UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1261

September Term, 2014

PARK AVENUE PROPERTY, LTD.

v.

JOHN C. WETZEL and MATTHEW KIMBALL

Meredith,
Reed,
Friedman,

JJ.

Opinion by Friedman, J.

Filed: April 25, 2016

The question in this case is whether a $60,243.90 mortgage payment was made. If Park Avenue Property, Ltd. made the payment and can prove it, it gets to keep the property. If it didn't make the mortgage payment—or even if it can't prove that it made the payment—the mortgage holder can foreclose. After a full evidentiary hearing, the circuit court found that there was insufficient evidence to show that Park Avenue had, in fact, made the mortgage payment. Moreover, the court found that Park Avenue's equitable defenses to the foreclosure lacked merit. Therefore, it allowed the foreclosure to proceed. Because we find no abuse of discretion in those decisions, we affirm.

FACTUAL AND PROCEDURAL BACKGROUND

Park Avenue is a limited liability company owned by Loren Williams. In 1995, Park Avenue purchased the property located at 1416 Park Avenue in Baltimore City from the Estate of Pauline F. Kirkley. The seller provided financing. Park Avenue executed a note payable to the Kirkley Estate who, along with its various representatives, successors, and assigns, we will refer to as the Note Holder. The note's principal was secured by a mortgage on the Property granted by Park Avenue to the Note Holder. The mortgage required Park Avenue to make monthly payments of $753.59 for ten years. At the end of the ten years, Park Avenue was required to pay off the balance of the mortgage, a payment that the parties refer to as the "balloon payment."

The parties agree that no payment was made when the balloon payment came due on February 10, 2006. Park Avenue says that within weeks of that due date, however, it made payment. Specifically, Abbey Williams, wife of Park Avenue's owner, Loren

Williams, claims that she wrote a check for $60,000 and sent it with a letter to the Note Holder in March of 2006. Despite Abbey's claim, however, we know that on June 14, 2006 the Note Holder sent a letter to Park Avenue demanding payment. In the letter, the Note Holder also noted that another Park Avenue employee, Laura Sheldon, had repeatedly assured the Note Holder that the balloon payment would be made, but that Sheldon hadn't returned the Note Holder's telephone calls since January of 2006. For reasons that are not clear to us, the matter was dropped.

Two years later, however, the Note Holder resumed collection efforts. It sent a fax to Park Avenue demanding payment, stating that "[t]he total amount due on the open mortgage … is $85,073.49." Additionally, the letter warned, "Please be advised that if full payment is not received in the form of wired/certified funds on or before August 20, 2008, the foreclosure sale will be advertised resulting in significant additional costs." When Park Avenue replied, it didn't deny that Park Avenue owed the money, but rather requested additional information about the precise amount due. Park Avenue wrote that "[t]he numbers you sent … do not match our records, please send … a breakdown of how the payments were applied to arrive at your total." The Note Holder responded with another fax providing the specific amount due and the manner in which it was computed. Thereafter, the Note Holder initiated a foreclosure action but, again for reasons that elude us, dismissed that action.

On July 15, 2010, nearly five years after the balloon payment was due, the Note Holder initiated a second foreclosure sale on the Property. Park Avenue filed for

bankruptcy and by operation of the bankruptcy laws, the foreclosure proceedings against it were stayed.

Meanwhile, Loren Williams, the principal of Park Avenue, was incarcerated in the Western Correctional Institution in Cumberland, Maryland. As is apparently routine, Loren's telephone calls were recorded by prison authorities, and as a result, there are audiotape recordings of several telephone conversations between Loren and Abbey Williams that occurred in 2011 about the balloon payment that was alleged to have been made in 2006. The telephone conversations are, however, somewhat ambiguous and are capable of two contrary interpretations: either (1) the Williamses were sorting through their existing documents to find proof that they had made payment back in 2006; or (2) they were concocting evidence to fit their spurious story that they had sent the balloon payment.

After Park Avenue's bankruptcy petition was dismissed and the bankruptcy stay lifted, the Note Holder reinitiated foreclosure proceedings. Park Avenue filed a petition for emergency stay of foreclosure pursuant to Maryland Rule 14-211, which the circuit court summarily denied. Park Avenue appealed from the denial of the emergency stay. Without offering any views on whether Park Avenue's defenses were meritorious, this Court reversed and remanded so that the circuit court could review the filings and determine whether Park Avenue had stated a facially valid defense. *Park Avenue Property, LTD. v. Wetzel,* no. 1066, September Term, 2011, slip op. at 10 (unreported opinion) (filed October 10, 2013).

On remand, the circuit court held a hearing on the merits of Park Avenue's defenses to foreclosure pursuant to Rule 14-211(b)(2)(C).[1] Park Avenue's principle defense was payment, that it had made the balloon payment back in 2006 and that the Note Holder had inexplicably refused tender. It also offered a "kitchen sink" of other defenses to the foreclosure action: laches, unclean hands, equitable estoppel, waiver, acquiescence, lack of standing, lack of service, and lack of jurisdiction. Park Avenue's witnesses at the hearing included Loren and Abbey Williams, and the attorney who had engaged in most of the collection efforts for the Note Holder. Park Avenue entered as exhibits the Note Holder's February 2006 letter requesting the final balloon payment, the letter allegedly sent to the Note Holder in March of 2006 with the balloon payment, a copy of Park Avenue's check number 114 made out for the "final payment," and the subsequent letters and faxes exchanged between the Note Holder and Park Avenue.

At the conclusion of the hearing, the circuit court found that there was no evidence to support Park Avenue's claim that Park Avenue had sent the balloon payment and that the Note Holder had refused tender of the balloon payment. Instead, the circuit court found that Park Avenue had not sent the final balloon payment. Moreover, the circuit court held that the Note Holder was not estopped or barred by laches from proceeding with the foreclosure. Park Avenue has again appealed.

[1] Rule 14-211(b)(2)(C) requires that if the circuit court concludes from the record that the motion to stay or dismiss the foreclosure sale "states on its face a defense to the validity of the lien" that the circuit court "shall set the matter for a hearing on the merits of the alleged defense."

DISCUSSION

Park Avenue claims that the circuit court erred in three respects: (1) by listening to and admitting into evidence the audio recording of telephone calls between Loren and Abbey Williams while Loren was in prison; (2) by rejecting what it believes to be the weight of the evidence that the Note Holder received the balloon payment check; and (3) by failing to find that laches and unclean hands barred the Note Holder from instituting a foreclosure sale. We will address each in turn.

1. Admissibility of the Audiotapes

With Abbey on the witness stand, she was asked by counsel to the Note Holder whether she and Loren in 2011 had discussed changing the date on the letter supposedly sent to the Note Holder in 2006. She said that she didn't remember. Counsel for the Note Holder suggested that the audiotapes could be played to refresh her recollection of the conversation. Park Avenue's counsel objected on the grounds that the audiotapes could not be properly authenticated and contained inadmissible hearsay. The court overruled the objection and allowed the audiotapes to be played. On the audiotape, Abbey could be heard saying that she had a copy of the letter sent to the Note Holder in 2006 but that she wouldn't do anything with it until instructed to do so by Loren. Loren and Abbey also could be heard discussing whether anyone besides Loren had a copy of Park Avenue's check number 114 (which the Williamses claim reflects the $60,243.90 balloon payment).

Park Avenue argues that the audiotapes of Loren and Abbey's telephone calls were improperly admitted into evidence. Park Avenue alleges that while they were admitted

under the guise of refreshing Abbey's recollection that they were instead used as a substitute for direct testimony. Moreover, Park Avenue argues that by listening to the recordings, the circuit court's view of the case was "tainted." The Note Holder counters that the recordings were properly used to refresh Abbey's recollection, and that once used for refreshing the witness, could also be used as substantive evidence. Both parties address the issue as a question of whether the audiotapes should have been admitted as evidence.

We hold, however, we need not resolve the question of admissibility because any error (if indeed there was any) was plainly harmless as the circuit court explicitly chose not to rely on the audiotapes in making its decision. Although the circuit court did discuss the telephone calls, it specifically disregarded them in making its decision:

> And I've listened to all of the testimony and I listened to the clips, and it certainly – some of that can be explained away with the explanation that the subject that was being discussed involved retrieving copies of the letter and check, but it seems to me, what can't be explained what ultimately is the inconsistency that undermines the entire account is the explanation that when [Loren] was talking to his wife on the [tele]phone on July, I forget the exact date, I think it might have been the 13th of 2011, he was looking at the bank statement of – that's in evidence as Defendant's No. 3 and that's why he was referring to [check number] 114 being missing.
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> * * *
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> So I think there are any number of reasons and certainly I'm not going to spend a lot of time taking all of this apart. I think probably anything I would find would fortify my view, but I am strongly inclined of the view that those checks – that those papers may have been created later. But in any event, I'm not finding that because I don't need to.

> [Abbey] testified that she sent those in February of 2006 and I have many problems with the credibility of [Abbey's] testimony, including her demeanor and including inconsistencies in her testimony.
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> * * *
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> I will say, and let me just go back for a moment, and again I'm not going to cover everything, but the checks that are missing from Defendant's Exhibit No. 3, that's his statement, are [check numbers] 111 and 114. And then there was discussion on the clips about [check number] 121. And [Loren] testified that 121 was the check for payment of the second mortgage but of course it wasn't because that was actually paid, at least according to what's in evidence, Plaintiffs' No. 5 by Check 211 on another account.

Despite this discussion of the audiotapes, the circuit court, ultimately based its decision on the evidence pertaining to events that occurred in 2008, two years after the alleged balloon payment but three years prior to the recorded telephone calls:

> [The Note Holder], according to Plaintiff's Exhibit 6, sent a letter on February 10, 2006 noting that the balloon payment was due on January 1, 2006 and hadn't been paid. And [it] recounted conversations with [Park Avenue's representative] that said that it would be paid and that [the Note Holder] had called [Park Avenue] several times since January 1st and [Park Avenue] hadn't returned [its] call.
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> So it's inconsistent with that having written that letter and the letter says [that the balance due is] $60,243.90, [and] gives ten days to pay[,] that [the Note Holder] would get the check and then simply not cash it. It makes no sense at all.
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> And then even if we accept the idea that [the Note Holder] was completely irrational, we then get the letter of June the 14th, 2006[,] which again demands payment of $60,243.96 and says nothing about the check that was supposedly received by [the Note Holder] sometime in the interim.

> And I find these letters were received by Park Avenue and that that's confirmed by other evidence during the chronology including what's in [the Note Holder's] file. And then we get to the August 12, 2008 letter from [the Note Holder] to [Park Avenue,] recounting the amount due and demanding payment. And then [Park Avenue] writes back on August the 28th, 2008 and says "The numbers don't match." And [the Note Holder] then writes back by fax on September the 9th, 2008 and attaches the items requested.
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> Now, during all of this period, from February 2006 to August [] 2008, the loan has supposedly been paid off. There's been a tender. A check's been sent and not a word is said about the fact that this check was sent.
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> And I find that silence to be telling and I find that silence to be inconsistent with the conclusion that the tender was, in fact, sent. It just doesn't make any sense.
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> * * *
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> And if we go beyond 2008, *and I'm really not going to go on.*

Thus, the circuit court clearly stated that it was basing its decision on its understanding of events that transpired between 2006 and 2008, and conversely, that it was not relying on evidence concerning subsequent events, including the audiotape recordings. Such a statement by the judge, specifying what he relied upon and what he ignored, is given significant deference. *Nixon v. State*, 140 Md. App. 170, 189 (2001) ("Deference has always been given to a trial judge's specific statement on the record that the court was not considering certain testimony or evidence"). In the absence of any suggestion to the contrary, we find the admission of those audiotape recordings, if error, to have been harmless.

2. The Weight of the Evidence

As we said at the outset, the key question in this case was whether Park Avenue made the $60,243.90 balloon payment. Park Avenue argues, in effect, that because Abbey Williams was the only witness who could testify that the balloon payment check was sent, because she so testified and presented a copy of the check, and because her testimony was not rebutted by another witness, that the "overwhelming weight of the evidence" supports its claim that Park Avenue made the payment. Park Avenue concedes that the circuit court has the ability to consider the credibility of the witnesses but argues that the documentary evidence supporting its argument is so overwhelming, that this Court should overrule the circuit court's credibility assessment.

When an action is tried without a jury, "the appellate court will review the case on both the law and the evidence. It will not set aside the judgment of the trial court on the evidence unless clearly erroneous, and will give due regard to the opportunity of the trial court to judge the credibility of the witnesses." Maryland Rule 8-131. "Findings are not clearly erroneous if any competent material evidence exists in support of the trial court's factual findings." *Bontempo v. Lare*, 444 Md. 344, 363 (2015) (internal quotations and citations omitted). We, therefore, defer to the circuit court's determination of which witnesses were credible, and the weight to give to each witness's testimony. *Cunningham v. Feinberg*, 441 Md. 310, 322 (2015).

The only witness who testified that the balloon payment check had been sent to the Note Holder was Abbey Williams. Abbey testified that she sent the check to the Note

Holder. Unfortunately for her, however, the circuit court specifically noted that it did not find her testimony credible. Beyond the witness testimony, however, the documentary evidence as described by the circuit court, above, supported the conclusion that Park Avenue never sent the balloon payment check notwithstanding Park Avenue's claim to the contrary. The circuit court found its view of the documentary evidence to be persuasive. After reviewing the evidence in the light most favorable to the Note Holder, we cannot conclude that the circuit court was clearly erroneous.

3. Equitable Defenses

Park Avenue's final arguments are that the circuit court's decision to permit the foreclosure sale to proceed was inequitable because, according to it, the Note Holder's efforts are barred by its unclean hands and by laches.

Unclean Hands

Park Avenue argues that the Note Holder has "unclean hands" and, as a result, should be precluded from foreclosing on the property. First, Park Avenue argues that the amount of money claimed by the Note Holder dramatically rose—as a result of interest and attorney's fees—in the period between 2006 and 2008. Second, Park Avenue argues that the Note Holder's decision to pay off a tax lien certificate days before it expired in May 2010 also increased the debt owed on the Property. The Note Holder should have protected Park Avenue from these increases, Park Avenue argues, and its failure to do so constitutes "unclean hands." The Note Holder counters that the circuit court properly found that the doctrine of unclean hands does not apply because the addition to principal of the interest,

collection fees, as well as the payment of the tax lien were all proper additions under the terms of the Note. Moreover, the Note Holder maintains that it was Park Avenue's unwarranted efforts to prolong the foreclosure process that increased the amount owed. We conclude that the defense of unclean hands does not apply to these facts.

"The equitable doctrine of unclean hands is designed to prevent the court from assisting in fraud or other inequitable conduct." *Gordon v. Posner*, 142 Md. App. 399, 433 (2002) (internal quotation and citation omitted). "If it finds no facts in the record disclosing inequitable conduct, however, an appellate court can rule that the maxim is inapplicable as a matter of law." *Id.*

Park Avenue's first argument regarding the increase in interest owed and the inclusion of attorney's fees fails as those are consequences of Park Avenue's own actions. The Note Holder incurred attorney's fees as a result of the effort to collect the overdue Note. Also, the result of prolonging the Note was the accrual of more interest. Park Avenue's second argument fails because, given the Note Holder's responsibilities as trustee and in light of the potential negative effects of not paying the tax lien, the Note Holder acted reasonably in paying the tax lien. The circuit court noted that "I don't think that the decision not to gamble is something that can be charged to the mortgagee as inappropriate conduct." Instead the circuit court found that the Note Holder's "conduct in paying the real property taxes was that of a prudent mortgagee." We agree.

We conclude that, given the Note Holder's responsibilities and the nature of the transaction, the Note Holder did not act inequitably, and, therefore, that the doctrine of unclean hands is not applicable.

Laches

At the merits hearing in the circuit court, Park Avenue presented a laches defense arguing, in effect, that the Note Holder had delayed too long before instituting foreclosure proceedings. Park Avenue supported this argument by noting that the Note Holder waited to institute foreclosure proceedings until after the death of George Radcliffe (a representative of the Note Holder, to whom the balloon payment was allegedly mailed). According to Park Avenue, Radcliffe was the only witness who could have testified to receipt of the balloon payment. By waiting until after Radcliffe died to institute the foreclosure, the Note Holder had, according to Park Avenue, prejudiced its defense. The circuit court rejected Park Avenue's laches defense, finding that Park Avenue was not prejudiced by Mr. Radcliffe's absence.

On appeal, Park Avenue argues that the circuit court misunderstood the significance of Mr. Radcliffe's death to the laches defense. Mr. Radcliffe's testimony, according to Park Avenue would go to the central question of whether the Note Holder received the balloon payment check. By contrast, the Note Holder argues that the circuit court considered and properly dismissed the laches argument because of its underlying finding that the balloon payment check was never sent. If the balloon payment check was never sent, the Note Holder contends, then Mr. Radcliffe's hypothetical testimony could not be material. We

conclude that Mr. Radcliffe's testimony was not material and that, therefore, the defense of laches does not apply.

"Laches is a defense in equity against stale claims, and is based upon grounds of sound public policy by discouraging fusty demands for the peace of society." *State Center, LLC v. Lexington Charles Ltd. Partnership*, 438 Md. 451, 587 (2014) (internal quotation and citation omitted). The defense of laches does not apply in every situation, rather, "laches applies when there is an unreasonable delay in the assertion of one's rights and that delay results in prejudice to the opposing party." *Id*. at 586 (internal quotation and citation omitted). Our review of the trail court's decision regarding laches is made without deference and seeks to determine "whether, (1) in the context of an equitable claim, (2) there was an unreasonable delay in the filing and, if so, (3) whether there was any prejudice." *Id.* at 585-86. Although Park Avenue's defense of laches does arise in the context of an action at equity—its claim for injunctive relief—there was no unreasonable delay and no prejudice.

We agree with the circuit court that there was no unreasonable delay in bringing in the foreclosure action. In judging whether there was an unreasonable delay, courts frequently take guidance from an analysis of whether a similar action at law would be barred by the relevant statute of limitations. *State Center*, 438 Md. at 603 (holding that "[a]lthough there is no bright-line rule, the doctrine of laches and statutes of limitations have an intertwined relationship that we must consider as a first step in this portion of the analysis."). An action at law would have been governed by the twelve year statute of

limitations provided by Section 5-102(a) of the Courts & Judicial Proceedings Article of the Maryland Code.[2] Thus, we think analogously a delay of less than twelve years will not ordinarily be considered unreasonable. Here the delay was five years.

There was also no prejudice to Park Avenue from the delay in instituting foreclosure proceedings. Prejudice is generally described as "anything that places the defendant in a less favorable position." *Id*. at 586 (internal quotation and citation omitted). Here, Park Avenue was not placed in a less favorable position by the Note Holder initiating the foreclosure in 2010. Park Avenue was on notice as early as June 2006 that its balloon payment had not been received. To suggest that the Note Holder would wait to institute foreclosure proceedings until Mr. Radcliffe's death, which was sudden and unexpected, simply so that Mr. Radcliffe would be unavailable to testify doesn't strike us as sincere, and, in any event, we agree with the circuit court that Park Avenue was not prejudiced by Mr. Radcliffe's absence. We conclude, therefore, that Park Avenue was not prejudiced by the delay between when the claim became ripe and when the Note Holder initiated the foreclosure proceedings.

Because Park Avenue was not prejudiced, and because the delay was not unreasonable, we hold that the doctrine of laches is inapplicable.

[2] In 2014, § 5-102 was revised to remove deeds of trust, mortgages, and promissory notes, signed under seal, that secure owner-occupied residential properties from the twelve-year statute of limitations for specialties. CJP § 5-102(c); Acts 2014, c. 592, § 1 (eff. July 1, 2014). Deeds, mortgages, and the like for non-owner-occupied properties, however, remain subject to the twelve-year statute of limitations for specialties.

In conclusion, we hold: (1) that the admission of the audio tapes was harmless error; (2) that the circuit court's decision was not against the weight of the evidence; and (3) that the equitable defenses of unclean hands and laches do not apply.

JUDGMENT OF THE CIRCUIT COURT FOR BALTIMORE CITY AFFIRMED. COSTS TO BE PAID BY APPELLANT.