

UNREPORTED
IN THE COURT OF SPECIAL APPEALS
OF MARYLAND

No. 0949

September Term, 2015

NICHOLAS CAPARELL

v.

CARRIE M. WARD, ET AL.
SUBSTITUTE TRUSTEES

Kehoe,
Friedman,
Wilner, Alan, M.
(Retired, Specially Assigned),

JJ.

Opinion by Kehoe, J.

Filed: May 18, 2016

*This is an unreported opinion, and it may not be cited in any paper, brief, motion, or other document filed in this Court or any other Maryland Court as either precedent within the rule of stare decisis or as persuasive authority. Md. Rule 1-104.

Nicholas Caparell has filed an interlocutory appeal from an order of the Circuit Court for Montgomery County denying his motion to stay the sale of his residence in a foreclosure proceeding. Caparell presents a single issue:

Did the circuit court err in denying the motion to stay without holding a hearing?

The appellees are Carrie M. Ward, *et al.*, the substitute trustees. In addition to addressing Caparell's contentions on their merits, the substitute trustees have filed a motion to dismiss this appeal, which we grant for the reasons set forth herein.

Background

In 2005, Caparell executed a note in the amount of \$387,200. The amount was secured by a deed of trust on Caparell's residence in Montgomery County, Maryland. Caparell defaulted on his obligations under the note and deed of trust, and the substitute trustees filed a foreclosure action in the Circuit Court for Montgomery County, in March 2013.

In June 2013, Caparell requested mediation. The mediation session took place on August 16, 2013, but the parties did not reach an agreement. The mediator filed a report stating that mediation had been unsuccessful on August 21, 2013. On September 17, 2013, the circuit court entered an order authorizing the substitute trustees to proceed with the foreclosure sale, subject to Caparell's right to file a motion to stay the sale and dismiss the action, pursuant to Md. Rule 14-211.

In December 2013, Caparell filed a Motion to Stay Sale of Property, asserting that the lender, Wells Fargo Home Mortgage, “fail[ed] to properly conduct loss mitigation,” and that the court should enjoin the substitute trustees “from conducting a foreclosure sale until [the lender] has properly considered [Caparell] for a loan modification.” The substitute trustees filed an opposition, asserting that his request for a loan modification had properly been considered and denied. A hearing on the motion was set for February 3, 2014. In the meantime, however, the substitute trustees conducted the sale. Initially, the circuit court denied Caparell’s motion to stay on the basis that the sale of the property had rendered the motion moot. Although it took several months to get the matter straightened out, eventually, the court set aside the foreclosure sale and revived Caparell’s motion to stay.

Caparell proceeded to file a supplemental motion to stay on May 16, 2014, and a hearing was scheduled for June 10, 2014. The docket entries establish that the hearing was held. On June 13, 2014, the circuit court entered an order stating that the motion to stay was “withdrawn with prejudice,” and that “the Substitute Trustees shall schedule a sale no sooner than 150 days from the date of this order.” There is no transcript of the hearing, and the record is unclear as to what induced Caparell to withdraw his motion with prejudice and why the substitute trustees were to wait 150 days before scheduling a sale.

The substitute trustees scheduled a foreclosure sale for June 17, 2015. In response, Caparell filed another motion to stay pursuant to Rule 14-211 on June 10, 2015. In this motion, Caparell asserted that:

(1) He had submitted a new request for mortgage assistance before the 150 day period expired. (This was not correct.)¹

(2) Wells Fargo denied the request because he “did not provide [Wells Fargo] with valid documents as requested.”

(3) His counsel appealed the decision, arguing that he had complied with each and every one of Wells Fargo’s demands regarding additional documentation. Still, his request was denied without an actual review of whether he would qualify for the applicable mortgage relief available to him.

Caparell contended that the substitute trustees should be enjoined from conducting the foreclosure sale until he received a proper review of his loan modification request.

The substitute trustees filed a response to the motion. They pointed out that Caparell had withdrawn his previous motion to stay with prejudice and that they had delayed scheduling the sale for 150 days, “which allowed [Caparell] to pursue other loss mitigation

¹Caparell does not provide us with the date that the second request for assistance was filed. From the copy in the extract, it appears that the request was filed on or after November 17, 2014. The 150 day period expired on November 10. *See* Md. Rule 2-203(a):

(a) **Computation of Time After an Act, Event, or Default.** In computing any period of time prescribed by these rules, by rule or order of court, or by any applicable statute, the day of the act, event, or default after which the designated period of time begins to run is not included. If the period of time allowed is more than seven days, intermediate Saturdays, Sundays, and holidays are counted; but if the period of time allowed is seven days or less, intermediate Saturdays, Sundays, and holidays are not counted. The last day of the period so computed is included unless:

(1) it is a Saturday, Sunday, or holiday, in which event the period runs until the end of the next day that is not a Saturday, Sunday, or holiday; or

(2) the act to be done is the filing of a paper in court and the office of the clerk of that court on the last day of the period is not open, or is closed for a part of the day, in which event the period runs until the end of the next day that is not a Saturday, Sunday, holiday, or a day on which the office is not open during its regular hours.

alternatives in the interim. Now, disappointed with the outcome of his loss mitigation efforts, [Caparell] is now [sic] renewing the Motion that he previously withdrew with prejudice.” Moreover, the substitute trustees argued that the time for filing a motion to stay had expired and that Caparell had failed to demonstrate good cause for his delay. Finally, the substitute trustees asserted that, based on the documentation that he provided to Wells Fargo, Caparell was ineligible for mortgage relief because his income was not sufficient to qualify for HAMP² in light of the balance due on his loan.

Without holding a hearing, and after consideration of the motion and the response, the court denied Caparell’s motion. The substitute trustees sold the property at auction on June 17, 2015. Caparell has appealed, challenging the court’s denial of his June 2015 motion to stay.

Analysis

We begin with the substitute trustees’ contention that this appeal should be dismissed because Caparell has failed to include the transcript of the June 10, 2014 hearing. They contend that the information contained in the transcript of the proceeding is relevant to resolving the issue now before us on appeal. In particular, the substitute trustees argue that “[w]ithout the transcript, this Court lacks a full and nuanced record of any events, stipulations or agreements relevant to the entry of the [June 2014 Order dismissing

²An acronym for the Home Affordable Modification Program.

Caparell’s motion to stay with prejudice].” And further, that “[b]ecause Caparell’s dismissal of the prior Motion *with prejudice* may have precluded him from subsequently prosecuting a similar motion to stay, a transcript of the June 10, 2014 hearing is a necessary part of the record in this case.” (Emphasis in original.)

Md. Rule 8-413(a) identifies the required contents of a record to be filed in an appeal. In pertinent part, the rule provides: “[t]he record on appeal shall include (1) a certified copy of the docket entries in the lower court, (2) the transcript required by Rule 8-411, and (3) all original papers filed in the action in the lower court” Md. Rule 8-413(a). With regard to the transcript, Md. Rule 8-411(a)(2) provides that “unless a copy of the transcript is already on file, the appellant shall order in writing from the court reporter a transcript containing . . . a transcription of any proceeding relevant to the appeal that was recorded pursuant to Rule 16-404 e.” Md. Rule 8-602(a)(6) provides this Court with discretion to dismiss an appeal where “the contents of the record do not comply with Rule 8-413.”

The record transmitted to this Court contained no transcripts of any hearings. This Court, on its own initiative, issued a show cause order to Caparell requiring him to “show cause in writing why the appeal should not be dismissed pursuant to Md. Rule 8-602(a)(6).” In response, Caparell asserted that he was appealing the circuit court’s June 15, 2015, order denying his motion to stay, and that the court denied that motion without holding a hearing. Accordingly, Caparell asserted that “there was no transcript to be included in the record.” The substitute trustees responded as well. The substitute trustees argued that the appeal

should be dismissed because Caparell's response failed to mention his December 2013 motion to stay and the resulting hearings, and that without the transcripts of those hearings the record was incomplete. This Court issued an order stating that the appeal could proceed. The order noted, however, that the appeal would be subject to dismissal "should it later be determined that a transcript necessary for this appeal was not filed as required by Rule 8-411." This brings us to the merits of the substitute trustees' motion to dismiss.

At the heart of Caparell's appeal is his contention that the foreclosure sale should not have occurred because the lender failed to properly review his most recent attempt to receive a loan modification. Based on the record before us, it is impossible to identify a factual basis for this assertion. Caparell's arguments are necessarily based on the premise that he withdrew his first motion to stay during the June 10, 2014, hearing, and, in return, the substitute trustees agreed to hold off on a sale for 150 days to give him an opportunity to pursue mortgage relief through HAMP. But the record is silent as to whether the 150 day delay was intended to give Caparell an opportunity to file the request, or to also provide the lender with an opportunity to act on the request. The June 13, 2014, order itself provides no insight. Presumably, the parties discussed these issues with the court at the June 10 hearing, but, without a transcript, we are left to speculate as to the parties' intentions. The uncertainty goes to the core of at least two potentially dispositive arguments raised by the substitute trustees on appeal: first, their contention that, by withdrawing his first motion to stay with prejudice, Caparell waived the right to file another; and second, that there was no

good cause to excuse his failure to file the second motion to stay because he did not file his request for mortgage relief until after the 150 day hiatus had expired. Without the transcript of the June 10, 2014, hearing, we are left to guess as to what the parties intended. Accordingly, we dismiss this appeal.³

APPEAL DISMISSED. APPELLANT TO PAY COSTS.

³ Were we to consider the merits of this appeal on the fragmented and incomplete record before us, we would affirm the judgment of the circuit court. To both the circuit court and this Court, the substitute trustees presented a detailed argument that Caparell was not eligible for HAMP relief because his income was insufficient. Although Caparell did not have an opportunity to challenge this assertion before the circuit court, he certainly had that opportunity on appeal and declined to do so. Caparell's failure to address this issue is fatal. Rule 14-211(a)(3) states:

(3) Contents. A motion to stay and dismiss shall:

(A) be under oath or supported by affidavit;

(B) state 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;

The Rules Committee's note to subsection (a)(3) states (emphasis added):

The failure to grant loss mitigation that should have been granted in an action to foreclose a lien on owner-occupied residential property may be a defense to the right of the plaintiff to foreclose in the pending action. *If that defense is raised, the motion must state specific reasons why loss mitigation pursuant to a loss mitigation program should have been granted.*