to the sale price of the home. *Id.* at

381. The Court of Appeals held that that fee was an impermissible "demand for additional legal fees for the benefit of the Trustees." *Id.* at 400. Further, the Court held:

> in the absence of specific authority in the contract of indebtedness or contained in statute or court rule, it is an impermissible abuse of discretion for trustees or the lenders who 'bid in' properties, to include the demand for additional legal fees for the benefit of the Trustees in the advertisement of sale, or in any other way, in that it is contrary to the duty of trustees to maximize the proceeds of the sales.

Id. at 400-01.

We do not think the "fee" in this case is the type of impermissible fee contemplated by *Maddox*. In support, we find *101 Geneva LLC v. Wynn*, a Court of Appeals case regarding advertisement fees decided subsequent to *Maddox*, to be persuasive. 435 Md. 233. In *Geneva*, the trial court found that a $750 fee included in the advertisement of sale was impermissible under *Maddox*. *Id.* at 238-39. The Court of Appeals reversed, explaining that "unlike the fee in *Maddox*, the fee [in *Geneva*] … [did] not apply automatically in every case, but rather only if a successful bidder defaults." *Id.* at 256. Further, the Court reasoned that:

> the 'reasonable and prudent man' should make every reasonable attempt to dissuade defaulting bidders who would delay unnecessarily the foreclosure proceedings. Imposing a conditional fee, such as the one here, is arguably a useful tool for trustees 'to timely and effectively recoup the balance remaining on the mortgage account,' which is the exclusive purpose of a foreclosure sale.

Id. at 257-58. The *Geneva* Court concluded that such a fee was different, outside the scope of *Maddox*, and was thus permissible. *Id.* at 258.

Here, the fee is more analogous to the fee in *Geneva* rather than the fee in *Maddox*. As the trial court explained, the complained-of fee "applies only to someone who purchased the property and then failed to settle on it." Further, "it's a charge as a result of the failure … to complete the contract." As in *Geneva*, potential buyers incur no additional charge on the sale price of the home unless the buyer subsequently breaches the contract to buy the home. We hold that this was an acceptable fee and, therefore, affirm the trial court's denial of this exception.[5]

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

[5] The Sterretts also argue the doctrine of "unclean hands" should absolve them of their debt and prohibit the Substitute Trustees from foreclosing. The Sterretts admit, however, that this argument was not raised at the trial court proceedings below. That argument is therefore unpreserved and waived. *See Baltimore Cnty., Maryland v. Aecom Servs., Inc.*, 200 Md. App. 380, 421 (2011) ("A contention not raised below either in the pleadings or in the evidence and not directly passed upon by the trial court is not preserved for appellate review.").