In the Circuit Court for Frederick County
Case No.: 10-C-15-002003

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 01129

September Term, 2016

HAROLD H. HOLBROOK, JR., et al.

v.

JEFFREY NADEL, et al.,
SUBSTITUTE TRUSTEES

Meredith,
Leahy,
Salmon, James P.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Meredith, J.

Filed: September 18, 2017

In this appeal, Harold Holbrook, Jr. ("appellant") challenges the denial, by the Circuit Court for Frederick County, of his motion to vacate the order ratifying the sale of his residential property following foreclosure proceedings. He presents two questions in his brief on appeal, which we have condensed:

Did the circuit court err in denying the motion to vacate? [1]

For the reasons that follow, we answer "no" to that question, and shall affirm the judgment of the Circuit Court for Frederick County.

FACTS AND PROCEDURAL HISTORY

Appellant, along with his wife (Michele S. Holbrook), owns residential real property at 4822 Westwind Drive in Mount Airy. The property was subject to a deed of trust securing a promissory note which fell into default. On July 16, 2015, the Substitute Trustees filed an Order to Docket suit pursuant to Maryland Rule 14-204 in the Circuit Court for Frederick County ("the foreclosure case").

On August 7, 2015, a private process server engaged by counsel for the Substitute Trustees filed affidavits of service, affirming under the penalties of perjury that she had

[1] In his Brief, appellant formulated his questions presented as:

> "1. Did the Circuit Court err in holding that the [appellant's] claims were untimely where appellant's [sic] claimed that the judgment was void for lack of subject matter jurisdiction?
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> 2. While the burden of proof for overcoming the presumption of validity of return of service is clear and convincing evidence, does this mean that the burden for impeachment of a witness is also clear and convincing evidence?"

served two sets of the documents the Substitute Trustees had filed in the foreclosure case, by delivering copies to appellant "on the 24th day of July 2015 at 6:15 p.m." at "**1**4822 Westw**oo**d Dr Mount Airy, MD." (Emphasis added.) The process server's affidavits described appellant as a Caucasian male, approximately age 70, standing 5'10" and weighing 170 pounds.[2]

On October 19, 2015, the Substitute Trustees filed an "Affidavit of Notice Pursuant to Maryland Real Property Article 7-105.2, 7-105.3, 7-105, 14-126, Rule 14-210 and Rule 14-209 et seq, and Certification of Compliance with HB-472 and the Rules and Regulations Pertaining Thereto," reflecting that the Trustees had, on October 9, 2015, "mailed or caused to be mailed, by certified mail, return receipt requested, and by first class mail, notice of the time, place, and terms of the sale [scheduled to take place] on October 26, 2015, under this foreclosure" to appellant and to Michele Holbrook, at "4822 Westwind Drive, Mounty [sic] Airy, MD 21771".

On November 12, 2015, the Substitute Trustees filed a Report of Sale, affirming, under the penalties of perjury, that the subject property had been sold at auction on October 26, 2015, at the Frederick County Courthouse. The Report of Sale stated that the

[2] Two sets of documents were served because both appellant and his wife were obligors on the deed of trust note. Michele Holbrook was served with the foreclosure documents via leaving a second set of the documents with appellant at the same time the documents were served upon appellant. But Michele Holbrook has never appeared in this case to contest service on her, and she filed no papers in the circuit court. The Motion to Vacate was filed in the name of "the Defendant, Harold Holbrook," and signed only by him. The Brief refers to "Appellant" in the singular, and "Appellant's wife" when making reference to Michele Holbrook.

property had been sold to "ARLP Securitization Trust, Series 2015-1, Purchaser, for the sum of $425,600.00, the said Purchaser being the highest and successful bidder." On November 12, 2015, the Substitute Trustees also filed the Purchaser's Affidavit, the Auctioneer's Affidavit, and a Certification of Publication, which indicated that a Notice advertising the October 26, 2015, auction had been published in the Frederick *News-Post*, a daily newspaper of general circulation, on October 9, October 16, and October 23, 2015. *See* Real Property Article § 7-105.1(o). The Substitute Trustees also filed a Certificate of Service, attesting that, on November 11, 2015, they had mailed, first-class, postage-prepaid, a copy of the Notice of Sale to appellant and Michele Holbrook at "4822 Westwind Drive, Mounty [sic] Airy, MD 21771." Appellant acknowledges that he received a copy of the Notice of Sale in November 2015.

On December 15, 2015, the Substitute Trustees filed a Certificate of Publication (post-sale), in which a representative of the Frederick *News-Post* averred that the Notice of Sale --- which had been generated by the Clerk of the Circuit Court on November 17, 2015, and which reflected that the sale of the property would "be ratified and confirmed thirty (30) days from the date of this Notice, unless cause to the contrary be shown" --- had been published in the *News-Post* on November 19, November 26, and December 3, 2015.

On December 23, 2015, the Final Order of Ratification, signed by a judge of the Circuit Court for Frederick County, was filed. It reflected that the Court was "satisfied

that the sale reported herein was fairly and properly made," and noted that "no exceptions ha[d] been filed to the sale within the time prescribed[.]"

Neither appellant nor Michele Holbrook contested the foreclosure at any time prior to, or within 30 days after, ratification.

But, on March 21, 2016 --- three months after the Final Order of Ratification was filed --- appellant, through counsel, filed a pleading captioned "Verified Motion to Vacate Sale of Property (Lack of In Personam Jurisdiction)," which was accompanied by a supporting memorandum of law. Appellant asserted in the motion to vacate that he was "not personally served in this action"; that he "learned of this action on or about November 18, 2015, when he received the Report of Sale from the Substitute Trustee"; and that the process server's affidavit of service --- reflecting that appellant had been served on July 24, 2015, with the documents pertaining to the foreclosure case --- had both an incorrect address and an inaccurate description of the person she claimed to have served. For these reasons, appellant asked the court to vacate the final order of ratification, "strike all actions taken by the [Substitute Trustees] and this Court resulting from anything filed in this case," and dismiss the case without prejudice.

Appellant represented in the motion to vacate that he "does not dispute [the Substitute Trustees' anticipated claim] that [the Substitute Trustees] *sent* several notices to the Holbrook's residence. However, the issue is whether Mr. Holbrook *received* notices, which he denies." (Emphasis added.) Appellant also acknowledged in the

memorandum filed in support of his motion that the loan was in fact in default because his wife "did not pay the mortgage over the approximate last two years."

The Substitute Trustees opposed the motion to vacate. Attached to the opposition was an affidavit from the process server, who did "solemnly declare and affirm under the penalty of perjury" that "[t]he prior affidavit [of service], which I personally typed, contained a typographical error," namely, it "indicated that I served Mr. Holbrook at 14822 Westwood Drive, when in fact, I served him at 4822 Westwind Drive."

On May 12, 2016, the circuit court conducted an evidentiary hearing. Appellant and an associate testified in support of appellant's motion to vacate. Appellant asserted that he was 6'2", weighed 230 pounds, and was 52 years old, as reflected on his driver's license. Appellant testified that he could not have been served on July 24, 2015, at 6:15 p.m. because he was, at that time, at an auto parts store. He produced receipts at the hearing reflecting that an entity named "Chewey's Performance Automotive, Inc." conducted two transactions at an Advance Auto Parts store in Mt. Airy at 6:22 and 6:26 p.m. on that date. Appellant claimed that he personally handled these transactions, even though his name was not on the receipts. He claimed that he used his friend's business account.[3] An associate of appellant who sometimes works with appellant on construction jobs testified that he and appellant had been working together on a job in Germantown earlier on July 24, and that appellant dropped him off at home around 6:05 on that date.

[3] The alleged friend, Mr. Chewey, did not testify.

He did not accompany appellant to the auto parts store and could not testify as to appellant's whereabouts at the reported time of service.

Lauren Bernstein, the private process server, testified that she had indeed personally served appellant at his home on July 24, 2015 at 6:15 p.m. She identified appellant in court as the person she had served. She testified that appellant had orally confirmed his identity when she served him (and she also said that she simultaneously served his wife by leaving Mrs. Holbrook's set of documents with him). She explained that the affidavits of service she initially had filed listed the address incorrectly (**1**4822 West**wood** Drive, Mt. Airy, instead of 4822 Westwind Drive) because she had mistyped the address. Nevertheless, she was positive that she had gone to the correct address on July 24 because she had used a GPS-based mapping app called "Waze" to get there.

Regarding her inaccurate description of appellant on the affidavits, Ms. Bernstein testified that she thought appellant was older than he actually was because he was bald and "[h]e just appeared older to me," and she admitted that she had only gotten a "quick glance" at him. Similarly, she was wrong on his height (by four inches) and weight for the same reason. But Ms. Bernstein testified that she had no doubt that she had served appellant at his home address on July 24, 2015. She recalled that his dogs were present. Additionally, the Substitute Trustees produced evidence that there is no such address as "14822 Westwood Drive" in Mt. Airy.

The court gave the parties leave to file supplemental post-hearing memoranda. On July 2, 2016, the court issued an opinion and order denying appellant's motion to vacate. The court explained:

> The standard to set aside a judgment based on lack of personal service where an affidavit of service has been filed is clear and convincing evidence. The Court is not convinced, using that standard, that Mr. Holbrook was not served.
>
> While the initial affidavit of service had significant errors in it, **the process server** testified under oath at the Motion to Vacate hearing and **identified Mr. Holbrook as the person she personally served**. She also revealed details about the location of service that appeared accurate. **The Court finds this testimony credible, and that Mr. Holbrook was properly served.**
>
> Additionally, even if Mr. Holbrook was not personally served, he was well aware of the default status of his mortgage and the subsequent sale of the property. He failed to file any objections or motions prior to the ratification, the audit or the clerk's certification. This is far from the required "ordinary diligence" required under Maryland law, *Wohl v. Keene*, 476 F.2d 171 (1973).

(Emphasis added.) This appeal followed.

STANDARD OF REVIEW

We observed in *Wilson v. Maryland Dept. of Environment*, 217 Md. App. 271, 286 (2014), that the determination of whether a person has been served is a question of fact. Because appellant's arguments turn upon this question of fact, we consider all evidence, and all inferences therefrom, in the light most favorable to the appellees, and will not set aside the circuit court's findings unless clearly erroneous. *Webb v. Nowak*, 433 Md. 666, 680 (2013).

DISCUSSION

Although appellant now urges us to find that the judgment was void for lack of "subject matter jurisdiction," he bases that argument on his assertion that the circuit court erred in finding that the private process server served him with the documents listed in her affidavit of service. The process server gave testimony that, if believed, supported the court's finding, and the ruling was not clearly erroneous. Because the trial judge found the process server's testimony credible, and also found as a fact "that Mr. Holbrook was properly served," there is no factual predicate for the jurisdictional arguments appellant has raised.

Appellant urges us to hold that the trial judge utilized an incorrect evidentiary standard, noting that the court said in its opinion that "[t]he standard to set aside a judgment based upon lack of personal service where an affidavit of service has been filed is clear and convincing evidence." Appellant concedes that numerous appellate opinions have included similar statements. *See, e.g., Ashe v. Spears*, 263 Md. 622, 628-29 (1971) ("[T]he burden of proof is on the person denying that he was served, and this burden can only be discharged by adducing conclusive and unrefuted testimony or circumstances, which must be clear and convincing." (Citations and internal quotation marks omitted.)). But appellant contends that the clear and convincing burden of proof should apply only when the challenged service of process was allegedly performed by a governmental official rather than a private process server. Appellees respond that no such distinction has been recognized in Maryland, citing *Pickett v. Sears, Roebuck & Co.*, 365 Md. 67,

84-85 (2001), and the argument has been squarely rejected elsewhere, citing *Drews v. Fannie Mae*, 850 N.W.2d 738, 744 (Minn. App. 2014).

We are not persuaded that a party contesting service should have a lower burden of proof if the service was performed by a private process server instead of a sheriff. And, in any event, we are not persuaded that the result in this case would have been any different if the trial judge had applied a preponderance standard. The judge *did not* say that she might have, let alone would have, ruled in appellant's favor if she applied a preponderance standard. And the trial judge affirmatively made findings that the private process server's testimony was "credible," and "that Mr. Holbrook was properly served." In light of those findings, appellant's jurisdictional arguments are without merit.

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