Circuit Court for Baltimore County
Case No. 03-C-12-012422 FC

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 821

September Term, 2016

CAROL G. SULLIVAN, ET VIR.

v.

MARK S. DEVAN, ET AL.

Eyler, Deborah S.
Kehoe,
Shaw Geter,
JJ.

Opinion by Kehoe, J.

Filed: August 10, 2017

Carol and Robert Sullivan, appellants, fell behind making payments on their home deed of trust. Despite attempting to enter into several payment plans, the appellants were unable to negotiate a loan modification, and the substitute trustees, appellees, filed a foreclosure action. The appellants filed a motion to stay and dismiss the foreclosure action, but did so over three years after the deadline to file the motion. The Circuit Court for Baltimore County denied the motion to stay and dismiss the foreclose action. Their home was sold at foreclosure. The court also denied appellants' post-sale exceptions.

The appellants noted the present appeal and present the following issues, which we have reworded:

1. Did the trial court err in ruling that the homeowners' motion to stay and dismiss did not, on its face, state a valid foreclosure defense?
2. Did the trial court err in ruling that there was no good cause for the late filing of the homeowners' motion to stay and dismiss?
3. Did the lower court err in denying the homeowners' motion to stay and dismiss, and exceptions to sale, without a hearing?

We will affirm the judgment.

Background

The appellants had a mortgage on their home in Baltimore from Wells Fargo, with America's Servicing Company (ASC) acting as the servicer for the loan. Like many Americans, the appellants began to have difficulty making their mortgage payments in 2008 and 2009. The appellants attempted to renegotiate their payments, a quest that was ultimately unsuccessful.

In August 2009, the appellants entered into a forbearance agreement which called for them to make four monthly payments of $3,621.20, followed by a balloon payment of

over $39,000. In a letter dated October 13, 2009, ASC confirmed that the appellants had entered into a forbearance agreement requiring four monthly payments. The letter stated, "Once the first four installments have been completed… [ASC] will complete an additional review to determine if a loan modification can be approved." The letter noted that there is no grace period for payments, and that if a payment was not received on or before the due date, "the Agreement will be void and the total delinquency, including fees, will be due immediately." Bank records submitted by the appellants show that they made a payment in the amount of $3,621.20. ASC indicated that the payment was credited toward "the unapplied funds balance for the … mortgage loan on September 17, 2009." There is some disagreement between the parties over whether this arrangement was a loan modification agreement or a "forbearance plan."

The appellants also pursued relief through the Home Affordable Modification Program ("HAMP"), an alternative offered in a letter they received. HAMP was a federal program, since ended, designed to encourage loan servicers to reduce mortgage payments for borrowers in danger of losing their homes. *See Granados v. Nadel*, 220 Md. App. 482, 488 n. 4 (2014).[1] ASC's records reflect that Mr. Sullivan called to express interest in

[1] HAMP was part of the Making Home Affordable Program ("MHA") rolled out in 2009 in the wake of the housing market collapse. *Making Home Affordable – Program Purpose and Overview,* U.S. DEP'T OF THE TREASURY, https://www.treasury.gov/initiatives/financial-stability/TARP-Programs/housing/mha/Pages/overview.aspx. The MHA programs expired on December 31, 2016. *Id*. Borrowers eligible for HAMP are typically required to complete a three-month trial payment plan, and successful completion is followed by an official modification agreement from the mortgage company. *Understand the Terms of Your*

HAMP and was informed that if he made an eligible payment on October 14, 2009, he would be entered into a temporary payment plan. The appellants provided bank records showing electronic funds transfers for $2,366.00 in October, November, and December of 2009. They state that they believed that by making the three required payments, they were eligible for a loan modification. The loan servicer's records do not indicate that any payment plan was initiated during that period.

What is undisputed is that, in January 2010, the appellants entered into a HAMP trial period plan. This was confirmed by the servicer's account notes as well as a letter dated January 14, 2010 from ASC confirming that the appellants had entered into a HAMP trial period plan (TPP) and notifying them of the requirement to complete counseling. Appellees point out that no payment was made in January. Appellants don't contest this but their bank records reflect an electronic funds transfer in February 2010 and withdrawals by check in March and April of 2010, all for the amount of $2,091.11. The appellants provide no further payment records, and the loan servicer's records indicate that they were removed from HAMP for nonpayment in September, 2010.

Modification, MAKING HOME AFFORDABLE, https://www.makinghomeaffordable.gov/already/Pages/already-mha-understand-terms-modification.aspx.

The appellants state that they continued to work with the servicer to reach a loan modification. No loan modification was granted, and a notice of intent to foreclose dated August 1, 2012 was issued. The foreclosure action was docketed on December 11, 2012.

The appellants requested a mediation session, which was scheduled for October 3, 2013. However, they failed to attend. Appellants contend that they did not attend because they had been led to believe by ASC that a loan modification agreement was forthcoming. Appellees dispute this. In any event, on October 15, 2013 the Office of Administrative Hearings filed a mediation report with the court noting that the appellants failed to attend the scheduled session. Appellants did not file a motion to stay and dismiss the foreclosure action within 15 days of this date.[2]

Appellee filed a certificate of publication on June 12, 2014. On June 17, 2014, appellants filed for bankruptcy. On September 18, 2014, the bankruptcy court either

[2] Maryland Rule 14-211(a)(2) requires that a motion to stay and dismiss be filed:

> **[N]o later than 15 days after the last to occur of:**
> (i) the date the final loss mitigation affidavit is filed;
> (ii) the date a motion to strike postfile mediation is granted; or
> **(iii) if postfile mediation was requested and the request was not stricken, the first to occur of:**
> (a) the date the postfile mediation was held;
> **(b) the date the Office of Administrative Hearings files with the court a report stating that no postfile mediation was held**; or
> (c) the expiration of 60 days after transmittal of the borrower's request for postfile mediation or, if the Office of Administrative Hearings extended the time to complete the postfile mediation, the expiration of the period of the extension.

(Emphasis added).

dismissed the proceeding or lifted the automatic stay. A new certificate of publication was filed and appellants again filed for bankruptcy a few days later. Once again, the bankruptcy court lifted the stay several months later. Appellees filed yet another certificate of bankruptcy and appellants filed a third bankruptcy petition. The bankruptcy court dismissed this action on or before January 20, 2016.

On February 12, 2016, appellants filed a motion to stay and dismiss the foreclosure action, raising the defenses that the papers filed with the court, including the notice of intent to foreclose, misstated the amount of the debt. They also contended that there was no foreclosure-triggering default because the loan servicer failed to grant loss mitigation in the form of a loan modification that the appellants contend should have been granted after they met the terms of the HAMP temporary payment plan.

The property was sold at auction on February 24, 2016.

In an order dated March 30, 2016, the trial court denied the appellants' motion to stay and dismiss on the grounds that the motion "is untimely filed, no good cause having been shown for the delay in filing, and the motion does not on its face state a valid defense to the validity of the lien … or to the right of the plaintiff to foreclose in the pending action."

The appellants filed exceptions to the sale of their home, raising the defenses that the documents including the notice of intent to foreclose misstated the amount of the debt and that there was no foreclosure-triggering default. The circuit court denied the exceptions and ratified the sale.

This appeal followed.

Standard of Review

A motion to stay and dismiss a foreclosure action is the method by which a borrower "may petition the court for injunctive relief, challenging 'the validity of the lien of the line or … the right of the lender to foreclose in the pending action.'" *Bates v. Cohn*, 417 Md. 309, 318-19 (2010) (quoting Maryland Rule 14-211(a)(3)(B)). We recently articulated the standard of review in *Mitchell v. Yacko*, __ Md. App. __, 2017 WL 2351499, at *9 (2017):

> [T]he denial of a motion to stay a foreclosure sale and dismiss the action under Maryland Rule 14–211 lies generally within the sound discretion of the trial court. Although we generally review the circuit court's denial of a Rule 14–211 motion for an abuse of discretion, we review the trial court's legal conclusions de novo. Further, we review the circuit court's decision to deny the motion without a hearing for legal correctness.

(Citations, bracketing and quotation marks omitted).

Analysis

1. and 2. The Rule 14-211 Motion to Stay and Dismiss

Maryland Rule 14-211(b)(1) provides that a court "shall deny the motion [to stay and dismiss], with or without a hearing, if the court concludes from the record before it that the motion . . . was not timely filed and does not show good cause for excusing non-compliance with subsection (a)(2) of this Rule[.]"

Appellants acknowledge, as they must, that they failed to file their motion within 15 days of the date that the Office of Administrative Hearings filed its mediation report with

the circuit court. However, appellants point out that the circuit court may consider an untimely-filed motion if it "state[s] with particularity the reasons why the motion was not filed[.]" Md. Rule 14-211(c)(3)(F). Appellants assert that their motion demonstrated good cause for their failure to timely file the motion. This argument is without merit.

In *Buckingham v. Fisher*, 223 Md. App. 82 (2015), and in the context of the circuit court's denial of a motion to stay and dismiss without a hearing, this Court addressed the applicable "pleading standard . . . [for] stating a facially valid defense that will require a trial court to hold a hearing on the motion." *Id.* at 85. We concluded: *first*, "that under Rule 14–211, a party must plead all elements of a valid defense with particularity," *id.* at 91, and *second*, that "particularity means that each element of a defense must be accompanied by some level of factual and legal support. General allegations will not be sufficient to raise a valid defense requiring an evidentiary hearing on the merits." *Id.* at 91-92. We see no reason why these same standards should not apply to appellants' obligation to "state with particularity the reasons why the motion was not filed timely." Rule 14-211(b)(3)(B). We now turn to appellants' motion to stay and dismiss.

Appellants' motion contains only one reference to timeliness: "This motion is filed presently for good cause under Md. R. 14-2511(a)(2)(C)." This bald and conclusory statement fails to meet the requirement of a particularized showing of good cause. At oral argument, appellants' counsel suggested that, because the motion had supporting exhibits and those exhibits included affidavits, account notes from the loan servicer, and bank statements, the trial court could have reviewed those to put the pieces together to form the

complete picture of why the motion was so late. This argument is unpersuasive. It is not incumbent upon a court to sift through the exhibits to a motion in order to cobble together a factual and legal basis for the relief that a litigant seeks. In this case, it was the appellants' own burden and they woefully failed to do so.

The defect in the appellants' motion is fatal to their appellate contentions that the circuit court erred when it denied their motion to stay and dismiss. Were we to examine the affidavits and exhibits, the result would be unchanged. The appellants each executed an affidavit that was attached as an exhibit to the motion. The relevant portions of appellants' affidavits are identical:

> Due to financial reasons, and also because my spouse and I were under the false impression that the mortgage company was still trying to work with us in good-faith on obtaining a loan modification until we filed for bankruptcy, we are now filing our motion to stay and dismiss.

These assertions are insufficient. Regardless of what transpired between the appellants and their lender's representative in 2012 and 2013, it was clear that appellees intended to proceed with foreclosure when they filed their first certificate of publication on June 12, 2014. Appellants must have thought so, because they filed their first bankruptcy proceeding three days later. Assuming, for the purposes of analysis, that the pending bankruptcy action constituted good cause for failing to file a motion to stay and dismiss, the first bankruptcy proceeding was terminated on September 18, 2014. Appellants filed their second bankruptcy petition on December 18, 2014. In the interim, they had ample time to file a motion to stay and dismiss. The same can be said of the time

period between the dismissal of their second petition and their filing of their third bankruptcy action.

3. The Post Sale Exceptions

Appellants filed post-sale exceptions, all but one of which essentially re-hashed the allegations they made in the motion to stay and dismiss. The circuit court denied their exceptions without a hearing. Appellants assert that the circuit court erred in doing so. They are wrong.

Maryland Rule 14-305(d) states in pertinent part:

> (d) Exceptions to Sale.(1) How Taken. A party, and, in an action to foreclose a lien, the holder of a subordinate interest in the property subject to the lien, may file exceptions to the sale. Exceptions shall be in writing, shall set forth the alleged irregularity with particularity. . . .
> (2) Ruling on Exceptions; Hearing. The court shall determine whether to hold a hearing on the exceptions but it may not set aside a sale without a hearing. The court shall hold a hearing if a hearing is requested and the exceptions or any response clearly show a need to take evidence.

It has been clear for a number of years that "a homeowner/borrower ordinarily must assert known and ripe defenses to the conduct of a foreclosure sale prior to the sale, rather than in post-sale exceptions." *Bates v. Cohn*, 417 Md. 309 (2010). Moreover,

> In *Bates*, the Court rejected the rationale . . . that Maryland courts sitting in equity have 'broad authority' and 'full power under Rule 14–305(e) to hear and determine all objections to the foreclosure sale. Rather, the adoption of Maryland Rule 14–305 not only created a new structure for the previously existing system of post-sale inquiries, but it also limited the permissible scope of post-sale exceptions to "irregularities."

Thomas v. Nadel, 427 Md. 441, 445 (2012) (citations omitted).

As a result, "[i]mproprieties in the larger foreclosure process that occur before the sale and are known to the homeowner prior to the sale must be raised pre-sale." *Devan v. Bomar*, 225 Md. App. 258, 268 (2015). This includes "[a] lender's failure to comply with pre-sale loss mitigation requests… must be raised ordinarily pre-sale in an effort to prevent the sale from occurring." *Bates v. Cohn*, 417 Md. at 328. Appellants' attempt to re-litigate the contentions that they made in their pre-sale motion was procedurally improper and the circuit court did not err in denying the exceptions without a hearing.[3]

THE JUDGMENT OF THE CIRCUIT COURT FOR BALTIMORE COUNTY IS AFFIRMED. APPELLANTS TO PAY COSTS.

[3] Appellants raised one new issue in their exceptions, namely that "there has been an error in the calculation of any past due amount, amounting to a misstatement of the amount of the debt." On appeal, appellants do not contend that the court erred in denying this exception and, in any event, it did not. *See Greenbriar Condominium, Phase I Council of Unit Owners, Inc. v. Brooks*, 387 Md. 683, 733–34 (2005) ("The precise indebtedness figure is to be adjudicated after the ratification of the sale itself, by the Circuit Court following receipt of the auditor's statement of account. Under Maryland law, the audit follows ratification; it does not precede it.").