UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 2122

September Term, 2014

DONALD L. CONOVER, ET AL.

v.

JEFFREY B. FISHER, ET AL.,
SUBSTITUTE TRUSTEES

Graeff,
Reed,
Eyler, James R.
(Retired, Specially Assigned),

JJ.

Opinion by Graeff, J.

Filed: August 3, 2016

This case arises from the foreclosure of property owned by Donald Conover and Deborah A. McGlauflin, self-represented appellants. After numerous motions were filed, the foreclosure sale occurred on October 21, 2013.

Appellants then filed, *inter alia*, a Counterclaim and Third-Party Complaint in the Circuit Court for Anne Arundel County against Jeffrey B. Fisher, Carletta M. Grier, Virginia S. Inzer, William K. Smart, appellees ("Substitute Trustees"). The Substitute Trustees filed a Line to Correct the Record and Request for Ratification, as well as a Lost Notes Affidavit and a Motion to Substitute Purchaser. The court held a hearing on pending motions, and on December 9, 2014, it issued the following rulings: (1) granting the motion to dismiss the counterclaim and third-party complaint; (2) granting the motion to substitute purchaser; (3) granting the Line to Correct the Record and Request for Ratification; (4) denying appellants' motion for relief based on new evidence pursuant to Md. Rule 2-305; and (5) denying appellants' motion to dismiss counsel for the Substitute Trustees.

On appeal, appellants raise sixteen questions for this Court's review, which we have consolidated and rephrased as follows:

1. Did the circuit court deny appellants due process and equal protection of the law?

2. Did the circuit court err in ruling against appellants on the merits?

For the reasons set forth below, we shall affirm the judgments of the circuit court.

FACTUAL AND PROCEDURAL BACKGROUND

On May 29, 2013, after appellants defaulted on a Note secured by a deed of trust encumbering real property located at 2682 Claibourne Court, Annapolis, Maryland 21043

(the "Property"), the Substitute Trustees initiated the foreclosure proceedings by filing an Order to Docket Suit in the Circuit Court for Anne Arundel County. Appellants had refinanced the Property in August 2001, with a loan from Navy Federal Credit Union ("NFCU") in the amount of $510,000. On June 14, 2013, appellants filed a motion to stay and dismiss, which was denied on July 16, 2013.

On July 22, 2013, appellants filed a notice of in banc review of the court's denial of their motion to stay and dismiss. On September 10, 2013, the court dismissed appellants' petition for in banc review because there was no final judgment.

On August 22, 2013, appellants filed a counterclaim and third-party complaint against the Substitute Trustees and NFCU, the secured lender/mortgagee, asserting claims of fraud and negligence. They argued, *inter alia*, that the Substitute Trustees and NFCU falsely represented that it was the Lender on the Note at issue and entitled to a Deed of Trust to secure the Note. They asserted that NFCU was never the creditor in this transaction, but the actual creditor was an investor from the sale of unregulated securities. They argued that the Deed of Trust was not properly perfected, and therefore, that NFCU had no right to foreclose on the Property. Appellants requested dismissal of the cause of action, a judgment declaring the Deed of Trust null and void, judgment in the sum of $1,093,680, plus punitive damages and attorney's fees.

On October 24, 2013, the Substitute Trustees and NFCU filed a motion to strike and/or dismiss the counterclaim and third-party complaint, asserting, *inter alia*, that the counterclaim and third-party claim failed to state a claim upon which relief could be granted. The Substitute Trustees and NFCU argued that appellants' claims relied on the

"faulty premise" that NFCU was not the originating lender, alleging that another unnamed entity was the originating lender, without stating who that entity was, or upon what facts they based that claim. Thus, they asserted, appellants did not sufficiently allege fraud or the factual predicate to assert a claim of fraud. The Substitute Trustees argued that, in any event, the lender at the time of the origination of the Loan was NFCU, and NFCU still held and owned the Note.

On October 11, 2013, appellants filed a motion for an ex-parte temporary restraining order and a preliminary and permanent injunction, requesting that the Substitute Trustees be enjoined from proceeding with the foreclosure sale "prior to a trial on the merits of this case." In the motion, appellants asserted, as in their previous filings, that frauds were being perpetrated on them and on the court. On October 16, 2013, after an emergency hearing, the court denied the motion.

On October 18, 2013, appellants filed a notice of in banc review of the court's denial of their motion for ex parte temporary restraining order, preliminary injunction and permanent injunction, and request for hearing. On December 9, 2013, the court dismissed the petition for failure to set forth sufficient questions, facts, and supporting argument as required by Md. Rule 2-551.

On October 21, 2013, the Substitute Trustees sold the Property to NFCU and reported the sale to the court. On November 12, 2013, appellants filed exceptions to the sale, which were denied by the court on December 11, 2013.

On December 18, 2013, appellants filed a notice of appeal to this Court, appealing the denials of both requests for in banc review. On March 25, 2014, the circuit court

entered an order staying all open motions pending appellants' appeal. On April 1, 2014, appellants filed a second notice of appeal to this Court. On May 20, 2014, the Substitute Trustees filed a motion to dismiss the appeals, which this Court granted on the ground that the appeals were not allowed by law.

On May 20, 2014, after the foreclosure sale, but prior to ratification, the Substitute Trustees filed a Line to Correct the Record and Request for Ratification, as well as a lost note affidavit and motion to substitute purchaser. In an affidavit filed on behalf of NFCU, the Substitute Trustees explained that NFCU was the originating lender of the Note in the amount of $510,000, which was sold to Fidelity Bank on January 15, 2014, but NFCU maintained the right to enforce the Note.[1] The Substitute Trustees stated that the original Note had been lost, that a diligent search had been conducted, including a "thorough and intensive check of all the physical and computer business records belonging to" NFCU, as well as a search of the file recovered from NFCU's previous law firm, which held the original Note. A copy of the original Note, however, had been filed with the Order to Docket.

The Substitute Trustees further stated that, during the course of the proceedings, particularly with reference to appellants' motion to stay and dismiss and for injunction, counsel for the Substitute Trustees made statements that NFCU originated the loan and had always owned the loan, but it "would have been more accurate to say that [NFCU]

[1] The Substitute Trustees explained that, after origination, Navy Federal Credit Union ("NFCU") sold the loan to E*Trade Financial, and E*Trade sold the loan to Fidelity Bank. NFCU serviced the loan while owned by E*Trade and "has held the note throughout, and had the contractual right/obligation to bring a foreclosure action it its own name."

originated this loan and is the intended holder of the Note with the right to enforce the Note." They asserted that "such omission was inadvertent," it was discovered only after the foreclosure sale, and it did not affect the validity of the sale. The Substitute Trustees requested that Fidelity Bank be substituted as purchaser in place of NFCU. They argued that there was no reason to delay entry of a final order of ratification of the foreclosure sale, and they requested that the sale be ratified.

On May 29, 2014, appellants filed a motion to dismiss the Substitute Trustees' counsel, alleging a conflict of interest due to the inconsistent statements regarding the owner of the loan. On June 2, 2014, they filed a Motion to Vacate Orders Based on New Evidence, asking the court to dismiss the foreclosure action because the order to docket suit was based on fraud. On August 5, 2014, appellants filed a Motion for Relief Based on New Evidence Pursuant to Rule 2-305, again requesting dismissal of the foreclosure action and asking the court to vacate all prior judgments in the case because they were based on false information.

On November 13, 2014, the Substitute Trustees filed an Opposition to Motion for Relief Based on New Evidence. They asserted that appellants were asking the court to reconsider prior orders denying the motion to dismiss the foreclosure action, but the request was too late. In any event, they asserted that appellants did not set forth a cogent basis for dismissal, noting that Maryland Rule 14-211 requires that a motion to dismiss state a valid defense to the lien, and/or lien instrument or the plaintiff's right to foreclosure.[2] They

[2] Md. Rule 14-211(a)(3)(B) provides:

(continued…)

noted that appellants had not denied being given a loan by NFCU or that they defaulted on the loan. The Substitute Trustees stated that appellants' sole contention was that, because the original note was lost, they did not owe the money, which was "a misinterpretation of Maryland law."

On July 29, 2014, the Substitute Trustees and NFCU filed a motion to dismiss and/or for summary judgment on the counterclaim and third-party complaint. In this motion, accompanied by an affidavit by NFCU's assistant vice president, the Substitute Trustees and NFCU asserted that, in 2001, appellants borrowed $510,000 from NFCU, and the loan was secured by a note dated August 17, 2001, and made payable to NFCU.[3] After origination of the loan, NFCU sold the Note to E*Trade with a pool of loans. Pursuant to the servicing agreement between E*Trade and NFCU, NFCU retained the servicing rights for the loan, including the right to enforce the loan in NFCU's name.

The Substitute Trustees argued that the counterclaim and third-party complaint failed to state a claim upon which relief could be granted because the "counts" alleged by appellants in their counterclaim were merely attempts to renew the defenses to the foreclosure, which defenses had already been litigated and rejected. Furthermore, they

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A motion to stay and dismiss shall:

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(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.

[3] The Substitute Trustees reiterated that, as explained in the Lost Note Affidavit, the original note had been lost or misplaced, but a copy of the note was attached as an exhibit.

asserted that the allegations in the counterclaim failed as a matter of law because the documents establishing the loan, including the Note and the Deed of Trust, reflected that NFCU was the originating lender and the only lender that appellants dealt with in relation to the loan. With respect to appellants' claims of fraud by NFCU, the Substitute Trustees and NFCU asserted that, despite appellants claim that NFCU "never loaned its capital at risk of loss in this transaction," appellants never identified who the "actual lender" was, never asserted that they relied, or had a right to rely on the "statement," and did not articulate how they had suffered compensable damages. The Substitute Trustees and NFCU asserted that, contrary to appellants claim that NFCU was not the originating lender, the Substitute Trustees and NFCU had filed affidavits stating that NFCU originated the loan and was entitled to enforce it.

On August 4, 2014, appellants filed an opposition, asserting that the Substitute Trustees and NFCU filed papers evidencing "several significant federal and state crimes sounding in Fraud, Bank Fraud, Perjury, and Obstruction of Justice." They asserted that the "motion papers have introduced an entirely new and fraudulent narrative" since appellants' home was sold in foreclosure, and that the foreclosure sale was "based on completely inaccurate information." They continued that the Substitute Trustees' May 20, 2014 filings "prove the fraud perpetrated against" the court and the appellants "inasmuch as all of the decisions" made by the court prior to the Substitute Trustees' Line to Correct the Record and Request for Ratification, as well as a lost note affidavit and motion to substitute purchaser, "were based on false information." And the new information "clearly show[ed] that" the Substitute Trustees had "no right to enforce the Mortgage Note."

On November 25, 2014, appellants filed a motion to strike the opposition to the motion for relief based on new evidence. They argued that it was not timely filed or supported by an affidavit.

On December 1, 2014, the court held a hearing on the Substitute Trustees' motion to substitute purchaser, line to correct the record, request for ratification, and motion to dismiss and/or for summary judgment. The hearing also addressed appellants' motion to dismiss counsel and to vacate orders based on new evidence.

Mr. Conover argued that "[e]very decision in this case made by [the court] during 2013 and every decision made by the Appellate Court during 2014 was made on false facts as proven by [the Substitute Trustee's] own unsworn statements and the affidavits . . . filed in 2014." He argued that the "basis of this case has been false from the beginning," and therefore, he requested that the court dismiss the underlying foreclosure action. Mr. Conover asserted that, despite the Substitute Trustees' claim that the original note had been lost, "the promissory note in this matter never existed."

Counsel for the Substitute Trustees argued that appellants refinanced their property on August 17, 2001, with NFCU, and NFCU originated the loan. Appellants were 56 months in arrears, owing approximately $250,000, and therefore, foreclosure proceedings were brought. Counsel stated that he learned during the course of the proceedings that NFCU sold the loan to E*Trade, and E*Trade subsequently sold the loan to Fidelity Bank on January 14, 2004. NFCU remained the servicer of the loan "from the very beginning," and pursuant to the terms of the servicing agreement between NFCU and Fidelity Bank, continued as the servicer after Fidelity became the owner of the loan. Counsel explained

that, when NFCU looked for the original note, it determined that the note had been transferred to a former law firm, but the law firm did not have the original note. Thus, the lost note affidavit was filed describing "what actions were taken, how they know they had the note, that they had the right to enforce the note at the time that the note was lost or misplaced, and that they still have the right to enforce the note." Counsel asserted that the relevant inquiry is not who the owner of the note is, but who has the right to enforce the note, and there is no dispute that NFCU has always had the right to enforce the note, and appellants "have always known that they should make their payments to" NFCU. Counsel explained that the line to correct the record did not affect the foreclosure, which was proper, but was instead to correct counsel's statements to the court. The "basic premise," counsel asserted, was that "there's not been any sort of fraud on this [c]ourt, that the noteholder has been [NFCU], they're the ones who are enforcing this, they've appointed substitute trustees who have taken this property to sale." Counsel requested that the court enter summary judgment, explaining that affidavits had been included in the record "in an effort to explain how . . . the chain of title of the ownership of the loan had gone."

Following the hearing, the court granted the Substitute Trustees' motions. The court did not issue a memorandum opinion. This appeal followed.

DISCUSSION

I.

Appellants' Brief

Initially, we observe that, although appellants set forth sixteen questions presented in their brief, their argument does not track these questions presented or, in most respects,

cite any authority, other than their own "beliefs," in support of their contentions that the court erred. Moreover, appellants' brief contains mostly an unsupported recitation of "facts" and conclusory statements based on those "facts." In requesting that this Court reverse the "three decisions" of the circuit court, appellants merely direct us to their previous filings, which they assert "are too voluminous for inclusion in" their brief in this Court, and ask us to take judicial notice of other documents that are "on file in the Anne Arundel County Courthouse."

Maryland Rule 8-504(a)(3) provides that an appellate brief shall contain "[a] statement of the questions presented, separately numbered, indicating the legal propositions involved and the questions of fact at issue expressed in the terms and circumstances of the case without unnecessary detail." In addition, Maryland Rule 8-504(a)(4) provides that a brief should contain a "clear concise statement of the facts material to a determination of the questions presented" and should reference the page of the record or transcript of testimony supporting its assertions. Maryland Rule 8-504(a)(6) provides that an appellate brief shall include "[a]rgument in support of the party's position on each issue."

As indicated above, appellants have failed to adhere to these rules. For this reason, this Court could dismiss the appeal or decline to address appellants' arguments. Md. Rule 8-504(c) ("For noncompliance with this Rule, the appellate court may dismiss the appeal or make any other appropriate order with respect to the case."). *See Diallo v. State*, 413 Md. 678, 692 (2010) ("'[A]rguments not presented in a brief or not presented with particularity will not be considered on appeal.'") (quoting *Klauenberg v. State*, 355 Md.

528, 552 (1999)); *Benway v. Md. Port Admin.*, 191 Md. App. 22, 32 (2010) (court is not required to seek out law to support appellant's contentions); *Honeycutt v. Honeycutt*, 150 Md. App. 604, 618 (when party fails to adequately brief an argument, court may decline to address it on appeal), *cert. denied*, 376 Md. 544 (2003); *Van Meter v. State*, 30 Md. App. 406, 408 (Appellate court "cannot be expected to delve through the record to unearth factual support favorable to appellant and then seek out law to sustain his position."), *cert. denied*, 278 Md. 737 (1976).

Nevertheless, to the extent that we are able, we will exercise our discretion to address appellants' arguments. We note that more than half of appellants' questions presented raise what they characterize as due process/equal protection claims. We will begin with that issue.

II.

Due Process & Equal Protection

As best we can discern, appellants contend that the court denied them due process and equal protection by: (1) granting summary judgment despite the "many obvious questions of material fact"; (2) deciding the Substitute Trustees' motions, but failing to rule on appellants' motions; (3) allowing the Substitute Trustees to file an untimely opposition to appellants' motion for relief based on new evidence; (4) granting the Substitute Trustees' motion to correct the record; and (5) granting the Substitute Trustees' motion to dismiss and/or for summary judgment "with prejudice," despite that appellants were not afforded

discovery or a trial on the merits.[4] None of these claims of error equate to constitutional violations.

Recently, this Court reiterated:

> The Due Process Clause of the Fourteenth Amendment "at a minimum . . . require[s] that deprivation of life, liberty or property by adjudication be preceded by notice and opportunity for hearing appropriate to the nature of the case." *Mullane* [*v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 313 (1950)]. Further, Article 24 of the Maryland Declaration of Rights, which has been interpreted to guarantee due process for the people of Maryland, has also been interpreted as requiring that a defendant be given adequate notice before a claim against him may proceed. *See, e.g., Pickett v. Sears, Roebuck & Co.*, 365 Md. 67, 71 (2001).

Swarey v. Stephenson, 222 Md. App. 65, 92-93 (2015).

Here, appellants were given notice of the proceedings and have taken full advantage of the opportunity to participate and to raise objections, including by filing a multitude of motions, as well as numerous appeals.[5] Contrary to appellants' contention, due process does not entitle a litigant to a trial. *See, e.g., Blue Cross of Maryland, Inc. v. Franklin Square Hosp.*, 277 Md. 93, 103-04 (1976) ("[W]ith respect to legal issues, due process does not even necessarily require that parties be given an opportunity to present argument."). Moreover, due process does not "require that a litigant be satisfied with the

[4] Appellants fail to discuss how any motions they filed remained viable after the court dismissed the case.

[5] As appellees note, "[a]ppellants have filed over 60 pleadings, motions and oppositions in this matter. In all of these filings, [a]ppellants have not denied that they received the proceeds of the loan, nor have they denied the default which serves as the basis for foreclosure."

result." *McAllister v. McAllister*, 218 Md. App. 386, 406 (2014). There has been no due process violation here.

With respect to the claim of a violation of the Equal Protection Clause, the United States Constitution provides that "no State shall make or enforce any law which shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV. "Although the Maryland Constitution contains no similarly expressed equal protection clause, we have observed on numerous occasions that the concept of equal protection is embodied in the due process requirement of Article 24." *Tyler v. City of Coll. Park*, 415 Md. 475, 499 (2010). "The basic concept behind equal protection is that, when the government decides to treat people differently based on a particular characteristic, its distinctions must be justified." *Doe v. Dep't of Pub. Safety & Corr. Servs*., 185 Md. App. 625, 636 (2009). To prevail on an equal protection claim, a plaintiff must show that they have "been treated differently from others with whom [they are] similarly situated and that the unequal treatment was the result of intentional or purposeful discrimination. Once this showing is made, the court proceeds to determine whether the disparity in treatment can be justified under the requisite level of scrutiny." *Morrision v. Garraghty*, 239 F.3d 648, 654 (4th Cir. 2001). *Accord Lonaconing Trap Club, Inc. v. Md. Dep't of Env't*, 410 Md. 326, 348 (2009) (equal protection challenge must show: (1) different treatment from others similarly situated; and (2) no rational basis for this disparate treatment).

Here, appellants have failed to make any showing that they have been treated differently from any other similarly situated litigants, much less that any different treatment

was the result of intentional discrimination. Appellants have failed to show that the circuit court violated their right to due process or equal protection.

III.

Rulings Against Appellants on the Merits

Appellants' ultimate claim is that the foreclosure was improper because it was "based on false facts from inception," and appellees have not proven NFCU's right to enforce the lost note. We disagree.

To be sure, the Substitute Trustees acknowledged that Fidelity Bank was the owner of appellants' loan, and they admitted that Fidelity Bank, and not NFCU, owned the loan at the outset of the foreclosure case. As they point out, however, the owner of a loan is irrelevant to the appointment of trustees to a deed of trust securing a note, and to the enforcement of that note. In *Deutsche Bank Nat'l Trust Co. v. Brock*, 430 Md. 714 (2013), the Court of Appeals explained:

> As the Comment to [Md. Code (2005 Repl. Vol.) § 3-203 of the Commercial Law Article] states, "[t]he right to enforce an instrument and ownership of the instrument are two different concepts." 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." *Id.* at § 3-301. *See also In re Veal*, 450 B.R. 897, 909 (9th Cir. BAP 2011) ("Article 3 does not necessarily equate the proper person to be paid with the person who owns the negotiable instrument."); *SMS Financial, LLC v. ABCO Homes, Inc.*, 167 F.3d 235, 238-39 (5th Cir.1999) (noting that a party's status as a holder and its attendant right to enforce an instrument is separate from the party's status as the owner of that instrument); *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)."); *In re Simmerman*, 463 B.R. 47, 60 (Bankr. S.D. Ohio 2011) (noting that "the holder of the note may differ from the owner of the note"). As the court noted in *In re Veal*, "[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." 450 B.R. at 912.

Id. at 730-31.

Here, pursuant to the Substitute Trustees' sworn affidavits and other documents presented to the court, NFCU originally owned the Note, and it maintained the right to enforce the Note even after the Note was sold. Appellants did not submit an affidavit disputing that they paid NFCU on the Note, and they produced no facts indicating that NFCU was not entitled to enforce the Note.

Moreover, that the original Note was lost does not render it unenforceable. In *Anderson v. Burson*, 424 Md. 232 (2011), the Court of Appeals explained:

> A foreclosure plaintiff commences an action to foreclose a deed of trust, which contains a power of sale provision, by filing an order to docket. *See* Md. Rule 14-207(a)(1); [Md. Code (2010 Repl. Vol.) § 7-105.1(d) of the Real Property Article]. An order to docket must include, among other documentation: a copy of the deed of trust, supported by an affidavit that it is a true and accurate copy; a copy of the debt instrument, supported by an affidavit certifying ownership of the debt instrument; and a deed of appointment of a substitute trustee, supported by an affidavit that it is a true and accurate copy of the deed of appointment. Md. Rule 14-207(b); Real Prop. § 7-105.1(d)(1)-(2).
>
> > The Circuit Court may not accept a lost note affidavit, in lieu of a copy of the debt instrument, unless the affidavit: "(1) [i]dentifies the owner of the debt instrument and states from whom and the date on which the owner acquired ownership; (2) [s]tates why a copy of the debt instrument cannot be produced; and (3) [d]escribes the good faith efforts made to produce a copy of the debt instrument." Real Prop. § 7-105.1(d-1).

Id. at 236 n.6.

Here, the Substitute Trustees submitted their affidavits, signed under oath, and attached to the Substitute Trustees' motions, in which representatives of NFCU explained the legal relationship of NFCU to Fidelity Bank. The Substitute Trustees identified the owner of the debt instrument, stating from whom and on what date the owner acquired ownership, explained why the original Note could not be produced, and explained the good faith efforts to produce the original Note. Moreover, they produced a copy of the original Note.

In appellants' opposition, they failed to counter the specific facts set forth in the Substitute Trustees' motion and affidavit, and did not allege or explain how or why NFCU could not enforce the Note. Appellants failed to identify any evidence, aside from their own "beliefs," to suggest that there was a dispute of material fact.[6] Appellants merely alleged generally a dispute of material fact without showing "with some precision that there is a genuine dispute of material fact." *King v. Bankerd*, 303 Md. 98, 112 (1985). Accordingly, in the absence of a dispute of material fact, summary judgment was properly entered.

JUDGMENTS AFFIRMED. COSTS TO BE PAID BY APPELLANT.

[6] A response to a motion for summary judgment, however, must "(1) identify with particularity each material fact as to which it is contended that there is a genuine dispute and (2) as to each such fact, identify and attach the relevant portion of the specific document, discovery response, transcript of testimony, . . . or other statement under oath that demonstrates the dispute." Md. Rule 2-501(b). Moreover, an affidavit opposing a motion for summary judgment "shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated in the affidavit." Md. Rule 2-501(c).