Circuit Court for Baltimore County
Case No. 03-C-14-006628

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 511

September Term, 2016

GAIL R. KENNEDY

v.

RICHARD A. LASH, *ET. AL.*

Kehoe,
Berger,
Sharer, J. Frederick
(Senior Judge, Specially Assigned),

JJ.

Opinion by Sharer, J.

Filed: August 15, 2017

It is not disputed that appellant, Gail R. Kennedy (Kennedy), defaulted on a promissory note securing the financing of her home, or that appellees, Richard A. Lash, *et al*. (Substitute Trustees), initiated foreclosure proceedings in the Circuit Court for Baltimore County. Kennedy's several attempts to dismiss or stay the proceedings, based primarily on her assertions of lack of notice, were denied. A foreclosure sale took place on January 12, 2016, which was ratified, over Kennedy's objection.

In her appeal, Kennedy presents two questions for our review, which we have recast as follows:[1]

1. Did the circuit court err when it ratified the foreclosure sale without first requiring the Substitute Trustees to undertake further efforts to give notice of the foreclosure sale when notice, sent by certified mail, had been returned undelivered?

2. Did the circuit court err by failing to hold a hearing on Kennedy's objection to the ratification of the foreclosure sale?

We shall affirm the judgment of the circuit court.

BACKGROUND

In December 2005, Kennedy executed a promissory note for $437,500 with First Horizon Home Loan Corporation to refinance the mortgage on residential property located

[1] Kennedy's questions presented as written verbatim in her brief:

1. Where Appellees had knowledge that their certified mail notice of foreclosure sale sent pursuant to Maryland Rule 14-210 had been returned "NOT DELIVERABLE AS ADDRESSED" were they required to undertake reasonable follow-up measures to attempt to give notice of the sale date to Appellant?

2. Where Appellant raised legal doubt as to the sufficiency of service of notice sale, was she entitled to a hearing pursuant to Maryland Rule 14-305(d)?

at 1602 Ridge Road in Baltimore County. The Note was secured by a properly recorded Deed of Trust. In April 2011, Kennedy defaulted on the Note and has since failed to make payments as and when required pursuant to the Note. In June 2014, First Horizon's substitute trustees, Richard A. Lash, *et al*.,[2] initiated a foreclosure action on behalf of the current holder of the Note.[3]

In July 2014, Kennedy filed a motion to dismiss the foreclosure action. While that motion was pending, she also requested mediation, which was unsuccessful. On April 29, 2015, following receipt of the mediation report, the circuit court denied the motion to dismiss. A separate contemporaneous order was entered allowing the Substitute Trustees to proceed to a foreclosure sale. Kennedy then filed a motion for reconsideration, which was also denied.

After denial of her motion for reconsideration, Kennedy filed a petition for Chapter 13 Bankruptcy, which stayed the foreclosure proceeding. On October 14, 2015, the bankruptcy petition was dismissed, resulting in the lifting of the automatic stay.

The foreclosure sale was scheduled for January 12, 2016. On December 30, 2015, notice of the sale was sent to Kennedy, as the debtor and record owner, and also to the "holder(s) of any subordinate interest in the property[,]" by certified mail, return receipt

[2] Richard A. Lash; Barry K. Bedford; David A. Rosen; Leonard W. Harrington, Jr.; Robert E. Kelly; Pooya Tavakol; and Ramsey Saleeby.

[3] Kennedy had filed for a Chapter 13 bankruptcy in June 2011, two months after her mortgage default, thereby staying collection of the default, and received a discharge in August 2013.

requested, and also by first class mail. Additionally, on December 16, 2015, the notice of sale was sent by first class mail to "All Occupants" located at the property address. As required, the Substitute Trustees also published notice of the sale in "The Jeffersonian," a newspaper of general circulation in Baltimore County, for the three consecutive weeks preceding the sale date.

The foreclosure sale was held on January 12, 2016, and the property was sold to The Bank of New York Mellon f/k/a The Bank of New York as trustee for First Horizon Alternative Mortgage Securities Trust 2006-FA1 for $508,284.85. Thereafter, the Substitute Trustees filed the requisite "Post-Sale Package," containing all required post-sale documents, verifying compliance with the relevant rules and statutes.

On February 11, 2016, Kennedy filed, *pro se*,[4] an objection to the ratification of the sale, alleging that she had not received a notice of the foreclosure sale date. The Substitute Trustees filed an opposition to her objection on March 16th, contending that they fully complied with the notice requirements of Md. Rule 14-210. Shortly thereafter, the Substitute Trustees sought ratification of the foreclosure sale, averring that that they had complied with relevant rules and asserting that no exceptions had been filed. Two weeks later, Kennedy filed a motion requesting a postponement of a decision on the ratification,

[4] Without explanation or a notice of withdrawal of appearance, Kennedy's then counsel appears to have stopped representing her at some point after filing a motion for limited discovery in May 2015, and before her *pro se* filing of an objection to the ratification of the foreclosure sale on February 11, 2016. Even though Kennedy filed for bankruptcy within this timeframe, her trial counsel remained attorney of record in the foreclosure action and had been included on the certificate of service on several filings by the Substitute Trustees through the trial court proceedings, and until Kennedy's notice of appeal.

with a request for a hearing. On April 25, 2016, the court entered an order denying Kennedy's objection and, in a separate order, ratified the foreclosure sale. This appeal followed.

DISCUSSION

Notice

When "ruling on exceptions to a foreclosure sale and whether to ratify the sale, trial courts may consider both questions of fact and law." *Jones v. Rosenberg*, 178 Md. App. 54, 68 (2008). In our review of the "court's ruling on exceptions to a sale, we apply a *de novo* standard of review as to questions of law but do not substitute our judgment for that of the trial court as to findings of fact unless we find them to be clearly erroneous." *Hood v. Driscoll*, 227 Md. App. 689, 697 (2016) (citation omitted).

Since "'there is a presumption that the sale was fairly made[,] … the burden is upon one attacking the sale to prove the contrary.'" *Hood*, 227 Md. App. at 696–97 (2016) (quoting *Burson v. Capps*, 440 Md. 328, 342–43 (2014)).

Because the certified mailing of the notice of sale was returned to the Substitute Trustees as "RETURN TO SENDER – NOT DELIVERABLE AS ADDRESSED – UNABLE TO FORWARD," Kennedy contends that she did not receive notice of the foreclosure sale. Therefore, she posits, the Substitute Trustees failed "to comply with Maryland law regarding notice to the property owner of the scheduled date of sale." We are not persuaded.

Rule 14-210 requires – other than publication of notice – that "[b]efore selling the property[,] … the [authorized party] shall also *send notice* of time, place, and terms of sale

(1) by certified mail and by first class mail[.]" Rule 14-210(b) (emphasis added). Additionally, the Rule requires only that the secured party "shall file an affidavit stating that (1) the [authorized party] has complied with the mailing provisions of this Rule or (2) the identity or address of the borrower … is not reasonably ascertainable." Rule 14-210(e). Further, if the identity or address is not "reasonably ascertainable" the foreclosing party need only include details of the "reasonable, good faith efforts that were made to ascertain the identity or address." *Id.* The test is whether the notice was mailed, as required, not whether it was received.

Similarly, the corresponding provisions of Md. Code, Real Property Article (R.P.) provide that – in addition to publication – a written notice "shall be sent: (i) [b]y certified mail, postage prepaid, return receipt requested, bearing a postmark from the United States Postal Service, to the record owner; and (ii) [b]y first-class mail." R.P. § 7-105.2(c)(1). The primary component of notice of sale, throughout the statute, is that notice "shall be sent." There is no requirement that proof of receipt be shown. *Id.* This is evident by the foreclosing party's choice of filing with the court, either a return receipt of the mailing or an affidavit, which verifies compliance of mailing or that the "address of the record owner is not reasonably ascertainable." R.P. § 7-105.2(c)(3). Further, the statute does not require giving notice to a record owner "whose address is not reasonably ascertainable[,]" R.P. § 7-105.2(c)(4), nor does it require that a "new or additional notice need be given" if the sale is postponed. R.P. § 7-105.2(d). *See also* R.P. § 7-105.9(f).

The provisions of both the R.P. § 7-105.1(h) and corresponding Md. Rule 14-209 provide assurances as to delivery of the preliminary order to docket or complaint to

foreclose by requiring personal service on the mortgagor, or qualified co-resident, but, if those efforts fail, service can be effectuated by posting and mailing copies of the notice. *See* R.P. §§ 7-105.1(h)(1), 7-105.1(h)(5). *See also* Rule 14-209(a)-(b). It is not unreasonable to conclude that, if *receipt* of a notice of sale by certified mail were required, the legislature would have expressed that requirement in the statute, as it has done with the requirement of filing of a proof of service, for however service was effectuated, of the preliminary foreclosure filings. *See* R.P. § 7-105.1(h)(6). *See also* Rule 14-209(e)(1)-(5).

As the Court of Appeals has emphasized, "[t]he Maryland foreclosure scheme requires that the Trustees send notice by both certified and first-class mail, two 'efficient and inexpensive means of communication' that we conclude are calculated reasonably to inform interested parties of the pending foreclosure action." *Griffin v. Bierman*, 403 Md. 186, 212 (2008) (quoting *Mullane v. Cent. Hanover Bank & Tr. Co*., 339 U.S. 306, 319 (1950)). In support of her assertion of a proof of receipt requirement, Kennedy relies on a footnote from *Griffin* wherein the Court posed a hypothetical that might have produced a different result – had the petitioner's first class mail also been returned or had the certified mail been returned for "something more revealing than 'unclaimed[.]'" 403 Md. at 202 n.11. Here, there is no evidence in the record to suggest that the first class mail copy of Kennedy's notice of sale was returned. Because certified mailing of the pre-sale notice was only one of three methods employed, and the only one returned, the Substitute Trustees were not required to expend further notice efforts. Though the certified mail copy of the notice of sale, restrictively addressed, to Kennedy was returned as "NOT DELIVERABLE AS ADDRESSED," her reliance on the *Griffin* hypothetical is not supported by the record.

The record supports a presumption that Kennedy's opposition to ratification was spurred by her receipt of the "Post-Sale Package" filed with the circuit court on January 27, 2016, and mailed to the same addresses as the notice of sale. The address to which the notice of sale was mailed to Kennedy, was the same to which the "Post-Sale Package" was successfully delivered to her and to which the order to docket foreclosure documents were initially delivered. That address was also utilized for posting pursuant to R.P. § 7-105.1(h), after three failed good faith attempts to personally serve her there. We can conclude that service of the order to docket foreclosure documents was successful because, thereafter, Kennedy retained counsel, who had filed a motion to dismiss the foreclosure action within two weeks of that service. Finally, we note that the same address appeared under her signature line on her *pro se* objection and motion opposing ratification.

Therefore, the Substitute Trustees' affidavits affirming compliance, filed with their "Post-Sale Package," together with the copy of the notice of sale letter to Kennedy, filed with their opposition to Kennedy's objection to ratification, which was addressed to the property address and included the postage receipt for the certified mail containing a postmark of mailing, was ample evidence of compliance.

Kennedy also contends that the Substitute Trustees' failure to include a copy of the envelope for the first class mail notice to her, suggests that they did not actually send it to her. In her brief, however, Kennedy concedes that "[w]hile a copy of … receipts … is *not required* under the Maryland foreclosure rules, such receipts *would* further establish precisely what mailings occurred[.]" (emphasis added). It is the absence of such a requirement that dooms her argument.

In response to Kennedy's various contentions of insufficient notice, the Substitute Trustees argue that they fully complied with the express requirements of both Maryland Rule 14-210 and its corresponding statute R.P. § 7-105.2, neither of which required actual receipt.

Included in the Substitute Trustees' "Post-Sale Package," was proof of filing of multiple affidavits of compliance, with attachments, evidencing: the three publications in "The Jeffersonian" newspaper; that notice was sent to each of the interested parties, including Kennedy, as debtor and record owner, by both certified mail and first class mail; and that, pursuant to R.P. § 7-105.9(c)(1), notice was sent to "All Occupants" by first class mail on December 16, 2015. In their opposition to Kennedy's objection to ratification, the Substitute Trustees attached the certified mail receipts for the pre-sale notice sent to each interested party, including Kennedy, each of which contained a postmark signifying mailing as addressed on December 30, 2015 and thereby confirming the contents of the "Post-Sale Package."

Moreover, despite Kennedy's statement to the contrary, no affidavit was appended to her objection to ratification, nor was there any other evidence to counter the affirmations of the Substitute Trustees. Additionally, her subsequent motion to postpone ratification and request for a hearing was untimely. Her motion also failed to include the second exhibit – the USPS tracking information for the certified mail notice – that she claimed would have shown that the notice was not sent to her.

The Substitute Trustees filed three affidavits affirming under the penalties of perjury that, *inter alia*, they published the notice of sale for the three weeks preceding the sale, and

sent notice to Kennedy directly by certified mail with return receipt and by first class mail as well as a copy to "All Occupants" by first class mail. Additional courtesy copies were also sent to both Kennedy's foreclosure counsel and bankruptcy counsel. Those combined efforts were "calculated reasonably" to give Kennedy notice of the sale in accordance with the Rules and parallel statutes. Absent any evidence to the contrary, we assign no error in the circuit court's determination of the Substitute Trustees' compliance with pre-sale notice requirements, and decision to ratify the sale.

Hearing Requirement

We review the foreclosure court's determination not to hold a hearing on Kennedy's exceptions for abuse of discretion. *See Four Star Enterprises Ltd. P'ship v. Council of Unit Owners of Carousel Ctr. Condo., Inc.*, 132 Md. App. 551, 567 (2000) ("We hold that the court below did not abuse this discretion by declining to hold a hearing after finding[] … that [appellant] had not established the necessity to take evidence.").

Rule 14-305(d) provides that the "court shall *determine whether to hold* a hearing" on an alleged exception. Rule 14-305(d)(2) (emphasis added). In order for a court to be compelled to make that determination, a hearing must be "requested *and* the exceptions or response clearly show a need to take evidence." *Id.* (emphasis added). Two conditions must be met in order to compel a hearing: (1) the moving party must request a hearing; and, (2) the court must find that there is a clear need for additional evidence to be received. *Id.* The Rule is clear: whether to hold a hearing is left to the court's discretion. *Four Star Enterprises*, 132 Md. App. at 567 ("A hearing is by no means mandatory under Rule 14–305(d)(2), even if one of the parties requests it. Because this rule is written in conjunctive

form, authorizing a proceeding 'if a hearing is requested *and* the exceptions or any response clearly show a need to take evidence,' it gives the court discretion.").

Kennedy's objection to the ratification failed to request a hearing. Shortly after receiving opposition to her objection to the ratification, Kennedy filed "Defendant's Motion and Request for Postponement of Decision on Ratification Due to Non Service, and Request for Hearing." The motion, however, other than reference to "hearing" in the title, contains no request for a hearing. Instead, she requests only "the postponement of a decision on ratification of the foreclosure sale in this matter until *a hearing can be held* to clarify Defendant's claim of non-service." (emphasis added). Even if we were to accept the motion as a sufficient request for a hearing, the fact remains that the motion was filed well outside the 30-day exceptions limitation. *See* Rule 14-305(d)(1) ("Any matter not specifically set forth in the exceptions is waived unless the court finds that justice requires otherwise.").

Furthermore, as we have discussed, there is an abundance of evidence in the record showing compliance with the notice requirement and a dearth of evidence that might lead us to conclude otherwise. Accordingly, we find no abuse of discretion in the court's decision not to hold a hearing.

CONCLUSION

Neither the Real Property statutes nor corresponding Maryland Rules require actual receipt of the notice of sale. Further, it is within the circuit court's discretion to determine whether or not to hold a hearing on exceptions. Rule 14-305(d)(2). Kennedy's assertions are unsupported by the record. Therefore, we find no error in the trial court's ratification

of the foreclosure sale upon receipt of uncontroverted evidence that the Substitute Trustees complied with the notice requirements. Moreover, the court was not required to hold a hearing on Kennedy's post-sale objection to ratification or her subsequent and untimely motion requesting postponement of ratification.

Accordingly, we affirm the circuit court's order of ratification.[5]

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

[5] We acknowledge that both parties have requested that this Court stay the issuance of an opinion or mandate in this appeal pending settlement discussions. Those requests, however, were untimely and inadequate.

Oral arguments were schedule for Monday, June 5, 2017. At approximately 4:15pm on Friday, June 2nd, the parties filed a joint motion to postpone oral arguments because of settlement discussions. The motion was denied, but neither party, nor counsel, appeared for oral argument. Accordingly, the panel referred the appeal to the Court's summary docket, but delayed the issuance of an opinion in expectation of being advised of the progress of settlement. On June 27th, having heard nothing from the parties, the Court inquired of counsel the status of the settlement discussions. Counsel for appellant and appellees responded on July 6th and July 3rd, respectively, stating that a settlement was still pending with hopes that it would be fully executed by July 31st, and requested that the Court stay its disposition. However, on July 31st, counsel for appellant advised the Court, by letter, that settlement was still pending and again requested a stay of disposition. On August 2nd, counsel for appellees filed a letter concurring with appellant's requested stay. At no point has either party properly moved to stay the disposition of this appeal, to dismiss the appeal, or to reinstate the appeal for oral argument. Such a motion would have been timely and appropriate as early as June 2nd, rather than the motion to postpone.