Circuit Court for Anne Arundel County
Case No. C-02-CV-14-000112

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1674

September Term, 2016

MICHAEL FOSTER, SUBSTITUTE TRUSTEE

v.

DENISE KENNEY BARTLETT, ET AL.

Kehoe,
Berger,
Reed,
JJ.

Opinion by Kehoe, J.

Filed: November 20, 2017

*This is an unreported opinion, and it may not be cited in any paper, brief, motion or other document filed in this Court or any other Maryland Court as either precedent within the rule of stare decisis or as persuasive authority. *See* Md. Rule 1-104.

Michael R. Foster, as substitute trustee for the benefit of the Queenstown Bank of Maryland, appeals from a judgment of the Circuit Court for Anne Arundel County that dismissed a foreclosure action filed by him. For reasons that we will explain, we will vacate the judgment and remand the case for further proceedings.

Background

This proceeding involves a parcel (the "Property") located at 2926 Mountain Road in Pasadena, Maryland. For many years, the Property was the location of Pasadena Furniture, LLC, a business owned by members of the Kenney family. At all times relevant to this appeal, the Property was owned as tenants in common by three entities: Margaret R. Kenney ("Margaret"), who has an undivided 41% interest; Denise Kenney Bartlett ("Denise"), who has an undivided 18% interest; and a trust (the "Trust") established under the will of John R. Kenney, Jr., Margaret's late husband, which owns the remaining 41% interest. The trustees of the Trust were Margaret, Denise, and John R. Kenney, III ("John"). Denise and John are the children of Margaret and her late husband.

In 2009, the Branch Banking and Trust Company ("BB&T") lent $510,000 to either Pasadena Furniture, or Denise, or both of them. This loan was secured by an indemnity deed of trust on the Property as well as a deed of trust on a separate parcel owned by Denise. The indemnity deed of trust was executed by Margaret and Denise in their capacities as trustees. John did not sign the deed of trust. Neither Margaret nor

Denise executed the BB&T deed of trust in their individual capacities.[1] Some of the proceeds of the BB&T loan were used to satisfy an existing mortgage to LSCG Fund 10, LLC. It isn't clear from the record what the payoff figure was. There is evidence in the record—specifically, a transcript of a deposition taken in a lawsuit between Denise and members of her family—that Denise used some of the loan proceeds for personal expenses. The BB&T deed of trust did not purport to encumber Denise's or Margaret's individual interests. John's failure to join in the conveyance rendered the grant of the Trust's interest ineffective. This is because Maryland has long adhered to the rule of unanimity, namely, "'[i]f there are two or more trustees, the powers conferred upon them can properly be exercised only by all the trustees, unless it is otherwise provided by the terms of the trust.'" *Sokol v. Nattans*, 23 Md. App. 600, 604–05 (1974) (quoting RESTATEMENT (SECOND) OF TRUSTS § 194 (1959)). The terms of the Trust are set out in the will of John R. Kenney, Jr., and there is nothing in the will that provides that the trustees can convey an interest in real property owned by the Trust by anything other than unanimous action.[2]

[1] The acknowledgments to the BB&T deed of trust recite that Margaret and Denise executed it individually and as trustees but the operative language of the deed of trust itself is clear and unambiguous.

[2] The Maryland Trust Act permits departures from the rule of unanimity under certain circumstances. *See* Estates and Trusts Article § 14.5-703(d). The Act doesn't apply to this

In 2013, Pasadena Furniture borrowed money from the Queenstown Bank to refinance the BB&T loan. The loan was secured by, among other things, an indemnity deed of trust on the Property. Denise signed the deed of trust in four capacities: (1) individually; (2) as a trustee of the Trust; (3) as attorney-in-fact for Margaret in her individual capacity; and (4), as attorney-in-fact for Margaret in her capacity as trustee. The deed of trust was dated January 14, 2013. The deed of trust recites that Denise was acting on Margaret's behalf "pursuant to a power of attorney recorded immediately prior hereto." The primary issue in this case is whether the Queenstown Bank deed of trust encumbered the undivided 41% interest in the Property that is titled to Margaret in her own name.

This brings us to the power of attorney. To the circuit court, Margaret pointed out two deficiencies in this instrument.[3] First, there is a possible inconsistency between the date of the notary's acknowledgment, which was January 16, 2013, and the date of Margaret's signature, which was either January 14th or January 16th. The numerals themselves are the problem—it appears that the person dating the document might have written "14" but then attempted to change the numeral to "16." However, this is by no

case because it became effective on January 1, 2015, *see* Chapter 585 § 2 of the Laws of 2014.

[3] Margaret has not filed a brief in this Court.

means certain. The second problem is that no one attested to Margaret's signature, even though Estates and Trusts Article § 17-110(a)(4) requires that powers of attorney be "attested and signed by two or more adult witnesses who sign in the presence of the principal and in the presence of each other."

The power of attorney and the deed of trust were recorded in the land records of Anne Arundel County on February 6, 2013. The proceeds of the loan were used to satisfy at least part of the BB&T debt[4] and that institution recorded a certificate of satisfaction in the land records.

Pasadena Furniture defaulted on the underlying loan obligation to Queenstown Bank. On October 21, 2014, Queenstown filed a foreclosure action against the Property. The statement of mortgage indebtedness filed by appellant stated that appellees owed $183,170.81, a sum which included the original principal amount, the cost of redeeming the Property from tax sale, interest, and late charges.

At the time the foreclosure proceeding was filed, John was the court-appointed temporary guardian of Margaret's person and property. The guardianship proceeding appears to have been contested. Margaret, individually, and John, as her temporary guardian, filed a joint Rule 14-211 motion to stay or dismiss the foreclosure proceeding.

[4] There is some evidence in the record the BB&T obligations were released for less than the full amount due but the details are very sketchy.

She contended that the Queenstown Bank deed of trust did not encumber her interest in the Property because the power of attorney to Denise was legally defective. She argued that the power of attorney was dated after Denise signed the Queenstown Bank deed of trust on Margaret's behalf and that it was not properly witnessed. Margaret also argued that her fiduciary duties as a trustee could not be delegated to Denise under Maryland law, [5] and even if such delegation were legal, the power of attorney did not do so. Finally, she noted that there was no conveyance of the Trust's interest because John did not execute the deed of trust. Margaret did not assert that Denise's execution of the Queenstown Bank deed of trust on her behalf was unauthorized.

Appellant opposed Margaret's motion on several grounds. First, he argued that, even though the power of attorney signed by Margaret was dated after the indemnity deed of trust was executed, it still sufficed as Margaret's ratification of Denise's execution of the deed on her behalf. Second, appellant posited that, even if the ratification were not effective, appellant was still entitled to a lien against Margaret Kenney's interest in the Property by virtue of operation of the doctrine of equitable subrogation, as it was the

[5] Margaret's understanding of the law is correct. An agent's signature to a deed of trust as attorney-in-fact for a principal cannot bind the principal in her capacity as a trustee. Absent specific language in the trust document—and there isn't any in Mr. Kenney's will—fiduciary powers cannot normally be delegated. *See, e.g., Jacob v. Davis*, 128 Md. App. 433, 460-61 (1999) ("It is a fundamental principle of trust law that a trustee may not delegate discretionary duties.").

refinancing loan from Queenstown Bank that allowed appellees to pay off the BB&T loan to which Margaret's interest was subject. Additionally, at the hearing on the motion, appellant's counsel stated "to be perfectly honest . . . I feel that I would lose credibility if I tried to assert" that the deed of trust encumbered the Trust's interest in the Property.

After the hearing, the circuit court granted the motion to stay or dismiss only as to Margaret. The court stated that "the signatures were not valid under those circumstances," and that there was a failure of proper attestation. Finally, the court stated that it was "not going to go into the equitable subrogation" argument. Queenstown Bank filed a motion for reconsideration, which was denied. The judgment was subsequently certified as final and this appeal followed.

Analysis

A motion to stay or dismiss a foreclosure proceeding is a petition for injunctive relief. *Bates v. Cohn*, 417 Md. 309, 318-19 (2010). "The grant or denial of injunctive relief in a property foreclosure action lies generally within the sound discretion of the trial court." *Svcek v. Rosenberg*, 203 Md. App. 705, 720 (2012) (quoting *Anderson v.*

Burson, 424 Md. 232, 243 (2011)). Therefore, we review the trial court's granting of the motion for abuse of discretion, although legal determinations are reviewed *de novo*. *Id.*

Before the trial court, appellant argued that application of the doctrine of equitable subrogation would permit it to step into the shoes of BB&T because the proceeds of the loan from Queenstown Bank allowed appellees to pay off the BB&T loan. Appellant's legal theory was correct,[6] and the evidence presented to the trial court included a colorable factual basis for application of the remedy.

In *Noor v. Centreville Bank*, 193 Md. App. 160 (2010), we considered a court's refusal to apply the doctrine of equitable subrogation. We wrote that, as a general rule,

> the award of equitable relief is discretionary with the court, that a party ordinarily has no legal entitlement to an equitable remedy, and that any "right" to equitable relief is subject to counter equities that may be relevant. There are limits to that discretion, however. A trial court has no discretion to misapply equitable doctrines or to refuse to apply one when the facts and circumstances of the case clearly warrant its application.

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[6] This Court recently explained:

> Subrogation simply means substitution of one person for another; that is, one person is allowed to stand in the shoes of another and assert that person's rights against the defendant. Factually, the case arises because, for some justifiable reason, the subrogation plaintiff has paid a debt owned by the defendant. Having paid the defendant's creditor, the plaintiff stands in the creditor's shoes . . . and is entitled to exercise all the remedies which the creditor possessed against the defendant.

Nutter v. Black, 225 Md. App. 1, 27 (2015) (quoting 1 Dan B. Dobbs, LAW OF REMEDIES § 4.3(4) (2d ed. 1993) (footnotes and quotation marks omitted)).

Id. at 175 (internal citations omitted).

In the present case, the issue of equitable subrogation was raised by appellant and the circuit court erred in declining to address the issue. We will vacate the court's judgment and remand the case for further proceedings.

In the interest of judicial efficiency, we will make some additional observations that might help to clarify things for the court and the parties.

First, we direct the trial court's attention to Real Property Article ("RP") § 4-109. The statute states in pertinent part:

> (b) If an instrument is recorded on or after January 1, 1973, whether or not the instrument is executed on or after that date, any failure to comply with the formal requisites listed in this section has no effect unless it is challenged in a judicial proceeding commenced within six months after it is recorded.
>
> (c) For the purposes of this section, the failures in the formal requisites of an instrument are:
>
> (1) A defective acknowledgment;
>
> (2) A failure to attach any clerk's certificate;
>
> (3) An omission of a notary seal or other seal;
>
> (4) A lack of or improper acknowledgment or affidavit of consideration, agency, or disbursement; or
>
> (5) An omission of an attestation.

A document granting a power of attorney is an "instrument" within the purview of RP § 4-109. This is made clear, albeit in dicta, by the Court's commentary in *Poole v. Hyatt,* 344 Md. 619, 624–25 (1997). The power of attorney which Margaret executed was filed in the land records on February 6, 2013. She filed her motion to stay or dismiss the

foreclosure proceeding on March 25, 2015. If the circuit court concludes that RP § 4-109 is applicable, then the defects in the power of attorney—namely, the absence of witnesses and the possible defect in the notary's acknowledgment—have been cured by the passage of time. The trial court has to decide whether RP § 4-109 applies because the statute is not intended to cure fraudulent, as opposed to merely defective, instruments. *Guttman v. Wells Fargo Bank*, 421 Md. 227, 243 n.7 (2011). (We do note, however, that Margaret's motion to stay or dismiss did not include an assertion that her signature on the power of attorney was procured through fraud.)

We do not believe that the circuit court can be faulted for failing to consider the possible effects of RP § 4-109 because the parties did not raise the issue to the court. However, the statute does exist and the court should bear it in mind in proceedings on remand.

Second, if the court decides that RP § 4-109 is inapplicable, the court must consider appellant's equitable subrogation contention. Whether it makes sense for appellant to seek this remedy on remand is, of course, up to him; but if the court decides to grant this relief, Queenstown Bank will step into the shoes of BB&T. Enforcing the BB&T deed of trust might be problematic for the reasons that we've previously discussed. If the trial court concludes that § 4-109 is applicable to the power of attorney, then appellant's equitable subordination contention is moot.

Third, at both the circuit court and appellate levels, appellant has argued that Margaret ratified the Queenstown Bank deed of trust after it was executed. A principal can ratify an agent's actions when the principal accepts the benefits of those acts after notice that the agent's actions were wrongful. *See Smith v. Merritt Savings & Loan*, 266 Md. 526, 539 (1972). A principal may also ratify by condoning the agent's actions through taking positive steps to comply with the contract. *Id.* at 539–40. In *Merritt Savings*, the Court concluded that Smith, whose signature on a deed of trust was forged, nonetheless condoned the fraud by making payments on the loan even after he learned that his signature had been forged. *Id.*

At the circuit court level, appellant's ratification argument was based on the notion that Margaret, in her individual capacity, benefited from the release of the BB&T deed of trust. But this doesn't work because the BB&T deed of trust did not purport to encumber her individual interest. Nor did the BB&T deed of trust effectively encumber the Trust's interest in the Property for the reasons that we have explained. At the hearing before the circuit court, appellant also suggested that Margaret might have signed a personal guaranty in connection with the BB&T loan that would have been released as a result of the Queenstown Bank refinancing. Counsel's suggestion, however, is not evidence. There might be facts that would support a finding of ratification by Margaret but those facts aren't presently in evidence. If appellant wishes to pursue ratification, he should be given

an opportunity to present additional evidence. As with the equitable subordination argument, appellant's ratification contentions would be mooted if the court concludes that RP § 4-109 applies in this case.

Finally, there is the matter of Queenstown Bank's claim against the Trust's interest in the Property. The trial court granted the motion to stay or dismiss only as to Margaret. The court's order did not address whether the foreclosure action could proceed against the Trust's undivided 41% interest in the Property. This appears to have been an oversight. We say this because appellant's counsel told the court that he would "lose credibility" if he argued that the deed of trust was enforceable against the Trust's interest in the Property, and the court appeared to agree. In any event, the conveyance of the Trust's interest to the Queenstown Bank was ineffective because the transfer did not conform to the rule of unanimity and because Margaret could not delegate her fiduciary duties to Denise.

On remand, the court should enter an order dismissing the foreclosure action as to the Trust's interest in the Property.

THE JUDGMENT OF THE CIRCUIT COURT FOR ANNE ARUNDEL COUNTY IS VACATED. THIS CASE IS REMANDED FOR FURTHER PROCEEDINGS CONSISTENT WITH THIS OPINION. COSTS TO BE PAID BY APPELLEE.