UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1357

September Term, 2014

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101 GENEVA, LLC

v.

JONATHAN ELEFANT ET AL.,
SUBSTITUTE TRUSTEES

Woodward,
Wright,
Thieme, Raymond G., Jr.
(Retired, Specially Assigned),

JJ.

Opinion by Woodward, J.

Filed: January 27, 2016

On March 8, 2013, appellees, Laura O'Sullivan, Erin Brady, Diana Theologou, Laura Latta, Jonathan Elefant, Chasity Brown, and Laura Curry, as substitute trustees, filed an order to docket a foreclosure of real property located at 9203 Wellington Court in Lanham, Maryland ("the property") against Orlando Delgado and Gladys Lucero ("the homeowners") in the Circuit Court for Prince George's County. Appellees sold the property to appellant, 101 Geneva, LLC, at a public auction on June 11, 2013. On July 8, 2013, the court issued a notice of sale, ordering that the sale of the property "be ratified and confirmed, unless cause to the contrary thereof be shown on or before the 8th day of August, 2013."

The homeowners timely filed exceptions to the foreclosure sale, in which they notified the trial court that they had filed a separate civil action to contest the foreclosure. Motions to dismiss the civil action were filed by appellant and appellees, and the court declined to rule on the homeowners' exceptions until after the motions to dismiss were resolved. The court dismissed the homeowners' civil action on January 10, 2014.

On February 10, 2014, appellant filed a motion to vacate and rescind the foreclosure sale ("motion to vacate") on the grounds that the delay in the ratification of the sale had caused a frustration of appellant's commercial purpose, or, in the alternative, constituted "exceptional circumstances" warranting a rescission of the sale. On July 21, 2014, the circuit court issued an order overruling the homeowners' exceptions and denying appellant's motion to vacate. On August 6, 2014, the court ratified the foreclosure sale.

On appeal, appellant presents three issues for our review, which we have condensed into two questions:[1]

> 1. Did the circuit court err or abuse its discretion in denying appellant's motion to vacate where appellant claimed that the doctrine of frustration of commercial purpose applied and was satisfied?
>
> 2. Did the circuit court err or abuse its discretion in denying appellant's motion to vacate where appellant claimed that exceptional circumstances existed to warrant a rescission of the foreclosure sale?

We answer both questions in the negative and, accordingly, affirm the judgment of the circuit court.

[1]Appellant's issues, as originally presented in its brief, are as follows:

> 1. Whether a party that purchases a property at foreclosure sale may have the offer to purchase rescinded or voided if the sale is not ratified in a reasonable period of time through no fault of the foreclosure purchaser?
>
> 2. Whether the Circuit Court abused its discretion in denying appellant's Motion to Vacate and Rescind the foreclosure sale on the basis that appellant's commercial purpose in buying the property was frustrated due to the extensive delay in ratification?
>
> 3. Whether the Circuit Court abused its discretion in denying appellant's Motion to Vacate and Rescind in light of the exceptional circumstances that existed with respect to the delay in ratification?

BACKGROUND

On March 8, 2013, appellees filed an order to docket a foreclosure of the property in the circuit court. On June 11, 2013, appellees sold the property to appellant at a public auction. On June 27, 2013, appellees filed a Report of Sale.

On July 8, 2013, the circuit court issued a notice, ordering that the sale of the property "be ratified and confirmed, unless cause to the contrary thereof be shown on or before the 8th day of August, 2013." The homeowners filed a Motion to Dismiss Final Order Ratification of Property Sale on July 15, 2013, which the court treated as exceptions to the foreclosure sale. In their exceptions, the homeowners notified the court that they had filed a "declaratory relief with a quiet title action and a *lis pendens* for a wrongful foreclosure action" ("the civil action") in the circuit court on June 27, 2013.

On August 12, 2013, appellees filed a motion to dismiss the civil action. On August 19, 2013, appellant filed its own motion to dismiss the civil action. The circuit court declined to rule on the exceptions while the civil action was pending.

On December 19, 2013, the circuit court held a status hearing in the foreclosure case and then reset the hearing for February 11, 2014. Both parties agree that the hearing was reset to permit the court to hear oral arguments on the motions to dismiss the civil action on January 10, 2014. On December 20, 2013, however, the homeowners filed a motion for

voluntary dismissal of the civil action. On January 10, 2014, the court dismissed the civil action.

On February 10, 2014, appellant filed the motion to vacate on the grounds that the delay in the ratification of the foreclosure sale had caused a frustration of appellant's commercial purpose, or, in the alternative, constituted "exceptional circumstances" warranting a rescission of the sale. The motion did not include a request for a hearing. Also on February 10, 2014, appellees filed a response to the homeowners' exceptions.

The circuit court held a status hearing on February 11, 2014. Both parties agree that the court stated at the hearing that it would review the homeowners' exceptions, appellees' response to the exceptions, and appellant's motion to vacate.[2] On February 18, 2014, appellees filed a response to appellant's motion to vacate, arguing that appellant's motion must be denied because (1) frustration of commercial purpose is not a valid ground to set aside a foreclosure sale; (2) even if frustration of commercial purpose is a valid ground, appellant has not established such frustration of commercial purpose; and (3) even if the delay in ratification is a sufficient ground to vacate the ratification, the delay is not attributable to appellees.

[2]At the time of the February 11, 2014 hearing, the time for filing a response to appellant's motion to vacate had not expired. *See* Maryland Rule 2-311(b).

Without holding a hearing, the circuit court issued an order on July 21, 2014, overruling the homeowners' exceptions. In its order, the court stated that "the case shall continue in due course."[3] That same day, the court issued a separate order denying appellant's motion to vacate, which was entered on July 31, 2014.

On August 6, 2014, the circuit court ratified the foreclosure sale. On August 27, 2014, appellant filed its timely notice of appeal from the court's order denying its motion to vacate.

STANDARD OF REVIEW

This Court reviews the circuit court's decision to deny appellant's motion to vacate under an abuse of discretion standard. *See 101 Geneva, LLC v. Wynn*, 435 Md. 233, 242 (2013) ("Moreover, the vacatur of a foreclosure sale . . . is a judicial decision affecting the rights and interests of litigants, and, as such, it is generally within the discretion of trial judges to rule on the matter." (citations and internal quotation marks omitted)); *see also Jones v. Rosenberg*, 178 Md. App. 54, 69 (2008) ("There is a presumption in favor of the validity of a judicial sale, and the burden is on the exceptant to establish to the contrary."). Questions of law decided by the circuit court are reviewed *de novo*. *See Burson v. Capps*, 440 Md. 328, 342 (2014).

[3] This order is mistakenly dated January 21, 2014.

DISCUSSION

I. Frustration of Commercial Purpose Doctrine

This Court has explained the frustration of commercial purpose doctrine as follows:

> The principle underlying the frustration of purpose doctrine is that where the purpose of a contract is completely frustrated and rendered impossible of performance by a supervening event or circumstance, the contract will be discharged. . . . **[T]he Court of Appeals outlined three factors that courts should examine when determinining whether the frustration doctrine applies: (1) whether the intervening act was reasonably foreseeable; (2) whether the act was an exercise of sovereign power; and (3) whether the parties were instrumental in bringing about the intervening event.** Under this doctrine, if a contract is legal when made, and no fault on the part of the promisor exists, the promisor has no liability for failing to perform the promised act, after the law itself subsequently forbids or prevents the performance of the promise. In order to succeed under this theory, however, performance under the contract must be objectively impossible.

Panitz v. Panitz, 144 Md. App. 627, 639-40 (2002) (emphasis added) (citations and internal quotation marks omitted). A party claiming frustration of commercial purpose must satisfy all three factors to succeed. *See id.* at 640 ("The doctrine of frustration of purpose is inapplicable to the case at hand because appellant's situation fails the first prong of the [frustration of purpose] test.").

A. Applicability of Doctrine

Appellant argues that the circuit court abused its discretion by not vacating the foreclosure sale pursuant to the doctrine of frustration of commercial purpose. According to

appellant, the doctrine is applicable in the foreclosure context, because foreclosure purchasers can seek to rescind a sale "on any applicable legal or equitable ground," and nothing in Maryland Rule 14-305 governing procedures following foreclosure sales limits foreclosure purchasers from "challeng[ing] a sale on legal and equitable grounds, including the equitable principle of commercial frustration."

Appellees respond that the doctrine of frustration of commercial purpose does not apply to a foreclosure sale, because "the Maryland Rules limit the circumstances when a lower court may rescind a foreclosure sale, and business frustration is not one." According to appellees, "at most, [ ] a purchaser qualifies for an abatement of interest to the extent a litigious homeowner seeks to delay the ratification . . . this is insufficient to qualify as an exception to a foreclosure sale."

Appellant has cited no caselaw from Maryland or any other jurisdiction, and we have found none, to support its contention that a circuit court may vacate a foreclosure sale pursuant to the doctrine of frustration of commercial purpose. We need not decide, however, if the doctrine applies to Maryland foreclosure proceedings, because, as we will discuss *infra*, appellant does not satisfy the doctrine's requirements under the circumstances of the instant case.

B. Application of Doctrine

Appellant contends that it satisfies the three factors of the frustration of commercial purpose doctrine. First, appellant argues that the one-year delay in ratification was not reasonably foreseeable to appellant when it purchased the property, given the mechanisms provided by the Maryland Rules for the timely and efficient disposition of properties. Appellant argues that, even though it was "aware that foreclosure sales may be delayed when exceptions are filed," it still "had a reasonable expectation that the exceptions would be timely addressed" by appellees and the circuit court. Second, appellant contends that the circuit court's failure to timely ratify the sale constituted an exercise of sovereign power. Third, appellant argues that the lengthy delay was largely the result of appellees' neglect of the case, specifically their delay in filing a response to the homeowners' exceptions. According to appellant, "the lengthy delay in filing the opposition and [appellees'] failure to diligently marshal the case toward ratification was the proximate cause of the prolonged delay in ratification."

Appellees respond that appellant is not entitled to relief under the frustration of commercial purpose doctrine, because (1) the delay in ratification was reasonably foreseeable, given that the homeowners filed exceptions and that the General Assembly has taken steps to slow down the foreclosure process by adding additional procedures; (2) despite the delay, the sale was eventually ratified; and (3) appellant cannot attribute any delay to

appellees, because appellees were under no obligation to respond to the homeowners' exceptions. According to appellees, Maryland caselaw demonstrates that, "while the performance of a contract may become inconvenient, unprofitable, or expensive, so long as the underlying purpose is still viable, the contract must stand."

We agree with appellees that appellant cannot satisfy the first factor of the frustration of commercial purpose doctrine, because the twelve-month delay[4] in the ratification of the foreclosure sale was reasonably foreseeable. The Court of Appeals has noted that

> [t]he courts have generally held that if the supervening event was reasonably foreseeable the parties may not set up the defense of frustration as an excuse for non-performance. The majority of the courts stress this principle in deciding cases on frustration, and hold that if the parties could have reasonably anticipated the event, they are obliged to make provisions in their contract protecting themselves against it.

Montauk Corp. v. Seeds, 215 Md. 491, 499-500 (1958).

The delay in the ratification of the foreclosure sale was reasonably foreseeable, because the homeowners not only filed exceptions, but also filed a separate civil action

[4] We accept appellant's contention that the delay in ratification constituted a twelve-month delay, even though appellant filed its motion to vacate on February 10, 2014, six months after the earliest anticipated date of ratification – August 8, 2013. *See* Md. Rule 14-305(c). In its motion to vacate, appellant stated the following: "As [the exceptions] need to be addressed not only by the Substitute Trustees and the Court, it is clear that there will be a further delay in the proceeding even justifying the [rescission] requested even more so." Because appellant referred to an additional delay in its motion to vacate, we accept *arguendo* its premise of a twelve-month delay.

contesting the foreclosure. The Court of Appeals has noted that, when former homeowners institute proceedings to vacate or delay foreclosures, "settlement [i]s delayed understandably." *See Baltrotsky v. Kugler*, 395 Md. 468, 479 (2006) (affirming an abatement of interest on the unpaid purchase price of the foreclosed property during the period of delay). In other words, a foreclosure purchaser can reasonably anticipate a delay in ratification if homeowners contest foreclosure proceedings, which the homeowners did here. The foreseeability of the delay does not change with the length of the delay; the fact that some delays in foreclosure ratification caused by litigation are greater than others does not render such delays unforeseeable. If we accepted appellant's argument that "lengthy delays" are unforeseeable, we would have to create a bright-line rule between foreseeable delays and unforeseeable, lengthy delays, which we decline to do given the uncertainties of litigation. Appellant's own argument demonstrates the difficulty of creating such a line: its motion to vacate was based on the idea that a delay in ratification of more than six months is unforeseeable, but, in its brief to this Court, it conceded that, "perhaps, a five month delay in ratification when legal challenges are filed is not extraordinary."

Furthermore, the public policy of Maryland is "to restrict or delay" the foreclosure process. *Maddox v. Cohn*, 424 Md. 379, 394 n.12 (2012) (noting that the former public policy to expedite foreclosure proceedings had been overruled by the recent statutes that instituted additional proceedings to protect the interests of former homeowners). Appellant argues "that

the actions taken by the legislature and the Court of Appeals in recent years in response to the foreclosure crisis relate to procedures that take place before the foreclosure sale and these legislative and judicial rule changes did not modify the post-sale process that is at issue here." We disagree.

In *Maddox*, the Court of Appeals did not limit its pronouncement that the state's public policy was to "restrict or delay the [foreclosure] process" to pre-sale proceedings only. *Id.* Rather, it framed the legislative and judicial response to the recent foreclosure crisis as mechanisms to delay foreclosures *both pre- and post-sale*:

> Since the beginning of the modern foreclosure problems, and especially after the passage of these recent statutes, this Court has amended its rules to ensure that the Rules are compatible with the Acts. These amendments include Md. Rule 14-201 (applicability), 14-204 (institution of actions), 14-205 (conditions precedent to filing), 14-207.1 (providing circuit courts with screening powers), 14-212 (mediation), 14-214 (sale), **14-215 (post-sale procedures), and 14-216 (proceeds)**. **For the most part, these rules afforded additional protection for mortgagors involved in foreclosure actions.**
>
> **Both the legislative acts and the amendments to the Rules were designed primarily to protect the interests of residential homeowners in the foreclosure process.** Additionally, certain of the Acts of 2009 were primarily to grant authority to local governments to enact ordinances requiring notice of foreclosures to the local governments in order to address some of the issues from the mortgage crisis that were impacting local governments.

Id. at 387-88 (emphasis added) (footnotes omitted).

Therefore, it was reasonably foreseeable that the homeowners' actions following the foreclosure sale would cause a delay in the ratification of sale. Because appellant cannot establish that the delay in ratification was not reasonably foreseeable, we need not examine the other frustration of commercial purpose factors. *See Panitz*, 144 Md. App. at 640.

Furthermore, the Court of Appeals has noted that the doctrine of commercial frustration "has been limited to cases of extreme hardship," and that "the courts have been careful not to find commercial frustration if it would only result in allowing a party to withdraw from a poor bargain." *Acme Mkts., Inc. v. Dawson Enters., Inc.*, 253 Md. 76, 90-91 (1969) (citations and internal quotation marks omitted); *see also Harford Cnty. v. Town of Bel Air*, 348 Md. 363, 387-88 (1998) ("[The doctrines of frustration of purpose and impossibility of performance] do not permit a party to abrogate a contract, unilaterally, merely upon a showing that it would be financially disadvantageous to perform it; were the rules otherwise, they would place in jeopardy all commercial contracts."). The Restatement (Second) of Contracts notes that

> the frustration must be substantial. **It is not enough that the transaction has become less profitable for the affected party or even that he will sustain a loss.** The frustration must be so severe that it is not fairly to be regarded as within the risks that he assumed under the contract.

Restatement (Second) of Contracts § 265 cmt. a (1981) (emphasis added).

In its motion to vacate, appellant stated the following:

> **When** the trustees fail to act timely and or **an excessive time delay occurs, the third party purchaser whose deposit is a [sic] risk stands to lose its investment,** if the market conditions which are presently very volatile, change, so that **the foreclosure purchaser is unable to obtain the return of the investment that they [sic] contemplated and calculated at the time of its bid**.
>
> ***
>
> In the interim, the [homeowners] who remain in the property and have clearly committed waste at the expense of [appellant] ([which] is required to pay the real estate taxes, water and sewer charges, and accruing interest) all the while, while the property is sold at its sole risk, **the delay and the change resulting in the market where the property was located has changed for the worst.**
>
> ***
>
> In bidding on the property, [appellant] anticipated the ratification to occur before September 2013 **so as to catch the market.**
>
> ***
>
> Additionally, [appellant] was made part of some protracted litigation [against the homeowners], for some unknown reason and [appellees] failed to provide a defense of same though they pursued a defense on their own behalf. Indeed **the protracted litigation caused additional expenses which could not have been considered in anticipation of the bid on the property.**

(Emphasis added).

Thus appellant makes it abundantly clear that the impetus behind its motion to vacate was the changing market, which resulted in a loss of its investment, causing the sale to be "a poor bargain." *See Acme Mkts., Inc.*, 253 Md. at 91. Appellant cannot, however, "'abrogate

a contract, unilaterally, merely upon a showing that it would be financially disadvantageous to perform it.'" *Harford Cnty.*, 348 Md. at 387-88 (quoting *Levine v. Rendles*, 272 Md. 1, 12 (1974)). Moreover, appellant did not submit any affidavits, depositions, appraisals, or any other evidence to show the general market decline or a loss of value on this particular property from August 2013 to August 2014; its statements regarding the loss of investment amount to mere allegations. In sum, because the delay in ratification was reasonably foreseeable and "would only result in allowing [appellant] to withdraw from a poor bargain," appellant's frustration of commercial purpose argument fails. *Acme Mkts., Inc.*, 253 Md. at 91.[5] Accordingly, the circuit court did not err or abuse its discretion in denying appellant's

[5]Furthermore, as stated above, "[i]n order to succeed under this theory, however, performance under the contract must be objectively impossible." *Harford Cnty. v. Town of Bel Air*, 348 Md. 363, at 385 (1998). Section 265 of the Restatement (Second) of Contracts provides the following examples where performance was an impossibility:

> 1. A and B make a contract under which B is to pay A $1,000 and is to have the use of A's window on January 10 to view a parade that has been scheduled for that day. Because of the illness of an important official, the parade is cancelled. B refuses to use the window or pay the $1,000. B's duty to pay $1,000 is discharged, and B is not liable to A for breach of contract.
>
> 2. A contracts with B to print an advertisement in a souvenir program of an international yacht race, which has been scheduled by a yacht club, for a price of $10,000. The yacht club cancels the race because of the outbreak of war. A has already printed the programs, but B refuses to pay the $10,000. B's duty to pay $10,000 is discharged, and B is not liable to A for breach of contract. A may have a claim under the rule stated in § 272(1).

(continued...)

motion to vacate on the grounds that appellant did not satisfy the frustration of commercial purpose doctrine.

II. Exceptional Circumstances

Alternatively, appellant argues that the circuit court abused its discretion in not rescinding the foreclosure sale based on "the extraordinary circumstances present in this case." First, appellant points to cases in which courts allowed for an abatement of interest accruing from the date of a foreclosure sale as justification for the circuit court to exercise

[5](...continued)

> 3. A, who owns a hotel, and B, who owns a country club, make a contract under which A is to pay $1,000 a month and B is to make the club's membership privileges available to the guests in A's hotel free of charge to them. A's building is destroyed by fire without his fault, and A is unable to remain in the hotel business. A refuses to make further monthly payments. A's duty to make monthly payments is discharged, and A is not liable to B for breach of contract.
>
> 4. A leases neon sign installations to B for three years to advertise and illuminate B's place of business. After one year, a government regulation prohibits the lighting of such signs. B refuses to make further payments of rent. B's duty to pay rent is discharged, and B is not liable to A for breach of contract.

Restatement (Second) of Contracts § 265 cmt. a, illus. 1-4 (1981).

Because the circuit court eventually ratified the sale on August 6, 2014, appellant can purchase the property at the price for which it bargained. Thus the purpose of the sale was not "completely frustrated and rendered impossible of performance." *Panitz*, 144 Md. App. at 639.

its equitable power in this case to excuse appellant from the contract. Second, appellant argues that appellees did not act reasonably and prudently in monitoring the case following the sale, particularly by not filing a response to the homeowners' exceptions. Third, appellant contends that appellees breached their obligation under the terms of the foreclosure sale to convey good and marketable title to appellant, because the Maryland Rules, as well as the circumstances and intent of the parties, "clearly establish[ed]" that time was of the essence with respect to the sale of the property.

Appellees respond that no exceptional circumstances existed to justify a rescission of the sale because there was no "time is of the essence" provision in the contract and the circuit court's equitable powers are "only as indefinite as the Maryland Rules allow." We agree with appellees and shall explain.

In *Baltrotsky*, the Court of Appeals explained when exceptional circumstances trump the express terms of a contract in the context of a foreclosure sale:

> It is beyond cavil that, generally speaking, the express terms of a contract bind the parties and courts should not meddle in the affairs of the parties by modifying terms of the agreement to assist a disadvantaged party. *Walther v. Sovereign Bank*, 386 Md. 412, 429-30 (2005) ("[O]ne of the most commonsensical principles of all of contract law [is] that a party that voluntarily signs a contract agrees to be bound by the terms of that contract."); *Calomiris v. Woods*, 353 Md. 425, 445 (1999) ("Contracts play a critical role in allocating the risks and benefits of our economy, and courts generally should not disturb an unambiguous allocation of those risks in order to avoid adverse consequences for one party."); *Post v. Bregman*, 349 Md. 142, 169 (1998) ("'Parties have the right to make their contracts in

> what form they please, provided they consist [sic] with the law of the land; and it is the duty of the Courts so to construe them, if possible, as to maintain them in their integrity and entirety.'" (*quoting Md. Fertilizing & Mfg. Co. v. Newman*, 60 Md. 584, 588 (1883))); *Faller v. Faller*, 247 Md. 631, 638 (1967).
>
> That general rule is tempered, however, by the caveat that "fraud, duress, mistake, or some countervailing public policy" may serve as occasions to modify or excise certain terms of a contract. *Calomiris,* 353 Md. at 445; *see also Md.-Nat'l Capital Park & Planning Comm'n v. Washington Nat'l Arena*, 282 Md. 588, 605-07 (1978); 5 Williston on Contracts § 12:3 (4th ed. 1993); Restatement (Second) of Contracts §§ 178, 184(1) (1981); *cf. Holloway v. Faw, Casson & Co.*, 78 Md. App. 205, 230-39 (1989), *aff'd in part, rev'd in part,* 319 Md. 324 (1990) (describing the "blue pencil" doctrine of contract law by which offensive terms are removed).

Baltrotsky, 395 Md. at 480.

In *Baltrotsky*, the Court of Appeals affirmed the circuit court's order granting the foreclosure purchasers an abatement of interest on the purchase price, even though the published notice of the foreclosure sale forbade any abatement of interest, because the case

> present[ed] an occasion where public policy . . . counsels that the provision allocating the payment of interest to the purchaser was set aside properly. [The former homeowner's] persistent and monotonous pleadings, advancing arguments rejected previously by the Circuit Court, served only to delay settlement on the properties and constituted "conduct of other persons beyond the power of the purchaser to control or ameliorate."

Id. at 480-81 (quoting *Donald v. Chaney*, 302 Md. 465, 477 (1985)).

As we have already stated, there is no case permitting a party to withdraw from a contract of sale of a foreclosed property merely due to delay. Furthermore, Maryland public

policy is to restrict or delay foreclosure proceedings. *See Maddox*, 424 Md. at 394 n.12. Thus we see no public policy reason to vacate the foreclosure sale simply because ratification was delayed.

Appellant provides two additional reasons why exceptional circumstances exist in the instant case: (1) appellees' failure to timely respond to the homeowners' exceptions constituted a breach of their duty to act diligently and prudently, and (2) appellees' failure to convey good and marketable title within a reasonable period of time constituted a breach of an implicit "time is of the essence" provision. We will address each argument in turn.

We agree with appellees that they did not breach any duty to act diligently and prudently, because appellees were under no obligation to respond to the homeowners' exceptions at all. Rule 14-305(d), entitled "Exceptions to Sale," clearly provides for the possibility of filing a response to exceptions, but does not state any requirement for a party to do so. *See* Md. Rule 14-305(d) ("The court shall hold a hearing if a hearing is requested and the exceptions *or any response* clearly show a need to take evidence." (Emphasis added)). Appellant cannot point to anything in the record that shows that the circuit court was waiting for appellees' response before ruling on the exceptions and ratifying the sale; rather, both parties agree that the court delayed such rulings until after it resolved the homeowners' civil action on January 10, 2014, five months after the initial ratification date of August 8, 2013. Indeed, the court did not ratify the sale until more than five months after appellees filed

their response; thus the delay in ratification was due to inaction by the court, not by appellees.[6] As a result, appellees did not breach their duty to act diligently and prudently.

We also agree with appellees that the terms of sale did not contain an implicit "time is of the essence" provision. Appellant is mistaken in its contention that "the rules, the circumstances of the transaction and the intent of the parties clearly establish" that time is of the essence with respect to foreclosure sales. In *Pines Plaza Ltd. Partnership v. Berkley Trace, LLC*, the Court of Appeals stated:

> [T]his Court has reiterated the general rule that "time is not of the essence of the contract of sale and purchase of land unless a contrary purpose is disclosed by its terms or is indicated by the circumstances and object of its execution and the conduct of the parties. . . . Ordinarily . . . time is held to be of the essence only when it is clear that the parties have expressly so stipulated or their intention is inferable from the circumstances of the transaction, the conduct of the parties or the purpose for which the sale was made."

431 Md. 652, 671 n.18 (2013) (citations omitted).

[6] In its reply brief, appellant claims that, "[h]ad [a]ppellees filed an opposition to the Exceptions at or before the status hearing, the [circuit court] would have been in a position to rule on the Exceptions and ratify the sale on January 10, 2014, the date the civil action filed by [the homeowners] was dismissed." The court, however, had received appellees' opposition to the exceptions and was in a position to rule on the exceptions by the status hearing on February 11, 2014, but it could not so rule because appellant had filed its motion to vacate the day before, and the court could not rule before appellees had an opportunity to respond. Thus, under appellant's theory, its own motion to vacate caused the delay after February 11, 2014.

Appellant did not adduce any evidence "from the circumstance of the transaction, the conduct of the parties or the purpose for which the sale was made" that showed a clear intention on the part of both parties that "time is of the essence" was an implicit provision in the terms of the foreclosure sale. *See id.* Indeed, any express "time is of the essence" provision in a contract usually refers to a particular date or a specific period of time by which an action or event must take place. Neither is present in the case *sub judice*.

Moreover, given the stated public policy to slow down foreclosure proceedings, as well as the foreseeability that ratification could be delayed if the homeowners contested the proceedings, a "time is of the essence" provision would need to be explicit in order to be enforceable. Because the terms of sale contained no such "time is of the essence" provision, there was no breach of contract by virtue of the delay in the ratification of the foreclosure sale. Accordingly, no exceptional circumstances existed to justify vacating the foreclosure sale.

JUDGMENT OF THE CIRCUIT COURT FOR PRINCE GEORGE'S COUNTY AFFIRMED; APPELLANT TO PAY COSTS.