

UNREPORTED
IN THE COURT OF SPECIAL APPEALS
OF MARYLAND

No. 1864

September Term, 2016

DAVID POINT DU JOUR, et al.

v.

HSBC BANK, N.A.

Wright,
Graeff,
Arthur,

JJ.

Opinion by Graeff, J.

Filed: December 19, 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.

In 2007, David Point du Jour and his mother, Lourdes Point du Jour, appellants, executed a promissory note that evidenced the terms of a home refinance loan from Delta Funding Corporation (“Delta Funding”). To secure the note, appellants executed a Deed of Trust on property owned by Ms. Point du Jour. The Deed of Trust was never recorded in the Land Records Office.

In 2016, HSBC Bank, N.A. (“HSBC”), filed a complaint for declaratory judgment and other equitable causes of action in the Circuit Court for Wicomico County. It alleged that it had acquired the note from Delta Funding in 2007, and it sought an order confirming its status as a first-priority lienholder, among other equitable relief. An amended complaint subsequently was filed, adding a claim for breach of contract and requesting monetary relief.

The parties filed cross motions for summary judgment. Following a hearing, the circuit court issued an order denying appellants’ motion for summary judgment and granting HSBC’s motion for summary judgment.

On appeal, appellants present the following questions for this Court’s review, which we have rephrased slightly, as follows:

1. Is HSBC’s complaint for declaratory judgment barred by the 3-year statute of limitations?
2. Did the circuit court err in concluding that appellants had the power and intent to have a lien placed on their property in consideration for a loan?

For the reasons set forth below, we answer both questions in the negative, and therefore, we shall affirm the judgment of the circuit court.

FACTUAL AND PROCEDURAL BACKGROUND

In July 2007, appellants obtained a loan from Delta Funding in the amount of \$127,980.00 to refinance an existing mortgage on property known as 104 Bridgeview Street in Salisbury (“the property”). Appellants executed a promissory note dated July 19, 2007, evidencing the terms of the loan. In pertinent part, appellants promised to repay the loan amount, plus interest, over the course of thirty years, in monthly payments of \$1,019.64. The note contained a provision that “the Lender may transfer this Note,” and “[t]he Lender or anyone who takes this Note by transfer and who is entitled to receive payments under this Note is called the ‘Note Holder.’” The note provided that the Note Holder had the power to collect a charge for a late payment, to demand payment of the outstanding loan amount in the case of default, and to enforce its rights under the note against any guarantor, surety, or endorser. Pursuant to the following provision in the note, appellants agreed to secure the note with a deed of trust:

In addition to the protections given to the Note Holder under this Note, A Mortgage, Deed of Trust, or Security Deed (the “Security Instrument”), dated the same date as this Note, protects the Note Holder from possible losses which might result if I do not keep the promises which I make in this Note. That Security Instrument describes how and under what conditions I may be required to make immediate payment in full of all amounts I owe under this Note.

The payee under the note was left blank.

The Deed of Trust that secured the note was executed by appellants on the same date as the note. It provided that MERS (the Mortgage Electronic Registration Systems, Inc.), as nominee for the Lender and Lender’s successors and assigns, had the right to

foreclose and sell the property in the event that appellants breached any of the terms of the note. It further provided:

This Security Instrument secures to Lender: (i) the repayment of the Loan, and all renewals, extensions and modifications of the Note; and (ii) the performance of Borrower's covenants and agreements under this Security Instrument and the Note.

For this purpose, Borrower irrevocably grants and conveys to Trustee, in trust, with power of sale, the following described property ... 104 Bridgeview Street, Salisbury, Maryland 21801.

The Deed of Trust also contained a provision stating that “[t]he Note or a partial interest in the Note (together with this Security Instrument) can be sold one or more times without prior notice to Borrower.”

In January 2016, HSBC filed a complaint against appellees, alleging that it was the current holder of the note, which was secured by a Deed of Trust that, for unknown reasons, had not been recorded. The complaint stated that the original Deed of Trust could not be located, and although a photocopy existed, the Land Records Office would not accept a copy for recordation.¹

The complaint included four counts. The first count, Declaratory Judgment, requested the court to determine that the photocopy of the Deed of Trust was valid and order the Division of Land Records to accept it for recordation. The second count, Specific Performance, requested the court to order the appellants to re-execute the Deed of Trust.

¹ The circuit court took judicial notice “that the land records for Wicomico County will not accept a copy [of a deed of trust] for recording unless it is ordered by” the circuit court.

The third count, Equitable Subrogation, requested the court to order that the Deed of Trust possessed a first-priority lien on the property. The fourth count, Equitable Lien, requested the court to order that HSBC holds an equitable first-priority lien on the property, subject to the terms and conditions in the Deed of Trust.

In March 2016, HSBC filed an amended complaint, adding a count for breach of contract. Count five alleged that appellants were in material breach of the loan, note, and Deed of Trust because they had made no payments since September 2011, and because they “fail[ed] to secure repayment of the Subject Note with a recorded first-priority lien on and against the Subject Property.”

Appellants filed an Answer to the First Amended Complaint, along with a motion for summary judgment. As grounds for the motion, appellants asserted: (1) Delta Funding, the original lender, was a “forfeited business entity,” and therefore, there were “no legal rights to be transferred or enforced by a third party”; (2) there was no evidence that the note had been transferred or assigned to HSBC, and therefore, HSBC lacked standing; (3) HSBC’s claims were barred by the three-year statute of limitations; and (4) the circuit court lacked authority to grant the relief requested by HSBC.

Appellants filed affidavits in support of their motion. They denied having had any communication or contractual relationship with HSBC or seeing the original “note” that HSBC was attempting to enforce.

HSBC filed an opposition, along with a cross motion for summary judgment. HSBC asserted that the “primary goal” of the suit against appellants was to record the Deed of

Trust “so that proper notice is given to the public of the status of title of the Property.” It stated that it would dismiss, without prejudice, its claims for specific performance, equitable subrogation, equitable lien, and breach of contract (Counts 2-5, respectively) if the circuit court granted summary judgment in favor of HSBC on its request for declaratory judgment (Count 1).

In support of its position that it was entitled to summary judgment on Count 1, HSBC asserted that it was undisputed that Ms. Point du Jour was the owner of the property, that she and her son, Mr. Point du Jour, refinanced the original mortgage with a loan from Delta Funding, and they signed the note and Deed of Trust at issue. HSBC submitted affidavits from two employees of Ocwen Loan Servicing, LLC (“Ocwen”), the loan servicer for HSBC. The affidavits stated that HSBC purchased the “Subject Loan and Subject Note” from Delta Funding on or about November 1, 2007, and that HSBC was the current holder of the note and the Deed of Trust.

The circuit court held a hearing on the parties’ motions for summary judgment on September 15, 2016. At the hearing, counsel for HSBC produced the original promissory note that had been signed by appellants, and counsel for appellants conceded that HSBC is the holder of a note that is endorsed “in blank.”²

² A person in possession of a note that is “either specially indorsed to that person or indorsed in blank, is a holder entitled generally to enforce that note.” *Deutsche Bank Nat’l Trust Co. v. Brock*, 430 Md. 714, 729-30 (2013) (footnotes omitted).

On October 13, 2016, the court issued a memorandum opinion and order denying appellants' motion for summary judgment and granting HSBC's cross motion for summary judgment on Count 1. The court found that "the subject note is a negotiable instrument that is indorsed in blank and is enforceable by HSBC," "notwithstanding the current corporate status of the first holder of the aforesaid instrument." On the limitations issue, the court determined that, as HSBC had argued, the note and Deed of Trust were "specialties" within the meaning of Md. Code (2013 Repl. Vol.), Courts and Judicial Proceedings Article (CJP), § 5-102(a)(1), and therefore, the appropriate statute of limitations was 12 years. The court also agreed with HSBC's argument that the claim was not barred by the doctrine of laches, finding that appellants had not been "prejudiced by the institution of this action that substantially relates to the documents that they signed under seal." Finally, the court rejected appellants' argument that the court lacked authority to order the requested equitable relief, citing the court's "broad equity powers."

The court concluded that it was "satisfied that the [appellants] in this case had the power and the intent to have a lien placed upon their property in consideration for the loan that is evinced by the subject note," and it expressed the basis for the relief granted as follows:

In order to enforce the parties' express intention, the Court sees no other way to do equity in this case than by ordering the Clerk of Court for Wicomico County to accept a photocopy of the subject deed of trust for recordation. Therefore, consistent with this opinion, the Court will enter an order declaring that the [appellants] have executed the subject deed of trust in the amount of \$127,980.00 and that this document evidences and constitutes a valid and enforceable lien of the real property and

improvements commonly known as 104 Bridgeview Street, Salisbury, Maryland 21801.

The Court further agrees that equity requires the Court to declare that the copy of the subject deed of trust executed by the [appellants] in the original principal amount of \$127, 980.00 is valid and enforceable for any and all purposes as the original of the subject document. ... The Court agrees with [HSBC] that the aforementioned relief is the type of equitable relief that should be administered in such a case where the parties have clearly intended a lien, an original deed of trust is lost, and the parties agree that a certain copy is exactly what the parties executed when they received their funds for their refinancing in July of 2007.

The court entered an order consistent with its memorandum opinion, granting summary judgment in favor of HSBC on Count 1 of the amended complaint and dismissing the remaining counts without prejudice. This appeal followed.

DISCUSSION

Maryland Rule 2-501(f) provides that “[t]he court shall enter judgment in favor of or against the moving party if the motion and response show that there is no genuine dispute as to any material fact and that the party in whose favor judgment is entered is entitled to judgment as a matter of law.” “The purpose of summary judgment is to determine whether there are facts in dispute that must be resolved through a more formal resolution process, such as a trial on the merits.” *Piney Orchard Cmty. Assn, Inc. v. Piney Pad A, LLC*, 221 Md. App. 196, 206 (2015) (quoting *Hines v. French*, 157 Md. App. 536, 549 (2004)). Consequently, “in order to defeat a motion for summary judgment, the party opposing the motion must present *admissible evidence* demonstrating the existence of a dispute of material fact.” *Id.* (quoting *Hines*, 157 Md. App. 549). In reviewing the propriety of a

trial court's action in granting a declaratory judgment at the summary judgment stage, we determine whether that declaration was correct as a matter of law. *Id.*

Appellants contend that the circuit court erred in its ruling on two grounds: (1) HSBC's claims were untimely filed, and (2) the evidence was insufficient to prove that appellants intended to place a lien on their property. We will address each contention in turn.

I.

Applicable Limitations

Appellants contend that the circuit court erred in considering HSBC's request for declaratory judgment because it was barred by the statute of limitations. It asserts that the limitations period began to run in July 2007, when the failure to record the Deed of Trust occurred. Appellants argue that "[t]he lender was on notice (or should have been on notice) at the time of the alleged omission," and they should have filed suit within the three-year statute of limitations set forth in CJP § 5-101. They contend that the complaint filed by HSBC in 2016 was time-barred.

HSBC argues that its complaint was not time-barred. It asserts that the statute of limitations in this case would be 12 years, pursuant to CJP 5-102(a)(1), because the note and Deed of Trust are documents "under seal."³ It argues, however, that because the

³ Md. Code (2013 Repl. Vol.), Courts and Judicial Proceedings Article (CJP), § 5-101 provides that "[a] civil action at law shall be filed within three years from the date it accrues unless another provision of the Code provides a different period of time within which an action shall be commenced." One such exception to the three-year statute of

complaint sought equitable relief, the doctrine of laches, rather than a statute of limitations, was the applicable doctrine to determine whether the complaint was time-barred. In that regard, HSBC argues that, because there was no evidence that appellants were prejudiced due to any alleged delay in bringing the action, the action was not barred by laches.

We agree with HSBC that, because it was seeking equitable relief, laches is the proper measure for determining whether the action was time barred. Additionally, we agree with the circuit court that the “action is not barred by laches as [appellants] have not been prejudiced by the institution of this action that substantially relates to the documents that they signed under seal.”

“All claims for purely equitable remedies . . . are potentially subject to laches,” which is “the limit equity places on stale claims.” *Murray v. Midland Funding, LLC*, 233 Md. App. 254, 260 (2017). For laches to bar an equitable action, there must be “both an inexcusable delay” in bringing the action, as well as “prejudice to the party asserting the defense.” *Id.* (quoting *Dept. of Human Serv. v. Kamp*, 180 Md. App. 166, 205 (2008)). “Prejudice is ‘generally held to be anything that places [the defendant] in a less favorable position.’” *State Ctr., LLC v. Lexington Charles Ltd. P'ship*, 438 Md. 451, 586 (2014) (quoting *Liddy v. Lamone*, 398 Md. 233, 244-45 (2007)).

limitations is CJP § 5-102(a), which provides for a 12-year statute of limitations for certain “specialties,” including actions on promissory notes and other documents signed under seal.

The circuit court granted summary judgment only on HSBC's request for declaratory judgment, which is relief that "can be obtained either at law or in equity." *Murray*, 233 Md. App. at 262 (quoting *LaSalle Bank, N.A. v. Reeves*, 173 Md. App. 392, 411 (2007)). The determination of whether a declaratory judgment proceeding is legal or equitable in nature is "made by an examination of the nature of the claim asserted and the relief requested." *LaSalle Bank*, 173 Md. App. at 411, (quoting *Fisher v. Tyler*, 24 Md. App. 663, 668-69 (1975)).

The relief sought by HSBC in its request for declaratory judgment was essentially equitable in nature, to the extent that it sought relief in the form of judicial recognition of the validity of the photocopy of the Deed of Trust as a lien on the property and an order that the photocopy be accepted for recording in the Land Records. Therefore, laches, rather than the statute of limitations, applies to a determination of whether the amended complaint was time-barred.

As indicated, for laches to bar an equitable action, there must be prejudice to the party asserting delay. *Murray*, 233 Md. App. at 260. Here, appellants made no claim below that they had been prejudiced by the filing of the action, nor did they assert any such prejudice in their brief. At oral argument, however, counsel for appellants argued for the first time that appellants were prejudiced. Although appellants have not made any payments on the loan since 2011, counsel argued that appellants were prejudiced by the delay because of the risk of a "derogatory notation on their credit report" and "the uncertainty that goes with that of not knowing where one is going to live." Any such

prejudice, however, is the result, not of any delay in the filing of the request for declaratory judgment, but rather, appellants' failure to make required payments on the note.

In sum, we conclude that HSBC's request for declaratory judgment sounds in equity, and even assuming, *arguendo*, that there was evidence of an "inexcusable delay" in filing the action, laches would not bar the action because there is nothing in the record demonstrating that any such delay resulted in any prejudice to appellants. Accordingly, the circuit court did not err in denying appellant's motion for summary judgment on the ground that HSBC's claim was time-barred.⁴

II.

Intent to Place Lien

Appellants next claim that the circuit court erred in granting summary judgment as a matter of law based on its conclusion that they "had the power and the intent to have a lien placed upon their property in consideration for the loan." In support, appellants assert that Delta Funding, the original Lender and Note Holder, is a forfeited entity in Maryland, and therefore, "there is no viable 'intent' that can be transferred to or from Delta Funding

⁴ Even if HSBC's claim for relief was subject to the statute of limitations, rather than laches, the complaint would not be time-barred. As counsel for appellants conceded at the hearing on the motion for summary judgment and at oral argument before this Court, the note and Deed of Trust are documents under seal. Accordingly, the complaint based on these documents was subject to the 12-year statute of limitations in CJP § 5-102(a)(1). Although CJP § 5-102 was amended, effective July 1, 2014, to provide that the 12-year statute of limitations does not apply to "[a] deed of trust, mortgage, or promissory note that has been signed under seal and secures or is secured by owner-occupied residential property, as defined in § 7-105.1 of the Real Property Article," this amendment does not apply here because it applies "prospectively to any cause of action that arises on or after the effective date of this Act." 2014 Md. Laws 4009 (Vol. V, Ch. 592, H.B. 274).

Corporation, a legal nullity.” Appellants contend that the affidavit of an employee of Ocwen was insufficient to evidence the intent of the parties because Ocwen is not a party to the suit. Finally, appellants suggest that the court erred in ordering equitable relief to enforce the intention of the parties because there was nothing in the record “to support contractual or other ‘express’ intent between HSBC and [appellants].”

HSBC contends that the circuit court properly determined that appellants intended to place a lien on the property, asserting that the language of the Deed of Trust establishes “the clear intention of the parties to create a lien on the Property.” It argues that appellants “have not offered any rationale or evidence as to why a court sitting in equity should not enforce” that intention, and therefore, this Court should affirm the court’s order granting summary judgment in its favor and awarding declaratory and other equitable relief. HSBC further asserts that the affidavit from Ocwen was proper under the Maryland Rules, and that the corporate status of Delta Funding is irrelevant.

“A lien on real property is a right based on contract, statute, or common law to have a debt or charge satisfied out of the particular property.” *Select Portfolio Servicing, Inc. v. Saddlebrook W. Util. Co., LLC*, 455 Md. 313, 315 (2017). A court of equity has the power to enforce a property owner’s express, written intent to create a lien on property. *See Watson v. Watson*, 304 Md. 48, 59 (1985) (“where one who has the right and power to do so intends by a writing to create a lien on his land to secure another but fails to create a statutorily valid security instrument, his expressed intention may be enforced in equity by the other party to the instrument”) (quoting *Adams v. Avirett*, 252 Md. 566, 571 (1969)).

Here, the circuit court properly found that the evidence established an intent to place a lien on the property. As HSBC asserts, the note and Deed of Trust clearly establish appellants' intent to place a lien on the property in consideration for the loan obtained from Delta Funding, and appellants did not present evidence in opposition to HSBC's motion for summary judgment that demonstrated any genuine dispute of material fact on that issue.

A deed of trust is a contract. *Riggs Nat. Bank of Washington, D.C. v. Wines*, 59 Md. App. 219, 226 (1984). And the interpretation of a contract is a question of law, which we review *de novo*. *Ocean Petroleum, Co. v. Yanek*, 416 Md. 74, 86 (2010). In doing so, we employ an objective approach, "according to which, unless a contract's language is ambiguous, we give effect to that language as written without concern for the subjective intent of the parties at the time of formation." *Id.* We "restrict our inquiry to the 'four corners of the agreement,'" *id.* (quoting *Cochran v. Norkunas*, 398 Md. 1, 17 (2007)), "and ascribe to the contract's language its 'customary, ordinary, and accepted meaning.'" *Id.* (quoting *Fister v. Allstate Life Ins. Co.*, 366 Md. 201, 210 (2001)). "The language of a contract is only ambiguous if, when viewed from [a] reasonable person perspective, that language is susceptible to more than one meaning." *Id.* at 87.

The Deed of Trust signed by appellants contains the following provision:

TRANSFER OF RIGHTS IN THE PROPERTY

The beneficiary of this Security Instrument is MERS (solely as nominee for Lender and Lender's successors and assigns) and the successors and assigns of MERS. This Security Instrument secures to Lender: (i) the repayment of the Loan, and all renewals, extensions and modifications of the Note; and (ii)

the performance of Borrower's covenants and agreements under this Security Instrument and the Note.⁵

For this purpose, Borrower irrevocably grants and conveys to Trustee, in trust, with power of sale, the following described property ... 104 Bridgeview Street, Salisbury, Maryland 21801.

This provision clearly establishes appellants' agreement to transfer to MERS, as the nominee for Delta Funding and its successors and assigns, the right to sell the property to satisfy the loan debt in the event of a breach, or, in other words to place a lien on the property. *See Select Portfolio Servicing*, 455 Md. at 315.

That appellants intended to place a lien on their property in consideration for the loan is further supported by the following language in Paragraph 4 of the Deed of Trust, which obligates appellants to establish and maintain the Deed of Trust as a first-priority lien:

Charges; Liens. Borrower shall pay all taxes, assessments, charges, fines, and impositions attributable to the Property which can attain priority over this Security Instrument, leasehold payments or ground rents on the Property, if any, and Community Association Dues, Fees, and Assessments, if any. To the extent that these items are Escrow Items, Borrower shall pay them in the manner provided in Section 3.

Borrower shall promptly discharge any lien which has priority over this Security Instrument unless Borrower: (a) agrees in writing to the payment of the obligation secured by the lien in a manner acceptable to Lender, but only so long as Borrower is performing such agreement; (b) contests the lien in good faith by, or defends against enforcement of the lien in, legal proceedings which in Lender's opinion operate to prevent the enforcement of the lien while those proceedings are pending, but only until such proceedings are concluded; or (c) secures from the holder of the lien an agreement satisfactory to Lender subordinating the lien to this[.]

⁵ The Deed of Trust defines "Note" as the promissory note signed by appellants on July 19, 2007, in the amount of \$127,980.00.

If Lender determines that any part of the Property is subject to a lien which can attain priority over this Security Instrument, Lender may give Borrower a notice identifying the lien. Within 10 days of the date on which that notice is given, Borrower shall satisfy the lien or take one or more of the actions set forth above in this Section 4.

(Emphasis added). Moreover, Paragraph 9 of the Deed of Trust provides that the Lender has the right to protect its interest in the property, further indicating the intent of appellants to create a lien on the property in consideration for the loan.⁶

We agree with HSBC that the current corporate status of Delta Funding, the original lender and holder of the note, is irrelevant to the question before us. As the circuit court noted, the “holder” of a promissory note, a person in possession of a note specifically endorsed to that person or endorsed in blank, is entitled to enforce the note. *Deutsche Bank Nat. Trust Co. v. Brock*, 430 Md. 714, 729-30 (2013). Accordingly, HSBC, the holder of the note that appellants signed, that was endorsed in blank, was entitled to enforce the note, regardless of Delta Funding’s current legal status and regardless of the absence of a contractual relationship between HSBC and appellants. The circuit court did not err in concluding that HSBC was entitled to summary judgment as a matter of law.

**JUDGMENT OF THE CIRCUIT
COURT FOR WICOMICO
COUNTY AFFIRMED. COSTS TO
BE PAID BY APPELLANTS.**

⁶ Because the four corners of the Deed of Trust unambiguously shows an intent to place a lien on the property as a part of the refinance agreement, it is not necessary to address appellants’ claim that the affidavits of Ocwen were insufficient to establish the intent of the parties.