UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1010

September Term, 2015

RAYMOND G. JACKSON, ET AL.

v.

JOSEPH V. BUONASSISSI, ET AL.,
Substitute Trustees

Meredith,
Wright,
Zarnoch, Robert A.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Meredith, J.

Filed: September 21, 2016

Jill and Raymond Jackson ("the Jacksons"), appellants, filed a motion to dismiss a foreclosure proceeding on April 10, 2015. The Circuit Court for Baltimore County denied appellants' motion on June 16, 2015. This appeal followed.

QUESTIONS PRESENTED

Appellants present seven questions in their brief for our review.[1] We have consolidated appellants' questions to two:

I. Did the circuit court err or abuse its discretion in refusing to permit discovery by appellants with regard to the issues raised in their motion to dismiss foreclosure?

II. Did the circuit court err in denying appellants' motion to dismiss?

---

[1] Appellants' questions as presented in their brief are:

1. Did the court err or abuse its discretion in refusing to grant a stay of the foreclosure proceeding in order to permit discovery by the defendants with regard to the issues raised in their motion to dismiss the foreclosure?
2. Did the court err or abuse its discretion in refusing to permit discovery by the defendants with regard to the issues raised in their motion to dismiss the foreclosure?
3. Did the court err in denying plaintiffs motion to dismiss the foreclosure?
4. Did the court err or abuse its discretion in concluding that defendants' motion to dismiss the foreclosure proceeding was not timely filed?
5. Did the court err in concluding that defendant's motion to dismiss the foreclosure proceeding did not substantially comply with Maryland Rule 14-211?
6. Did the court err in concluding that defendants' motion to dismiss the foreclosure proceedings fails to state a valid defense to the plaintiffs' claim?
7. Did the court err or abuse its discretion in refusing to grant the Jacksons the discovery they requested in their motion to dismiss?

We answer "no" to Questions I and II, and affirm the decision of the Circuit Court for Baltimore County.

FACTUAL AND PROCEDURAL BACKGROUND

The Jacksons are the owners of the residential real property located at 16001 Baconsfield Lane in Monkton, Baltimore County, Maryland. On May 8, 2003, the Jacksons refinanced the existing debt on the property through lender Southern Trust Mortgage, LLC. The Jacksons executed a promissory note in the amount of $417,725.00 secured by a deed of trust lien on the property. The Jacksons defaulted on their loan on September 2, 2006. On May 9, 2008, Banc of America Mortgage Capital Corporation ("BAMCC"), acting as "noteholder," appointed Joseph Buonassissi, II, Richard Henning, Jr., Richard Lash, Keith Yacko, Brian McNair, James Inabinett, Jr., and David Rosen as substitute trustees (collectively the "Substitute Trustees").

On October 20, 2008, the Substitute Trustees filed an order to docket a foreclosure action. Among the exhibits the Substitute Trustees filed with the order to docket was a copy of the note originally executed by the Jacksons. The copy of the note reflects two endorsements: 1) A special endorsement by Southern Trust Mortgage to Wells Fargo Bank, N.A. ("Wells Fargo") appeared on the backside of page three of the note. 2) An endorsement in blank, made by Wells Fargo, appeared on an allonge attached to the note.[2] At the time the Substitute Trustees filed the order to docket, Wells Fargo also filed an

[2] An allonge is a "slip of paper sometimes attached to a negotiable instrument for the purpose of receiving further indorsements when the original paper is filled with indorsements." Black's Law Dictionary 88 (9th ed. 2004).

affidavit stating that it was "either the holder or the agent for the holder of" the May 8, 2003, promissory note, as to which the Jacksons owed $473,210.84 as of October 16, 2008, including past due interest in the amount of $51,218.87. Wells Fargo filed amended affidavits on March 1, 2010, and October 22, 2010, stating each time that Wells Fargo was "either the holder or the agent for the holder of" the note.

The Jacksons filed a request for mediation on June 26, 2012, but the Substitute Trustees moved to strike the request on the ground that the order to docket had been filed before the General Assembly provided any right to mediation. The Circuit Court for Baltimore County agreed with the Substitute Trustees, and struck the mediation request on August 7, 2012.

After a foreclosure sale was scheduled for May 13, 2014, the Jacksons filed a motion to stay foreclosure sale on May 8, 2014. The Jacksons' motion was denied by the circuit court on May 9, 2014. The Jacksons filed no notice of appeal within 30 days after the entry of the order, and therefore, no issues pertaining to that motion are before us pursuant to the notice of interlocutory appeal filed June 16, 2015.

On May 13, 2014, Raymond Jackson individually filed a voluntary petition for bankruptcy under Chapter 13 in the United States Bankruptcy Court for the District of Maryland, staying the foreclosure proceeding. On September 18, 2014, a proof of claim was filed in Mr. Jackson's bankruptcy case by Bank of America, N.A., as a creditor asserting a secured claim relative to 16001 Baconsfield Lane. Bank of America's proof of claim did not identify BAMCC as a creditor. The copy of the note Bank of America filed

as an exhibit with its proof of claim reflected the special endorsement from Southern Trust Mortgage to Wells Fargo, located on the back of page three of the note, the same as the copy of the note which had been filed as an exhibit with the order to docket. But the copy of the note filed in the bankruptcy court showed a blank endorsement by Wells Fargo located underneath the Jacksons' signatures on page three of the note. Consequently, the copy of the note filed in the bankruptcy court differed from the copy of the note filed with the October 20, 2008, order to docket, which contained a blank endorsement to Wells Fargo on an allonge, rather than on the signature page. All other aspects of the two copies of the note appear to be identical, including the special endorsement to Wells Fargo from Southern Trust Mortgage that appears in an identical location on both copies.

Raymond Jackson's bankruptcy case was dismissed in early 2015, and the stay was lifted on February 2, 2015. On April 10, 2015, the Jacksons filed a motion to dismiss the foreclosure proceeding. After the Substitute Trustees filed a response, the Jacksons' motion was denied by the circuit court on June 16, 2015. The circuit court stated in its order that the motion was "not timely filed, does not substantially comply with Maryland Rule 14-211, and fails to state a valid defense to the claim." The denial of the motion was docketed June 19, 2015. This interlocutory appeal was filed on July 14, 2015.[3]

[3] We have assumed that the Jacksons have the right to immediately appeal the denial of the motion dismiss because the relief requested was in the nature of injunctive relief. *See Fishman v. Murphy ex rel. Estate of Urban*, 433 Md. 534, 540 n.2 (2013) (stating that the appellant could "appeal the Circuit Court's interlocutory order denying the Motion to Stay and Dismiss because the motion was made under Rule 14–211 and contemplated injunctive relief as a remedy.").

STANDARD OF REVIEW

We review the circuit court's denial of a motion to stay or dismiss a foreclosure action for an abuse of discretion. *Burson v. Capps*, 440 Md. 328, 342 (2014). We also review "the denial of discovery [in a foreclosure action] under the abuse of discretion standard." *Jones v. Rosenberg*, 178 Md. App. 54, 66 (2008). "We will reverse under this standard if we determine that 'no reasonable person would take the view adopted by the [trial] court[.]'" *Fishman v. Murphy ex rel. Estate of Urban*, 433 Md. 534, 546 (2013) (quoting *Aventis Pasteur, Inc. v. Skevofilax*, 396 Md. 405, 419 (2007) (alterations in original)). The legal conclusions of the circuit court, however, are reviewed *de novo*. *Wincopia Farm, LP v. Goozman*, 188 Md. App. 519, 528 (2009).

DISCUSSION

I. Timeliness under Maryland Rule 14-211

The Jacksons have challenged the circuit court's ruling that their motion to dismiss was not timely filed. Maryland Rule 14-211, captioned "Stay of Sale; Dismissal of Action," provides, in relevant part:

> In an action to foreclose a lien on owner-occupied residential property, a motion by a borrower to stay the sale and dismiss the action shall be filed no later than 15 days after the last to occur of:
>
> > (i) the date the final loss mitigation affidavit is filed;
> > (ii) the date a motion to strike postfile mediation is granted; or
> > (iii) if postfile mediation was requested and the request was not stricken, the first to occur of:
> >
> > > (a) the date the postfile mediation was held;
> > > (b) the date the Office of Administrative Hearings files with the court a report stating that no postfile mediation was held; or

> (c) the expiration of 60 days after transmittal of the borrower's request for postfile mediation or, if the Office of Administrative Hearings extended the time to complete the postfile mediation, the expiration of the period of the extension.

Rule 14-211(a)(2)(A).

Rule 14-211 became effective May 1, 2009, *i.e.*, after the October 20, 2008, order to docket was filed in this case. In the circuit court, the Jacksons asserted that Rule 14-211 was not applicable to this foreclosure proceeding because that Rule was adopted after the action was instituted. The Jacksons did not submit any argument in the circuit court asserting that, if Rule 14-211 did apply, their motion was timely under that Rule. The Substitute Trustees countered that Rule 14-211 did in fact apply, and that the Jacksons had failed to timely file their motion to dismiss under that Rule. The Substitute Trustees also pointed out that the Jacksons' motion did not comply with the operative rule that governed foreclosures prior to the adoption of Rule 14-211. The prior rule – Maryland Rule 14-209(b) – required the moving party to file an affidavit stating "whether the moving party admits any amount of the debt to be due and payable," and that any amount admitted to be due had been "paid into court with the filing of the motion." *See Jones*, *supra*, 178 Md. App. at 65–66. Neither party presented arguments addressing substantial compliance with Rule 14-211. The circuit court ultimately held that the Jacksons' motion was untimely and that they had not substantially complied with Rule 14-211.

On appeal, the Jacksons urge us to find that the circuit court erred in holding that they had not substantially complied with Rule 14-211. But in the Jacksons' initial brief in this Court, they asserted – as they had argued in their motion to dismiss – that Rule 14-211

is *inapplicable* to this foreclosure proceeding. However, in their reply brief, the Jacksons state that "Maryland Rule 14-211 is the applicable law governing this appeal" and that we should find substantial compliance with that rule.

This Court will ordinarily "not decide any other issue [besides jurisdiction] unless it plainly appears by the record to have been raised in or decided by the trial court [.]" Maryland Rule 8-131(a). It appears that neither party presented substantive arguments concerning substantial compliance with Rule 14-211 before the circuit court. Nevertheless, because the circuit court denied the Jacksons' motion at least in part based on a lack of substantial compliance with 14-211, it is an issue that we could address pursuant to Rule 8-131(a).

But the Jacksons failed to articulate any argument pertaining to substantial compliance in their initial brief before this Court. The Court of Appeals has stated: "An appellant is required to articulate and adequately argue all issues the appellant desires the appellate court to consider in the appellant's initial brief." *Oak Crest Vill., Inc. v. Murphy*, 379 Md. 229, 241 (2004). *Accord Robinson v. State*, 404 Md. 208, 215 n.3 (2008) ("An appellate court will not ordinarily consider an issue raised for the first time in a reply brief."); *Gazunis v. Foster*, 400 Md. 541, 554 (2007) ("[A]ppellate courts ordinarily do not consider issues that are raised for a first time in a party's reply brief."); *State v. Jones*, 138 Md. App. 178, 230 (2001) ("The cases are legion, in Maryland and elsewhere, that an appellate court generally will not address an argument that an appellant raises for the first time in a reply brief."), *aff'd*, 379 Md. 704 (2004); *Federal Land Bank of Baltimore, Inc.*

v. Esham, 43 Md. App. 446, 457 (1979) ("it is necessary for the appellant to present and argue all points of appeal in his initial brief").

In their initial brief, the Jacksons did not make any mention of substantial compliance with the time limits of Rule 14-211. Nor did the Substitute Trustees address substantial compliance in their brief. Arguments pertaining to substantial compliance with Rule 14-211 were first raised in this Court in the Jacksons' reply brief. There, the Jacksons argue that "[t]he trial court also concluded that the Jacksons' motion failed to comply substantially with the requirements of Rule 14-211. The court, however, does not identify any such supposed failures[.]" Because this issue was first raised in the Jacksons' reply brief, we will not consider the argument.

II. The Jacksons' Remaining Arguments

A. Status of the Original Note and the Two Copies

The Jacksons raise multiple questions regarding the differences in the endorsements shown on the copy of the note attached to Bank of America's bankruptcy claim filed in September 2014, and the copy of the note that accompanied the order to docket in October 2008. The Jacksons theorize that there is "no longer a single note," but rather "two distinct notes," and they assert that Wells Fargo should be precluded from enforcing either of the notes without further discovery. The Jacksons further assert that "[t]he legal issue here is thus not whether Wells Fargo has the ability to enforce *the* note in question; The issue is, *which* of the two notes is Wells Fargo entitled to enforce?" The Jacksons contend that, because of the unexplained discrepancies between the two copies of the note, the circuit

court abused its discretion by denying both their motion to dismiss and their request for discovery. We disagree.

The Court of Appeals has stated that "the person or entity obligated on a promissory note must pay the obligation to, in relevant part, 'a person entitled to enforce the instrument.'" *Deutsche Bank Nat. Trust Co. v. Brock*, 430 Md. 714, 729 (2013) (quoting Maryland Code (1975, 2002 Repl.Vol.), Commercial Law Article ("CL"), § 3-412). A promissory note may be enforced by either

> (i) the holder of the instrument, (ii) a nonholder in possession of the instrument who has the rights of a holder, or (iii) a person not in possession of the instrument who is entitled to enforce the instrument pursuant to § 3–309 or § 3–418(d). A person may be a person entitled to enforce the instrument even though the person is not the owner of the instrument or is in wrongful possession of the instrument.

CL § 3–301. As the Court of Appeals has succinctly summarized,

> a "holder" is "[t]he person in possession of a negotiable instrument that is payable either to bearer or to an identified person that is the person in possession." *Id*. at § 1–201(b)(21)(i). A promise or order is payable to bearer if it states that: (a) it is payable to bearer or to cash; (b) indicates that an individual or entity in possession of the promise or order is entitled to payment; (c) does not state a payee; or, (d) otherwise indicates that it is not payable to an identified person. *Id*. at § 3–109(a). Thus, **the person in possession of a note, either specially indorsed to that person or indorsed in blank, is a holder entitled generally to enforce that note.**

Deutsche Bank, *supra*, 430 Md. at 729–30 (emphasis added).

As the Court of Appeals has noted, and the Commercial Law Article makes clear,

> The holder of a note is "entitled to enforce the instrument even [if it is] not the owner of the instrument or is in wrongful possession of the instrument." CL § 3-301.

Id. at 730. "The person in possession of a negotiable instrument that is payable either to bearer or to an identified person that is the person in possession" qualifies as a holder of that instrument. CL § 1-201(b)(21)(i). Here, the affidavits filed in the circuit court confirm that Wells Fargo is the holder of the note, and is entitled to enforce the note.

The 2014 and 2008 copies of the note show the special endorsement to Wells Fargo from Southern Trust Mortgage, LLC, the original payee on the note, which appears in the same location on both copies of the note. Both copies of the note also contain an endorsement in blank by Wells Fargo, although the endorsement in blank appears on an allonge attached to the 2008 copy, but appears on the third page of the 2014 copy. The Jacksons have devoted most of their argument before the circuit court and this Court to contesting whether Wells Fargo is actually in possession of the original note, and they questioned the authenticity of the copy of the note filed by the Substitute Trustees. The Jacksons asserted in the circuit court that a "false document has been filed, either in this foreclosure action, or in the related Chapter 13 bankruptcy," and they "den[ied] the legitimacy of any promissory note copies of which have been produced" until a forensic document examiner could examine the original "wet-ink" copy of the note.

In our view, any doubts as to whether Wells Fargo is a holder in possession of the "wet-ink" copy of the note were resolved at oral argument. At oral argument, counsel for appellees produced the original note in Court, and allowed the Jacksons' counsel to inspect the note. Counsel for appellees also represented that he had offered the Jacksons' counsel

opportunities to view the note on multiple occasions prior to argument. Counsel for the Jacksons did not dispute that offers to inspect the note had been tendered and rejected.

We have no doubt that Wells Fargo is a "person in possession of a negotiable instrument that is payable either to bearer or to an identified person that is the person in possession" of the instrument. CL § 1-201(b)(21)(i). Wells Fargo is entitled to enforce the note by virtue of being the holder of the note. *Deutsche Bank*, *supra*, 430 Md. at 729–30. Therefore, the circuit court did not abuse its discretion in denying the Jacksons' motion to dismiss and in denying the request for discovery. *Burson*, *supra*, 440 Md. at 342.

B. The Identities of Bank of America, N.A., and Banc of America Mortgage Capital Corporation as One or Two Entities

Section 2 of the Jacksons' brief asserts: "The [circuit] court erred if it based its denial of the motion to dismiss on the claim of the substituted trustees that Bank of America, N.A., and BAMCC are one and the same entity." The Jacksons contend that they could have determined through discovery whether Bank of America and BAMCC are the same entity. The Jacksons seemingly argue that Wells Fargo's ability to enforce the note is contingent upon determining the status of Bank of America or BAMCC as potential owners of the note.

But, as explained above, Wells Fargo is the holder of the note, and Wells Fargo is therefore entitled to enforce the note, without regard to the status of Bank of America or BAMCC as possible owners of the note. *Deutsche Bank*, *supra*, 430 Md. at 731 (stating, "[u]nder established rules, the maker [of a note] should be indifferent as to who owns or has an interest in the note so long as it does not affect the maker's ability to make payments

on the note.") (quoting *In re Veal,* 450 B.R. 897, 911 (B.A.P. 9th Cir. 2011)); *see also In re Walker*, 466 B.R. 271, 280 (Bankr.E.D.Pa.2012) ("[T]he borrower's obligation is to pay the person entitled to enforce the note (who need not be the 'owner' of the note)."). Furthermore, it has not been suggested that any party other than Wells Fargo has attempted to foreclose on the property despite the fact that the Jacksons have been in default for approximately a decade. Therefore, the circuit court did not abuse its discretion in denying the motion to dismiss notwithstanding the Jacksons' question regarding ownership of the note.

C. Transfer of the Note to Banc of America Mortgage Capital Corporation

Section 3 of the Jacksons' brief asserts: "There is no evidence that either note was transferred to BAMCC." The Jacksons contend that this "is something which the requested discovery would have determined." The ownership interest or status of BAMCC does not affect Wells Fargo's ability to enforce the note as the holder. Both copies of the note contain seemingly identical special endorsements from Southern Trust Mortgage to Wells Fargo, which is now in possession of the original note. CL § 1-201(b)(21)(i). Therefore, the circuit court did not abuse its discretion in denying further discovery regarding transfers of the note to BAMCC. *Jones*, *supra*, 178 Md. App. at 66 ("A trial court abuses its discretion only if no reasonable person would take the view adopted by the trial court in denying discovery.").

JUDGMENT OF THE CIRCUIT COURT FOR BALTIMORE COUNTY AFFIRMED. CASE REMANDED FOR FURTHER PROCEEDINGS CONSISTENT WITH THIS OPINION. COSTS TO BE PAID BY APPELLANTS.