Circuit Court for Harford County
Case No. 12C14001518

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1770

September Term, 2016

ALEXANDER BRUNSON, et al.

v.

LAURA H.G. O'SULLIVAN, et al.
SUBSTITUTE TRUSTEES

Berger,
Arthur,
Raker, Irma S.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Berger, J.

Filed: December 7, 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. Md. Rule 1-104.

This case arises out of a foreclosure action initiated in the Circuit Court for Harford County by substitute trustees Laura H.G. O'Sullivan, Erin M. Brady, Diana C. Theologou, Chastity Brown, Laura T. Curry, and Alyson Gromak (collectively, "the Substitute Trustees"), appellees, against mortgagors Alexander Brunson and Vanille C. Brunson ("the Brunsons"), appellants.

On appeal, the Brunsons present four questions for our review,[1] which we have rephrased and consolidated as follows:

1. Whether the circuit court abused its discretion in denying the Brunsons' motion to stay the sale and dismiss the foreclosure action.

2. Whether the circuit court erred or abused its discretion in ratifying the foreclosure sale over the Brunsons' exceptions and without a hearing.

For the reasons explained herein, we shall affirm the judgment of the circuit court.

[1] The Brunsons articulate the issues as follows:

1. The Circuit Court abused its discretion, by not having a requested hearing on Exceptions that clearly showed the need to take evidence on Appellant's claim that Appellees violated Md. Rule 14-214 (b)(2) and Md. Rule 14-213?

2. The Court erred denying Appellant's claim of Doctrine of Res Judicata bars the present foreclosure action where the previous foreclosure was fully adjudicated on the merits?

3. The Circuit Court erred denying Defendant's Motion to Dismiss for Lacked Subject Matter Jurisdiction where foreclosing party failed to file Order to Docket?

4. Did the circuit court err, ratifying a Substitute Trustee deed of trust foreclosure sale that was conducted by an individual who was not an appointed trustee or substitute trustee as required by Md. Rule 14-214 (b)(2)?

FACTS AND PROCEEDINGS

In 2006, the Brunsons refinanced the mortgage on their home, a residential property located at 511 County Ridge Circle, Bel Air, Maryland 21015 ("the Subject Property"), with a home loan from Mortgage Lenders Network USA, Inc. ("Mortgage Lenders"). In so doing, the Brunsons executed an interest only/adjustable rate note ("the Note") in the amount of $422,400.00 in favor of Mortgage Lenders. The Brunsons also executed a deed of trust naming Mitchell L. Heffernan as the trustee and Mortgage Electronic Registration Systems, Inc. ("MERS") as the beneficiary. The deed of trust included a power of sale provision allowing the lender or its successors and assigns to initiate foreclosure in the event of default.

The Brunsons defaulted on their mortgage loan in February of 2008. The subsequent history of the Brunsons' debt is complex and is not relevant to our analysis. What matters for our purposes is that U.S. Bank ultimately became the trustee of the Subject Property[2] and believed itself to be in possession of the Note.[3] On or about May

[2] In the initial deed of trust assignment, MERS named "the holders of Mortgage Asset-Backed Pass-Though Certificates Series 2007-SP2" as its successors and assigns. This nomenclature was apparently incorrect, as it was later changed to "the Holders of the RAAC Series 2007-SP2 Trust, Mortgage Asset-Backed Pass-Through Certificates, Series 2007-SP2" in a corrective assignment.

[3] The Brunsons have discovered -- and the Substitute Trustees concede -- that the Note was filed with the Circuit Court for Harford County sometime in 2008, where it has been located ever since. At some point before it was filed, the Note was indorsed to LaSalle Bank N.A., which, after a series of mergers, is now U.S. Bank. It is unclear whether the Note was ever physically transferred to LaSalle Bank or its successors. For reasons discussed below, we need not determine whether U.S. Bank was the holder of the Note when it brought the foreclosure action.

22, 2014, U.S. Bank had its loan servicer execute a substitution of trust giving the Substitute Trustees all the powers conferred by the deed of trust.

On May 22, 2014, the Substitute Trustees filed a foreclosure action against the Brunsons in the Circuit Court for Harford County. The Brunsons filed a motion to stay the sale and dismiss the foreclosure action, which the circuit court denied. On August 5, 2016, the Substitute Trustees sold the Subject Property back to U.S. Bank at public auction and filed a report of sale. The sale was conducted by Rachael Kiefer, an attorney in the same law firm as the Substitute Trustees. The Brunsons filed exceptions to the foreclosure sale and requested a hearing. After denying the Brunsons' request for a hearing, the circuit court ratified the sale on September 23, 2016.

DISCUSSION

I. Standard of Review

Prior to a foreclosure sale, the borrower "may file in the action a motion to stay the sale of the property and dismiss the foreclosure action." Md. Rule 14-211(a)(1); *see also Burson v. Capps*, 440 Md. 328, 341-42 (2014) ("Before a foreclosure sale takes place, 'the defaulting borrower may file a motion to stay the sale of the property and dismiss the foreclosure action.' ") (citing *Bates v. Cohn*, 417 Md. 309, 319 (2010)). We review a trial court's denial of a motion to stay and dismiss under an abuse of discretion standard, but we give no deference to the trial court's legal conclusions. *Burson*, *supra*, 440 Md. at 342 (citing *Svrcek v. Rosenberg*, 203 Md. App. 705, 720 (2012)).

After a foreclosure sale, the borrower may file exceptions to the sale of the property. Md. Rule 14-305; *see also Fagnani v. Fisher*, 418 Md. 371, 383-84 (2011) ("Maryland

Rule 14–305(d) provides that if a party perceives an irregularity in the foreclosure sale, it may file exceptions to the sale of the property."). Upon request, the trial court shall hold an evidentiary hearing if it determines that "the exceptions or any response clearly show a need to take evidence." Md. Rule 14-305(d)(2). This determination is within the sound discretion of the trial court. *See Four Star Enterprises Ltd. P'ship v. Council of Unit Owners of Carousel Ctr. Condo.*, Inc., 132 Md. App. 551, 567 (2000) (applying an abuse of discretion standard in reviewing the lower court's denial of a hearing on exceptions under Rule 14-305(d)(2)).

Once a foreclosure sale has been ratified, the borrower "bears the burden of showing that the sale was invalid, and must show that any claimed errors caused prejudice." *Burson*, *supra*, 440 Md. at 343. We will presume "that the sale was fairly made, and that the antecedent proceedings, if regular on the face of the record, were adequate and proper." *Id.* at 342-43 (quoting *Fagnani*, *supra*, 418 Md. at 384). When the purchaser is the mortgagee or assignee, as is the case here, we need only "slight evidence of partiality, unfairness, or want of the strictest good faith" to set aside the sale. *Fisher v. Ward*, 226 Md. App. 149, 160-61 (2015) (quoting *Fagnani*, *supra*, 418 Md. at 391). We accept the trial court's factual findings unless they are clearly erroneous, but we review its legal conclusions *de novo*. *Burson*, *supra*, 440 Md. at 342 (quoting *Jones v. Rosenberg*, 178 Md. App. 54, 68 (2008)).

II. The Circuit Court Did Not Abuse Its Discretion In Denying the Brunsons' Motion to Stay and Dismiss the Foreclosure.

The Brunsons argue that their motion to stay should have been granted for three independent reasons:

1. The Substitute Trustees' action was barred by *res judicata*.

2. Three of the Substitute Trustees' affidavits misidentified the debt owner.

3. The deed of trust assignment was invalid because the deed of trust and the Note had been separated.

The Brunsons' arguments are without merit. Although there was a prior foreclosure action involving the same parties and property, the circuit court dismissed that action without prejudice at the plaintiffs' request. The affidavits in question were acceptable to the circuit court, which was in the best position to determine whether the Substitute Trustees had established their right to foreclose. Further, under the circumstances of this case, the circuit court correctly rejected appellants' contention that the deed of trust assignment was invalid because the deed of trust and the note had been separated.

A. The Circuit Court Correctly Found that the Foreclosure Action Was Not Barred by Res Judicata.

The Brunsons argue that U.S. Bank was barred from bringing a foreclosure action because its successor in interest had previously brought and dismissed a foreclosure action on the same property. Because the prior action was dismissed without prejudice, we hold that the doctrine of *res judicata* is inapplicable.

An action is barred by *res judicata* when it meets the following requirements:

> (1) that the parties in the present litigation are the same or in privity with the parties to the earlier dispute; (2) that the claim presented in the current action is identical to the one determined in the prior adjudication; and (3) that there was a final judgment on the merits.

Davis v. Wicomico Cty. Bureau, 447 Md. 302, 306 (2016) (quoting *Colandrea v. Wilde Lake Community Ass'n, Inc.*, 361 Md. 371, 392 (2000)). The dismissal of an action without prejudice is not a final judgment on the merits for the purposes of *res judicata*. *See N. Am. Specialty Ins. Co. v. Boston Med. Grp.*, 170 Md. App. 128, 143 (2006) ("Without prejudice is understood to mean that the action can be reinstituted, and any argument that the issues have already been litigated will not be entertained."); *see also Richman v. FWB Bank*, 122 Md. App. 110, 158 (1997) (observing that "a dismissal without prejudice is not, of course, an adjudication on the merits").

In the case at hand, the Substitute Trustees do not deny that U.S. Bank or its predecessor initiated a foreclosure action against the Brunsons involving the Subject Property on or about July 9, 2008.[4] The Substitute Trustees maintain, however, that there was no final judgment on the merits. We agree. Although the prior action was dismissed in April of 2010, the order expressly noted that the case was dismissed without prejudice. Because there was no final judgment on the merits, the Substitute Trustees of U.S. Bank were free to initiate a second foreclosure action against the Brunsons.[5]

[4] That action was captioned as *Randa S. Azzam, et al. v. Alexander Brunson, et al.*, Case No. 12C08001967 in the Circuit Court for Harford County.

[5] The Brunsons also argue that the second foreclosure action was barred because the circuit court issued a memorandum opinion and order in the prior action. The order in

B. The Circuit Court Did Not Abuse Its Discretion In Allowing the Foreclosure Action to Move Forward Despite Inaccuracies In the Substitute Trustees' Affidavits.

The Brunsons argue that the circuit court should have dismissed the foreclosure action because three affidavits filed with the Order to Docket misidentified the owners of the underlying debt.[6] In particular, the Preliminary Loss Mitigation Affidavit, the Affidavit of Default and Indebtedness, and the Affidavit Certifying Ownership of Debt Instrument were executed by the loan servicer for "U.S. Bank National Association, as Trustee, successor in interest to Bank of America National Association, as Trustee, successor by merger to LaSalle Bank National Association, as Trustee for *Residential Asset Mortgage Products, Inc.*, Mortgage Asset-Backed Pass-Through Certificates, Series 2007-SP2" (emphasis added). The parties are in agreement that the owner of the debt is not Residential Asset Mortgage Products, Inc., but "the Holders of the RAAC Series 2007-SP2 Trust, Mortgage Asset-Backed Pass-Through Certificates." The Brunsons maintain that this error rendered the affidavits invalid and, inasmuch as the affidavits were a prerequisite to

question, however, merely disposed of the parties' interlocutory motions and allowed the foreclosure action to proceed forward. Critically, the circuit court did not make a final judgment on the merits.

[6] The Brunsons also argue that the order to docket is missing an affidavit certifying that the submitted copy of the Note is a true and accurate copy. The order to docket does include a copy of the debt instrument with an accompanying affidavit as required by Maryland Rule 14-207(b). Insofar as the Brunsons are claiming that an additional affidavit was required for the copy of the Note, that issue was not raised or decided at the trial level. *See* Md. Rule 8-131(a).

foreclosure, necessitate a dismissal of the action.[7] We hold that the circuit court properly exercised its discretion in allowing the foreclosure to move forward.

The affidavits at issue were filed by the Substitute Trustees pursuant to Maryland Rule 14-207(b). The purpose of such filings is to establish that the plaintiff is legally entitled to foreclose on the Subject Property. *See Svrcek v. Rosenberg*, 203 Md. App. 705, 724-25 (2012) (trustee established its right to foreclose by, *inter alia*, filing the required affidavits). The Brunsons have failed to show that the alleged inaccuracies reveal any serious legal deficiency in the foreclosure action. The Brunsons do not dispute that the sworn statements in the affidavits were true, that the loan servicer was authorized to execute the affidavits on behalf of U.S. Bank, or that U.S. Bank was acting on behalf of the Holders of the RAAC Series 2007-SP2 Trust. Indeed, the debt owner was correctly identified in the substitution of trustee, in the notice of intent to foreclose, and in the corrected assignment of the deed of trust.

To be sure, the misidentification of a debt owner in an affidavit *could* be an indication that the plaintiff is not entitled to foreclose. The circuit court, however, was in the best position to make this assessment in the instant case. Despite the formal irregularities in the filings, the circuit court was satisfied that the affidavits demonstrated what they purported to show, namely, that the Substitute Trustees were entitled to foreclose

[7] The debt owner was also misnamed in the corporate assignment of deed of trust. As we will explain in the next section, the right to foreclose follows the promissory note rather than the deed of trust. A mistake in a deed of trust assignment is not, therefore, a defense to "the validity of the lien or the lien instrument or to the right of the plaintiff to foreclose in the pending action." *See* Md. Rule 14-211(a)(3)(B).

on the Subject Property. Because the circuit court properly exercised its discretion, we will not disturb its ruling on appeal.

C. The Circuit Court Correctly Found that the "Bifurcation" of the Note and the Deed of Trust Was Not a Bar to Foreclosure.

The Brunsons contend that the assignment of the deed of trust was invalid because the deed of trust was separated from the Note. This argument is based on a fundamental misunderstanding of foreclosure law. To be sure, we have called the assignment of a mortgage alone a "nullity." *Svrcek v. Rosenberg*, 203 Md. App. 705, 727 (2012) (quoting *Le Brun v. Prosise*, 197 Md. 466, 474-75 (1951)). This does not mean, however, that the separation of a deed of trust and a promissory note is a bar to foreclosure. It means, rather, that the right to enforce the deed of trust always follows the promissory note. *Id.* at 727 ("Maryland law makes clear that once the note was transferred, the right to enforce the deed of trust followed."); *see also Le Brun v. Prosise*, 197 Md. 466, 474-75 (1951) ("The note and the mortgage are inseparable; the former as essential, the latter as an incident. An assignment of the note carries the mortgage with it, while an assignment of the latter alone is a nullity."); *see also Anderson v. Burson*, 424 Md. 232, 251 (2011) n. 21 ("Maryland law holds that the mortgage transfers with the mortgage note."). The alleged separation of the instruments is not, therefore, a proper basis for challenging the Substitute Trustees' right to foreclose, and the circuit court correctly rejected this argument.

To the extent the Brunsons now argue that the Substitute Trustees had no right to foreclose because neither they nor U.S. Bank were in possession of the Note when the action was initiated, this argument was not properly raised in the trial court. We generally

will not decide an issue "unless it plainly appears by the record to have been raised in or decided by the trial court." Md. Rule 8-131(a). In their motion to stay and dismiss, the Brunsons conceded that the Substitute Trustees had possession of the Note; they merely challenged the Substitute Trustees' right to foreclose without proving the Note's prior transfer history.[8] We reject the Brunsons' efforts to change the factual and legal basis of their defense on appeal. Indeed, permitting them to do so would merely delay the legal consequences of their undisputed default.[9]

For the foregoing reasons, we hold that the circuit court did not abuse its discretion in allowing the foreclosure to move forward.

III. The Circuit Court Did Not Err or Abuse Its Discretion In Ratifying the Foreclosure Sale.

The Brunsons argue that the foreclosure sale should be set aside because it was not conducted by an appointed or substitute trustee. Notably, the Brunsons needed to show that the Substitute Trustees were not present at the sale and that their absence, taken together with the overall circumstances of the sale, resulted in prejudice. In our view, the

[8] The Brunsons did allege in a conclusory manner that U.S. Bank was not in possession of the Note, but they failed to state with particularity the legal grounds for concluding that the foreclosure action was invalid. *See* Md. Rule 14-211(a)(3)(B) (requiring the defendant to "state with particularity the factual and legal basis of each defense"); *see also Buckingham v. Fisher*, 223 Md. App. 82, 95 (2015) ("Although the Buckinghams pointed out inconsistencies in the notice, they failed to allege with particularity the legal grounds pursuant to which the trial court could determine that the notice would prohibit the Trustees from proceeding with the foreclosure sale."). The Brunsons' later arguments concerning the possession of the Note were not timely, and the circuit court properly disregarded them in its memorandum opinion.

[9] The record reflects that the Brunsons have not made any payments on the home loan since 2008.

Brunsons failed to satisfy their burden, and therefore, the trial judge did not abuse its discretion in ratifying the foreclosure sale. We further hold that the circuit court did not err in denying the Brunsons' request for a hearing on their exceptions.

Maryland Rule 14-214(b)(2) provides that "[a]n individual appointed as trustee in a deed of trust or as a substitute trustee shall conduct the sale of property subject to a deed of trust." A sale conducted by an agent is nonetheless valid as long as one of the trustees is physically or constructively present. *See Fisher v. Ward*, 226 Md. App. 149 (2015) (foreclosure sale conducted by trustees' attorney was valid because one of the trustees was constructively present). More broadly, "absence of the trustee from the sale is merely a circumstance to be considered by the court in its ultimate determination of fairness of the proceedings." *Id.* at 159. The court must determine whether "the absence of a trustee [is] merely an irregularity or harmless error not affecting the substantial rights of the parties." *Id.*

In the instant case, the Brunsons do not claim that the Substitute Trustees were absent during the foreclosure sale. Indeed, the Brunsons state that they "never alleged in their brief that a trustee had to be physically present at the place and time of the sale." The Brunsons' sole complaint is that the Substitute Trustees used an agent to conduct the sale. The use of an agent in these circumstances is not fatal to the sale. We, therefore, hold that the trial court did not err in satisfying the foreclosure sale in this proceeding.

Assuming *arguendo* that the Brunsons had demonstrated that the Substitute Trustees were absent during the sale, the Brunsons have failed to show -- or even to allege -- that they suffered any prejudice as a result. In *Fisher v. Ward*, we considered whether a party

seeking to invalidate a foreclosure sale had suffered prejudice due to the absence of the substitute trustees at the sale. 226 Md. App. 149 (2015). We concluded that the manner of the sale was not prejudicial:

> Fisher's argument is based solely on the absentee participation of Trustees in the sale itself. She raises no assertions of irregularity in regard to any other aspect of the proceedings. Nor does she challenge the sufficiency of the price brought by the sale. Applying *Wicks*, we conclude that the absence of Trustees is but a factor to be considered in determining the fairness and validity of the sale. Absent other irregular factors, we conclude that, although required, Bierman's "presence" at the sale by telephone did not create unfairness or prejudice to Fisher to warrant reversal of the judgment of the circuit court.

Id. at 161. Here, the Brunsons do not challenge the sufficiency of the price or otherwise explain how the manner of the sale undermined its fairness. We will not, therefore, disturb the circuit court's ratification of the foreclosure sale.[10]

The Brunsons also contend that the circuit court should not have ratified the sale without an evidentiary hearing. Such a hearing was only required, however, if the circuit court determined that "the exceptions or any response clearly show a need to take evidence." Md. Rule 14-305(d)(2). The Substitute Trustees have never claimed that Kiefer was a trustee; they merely assert that she was authorized as their agent to conduct the sale.

[10] The Brunsons make the additional argument that the report of sale was improper because Kiefer signed it as a trustee rather than as an agent. After a foreclosure sale is ratified, however, the borrower is generally confined to raising "procedural irregularities in the sale itself" or challenges to the statement of debt. *Bates v. Cohn*, 417 Md. 309, 321 (2010) (quoting *Greenbriar v. Brooks*, 387 Md. 683, 688 (2005)). Because a report of sale is necessarily produced after the conclusion of the sale itself, we are not persuaded that an irregularity in the report of sale is a proper basis for an exception. Assuming such an irregularity exists, the Brunsons have failed to show that Kiefer's manner of signing the report of sale led to any confusion or prejudice.

Because the parties agreed that Kiefer was not a trustee, the question before the court was primarily legal in nature, and the value of further evidentiary hearings was rather limited. We hold, therefore, that the circuit court did not abuse its discretion in finding that there was no clear need to take evidence on Kiefer's authority to conduct the sale.

In our view, the circuit court did not err in allowing the foreclosure action to move forward and in ratifying the sale at its conclusion. Accordingly, the trial court did not abuse its discretion in refusing to set aside the Substitute Trustees' sale of the subject property to U.S. Bank.

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