Circuit Court for Baltimore County
Case No.: 03-C-14-013469

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1949

September Term, 2016

WILBERT EPPS

v.

BANK OF AMERICA N.A., et al.

Meredith,
Arthur,
Eyler, James R.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Meredith, J.

File: November 17, 2017

Substituted trustees for Bank of America, National Association ("Bank of America"), appellee, filed an action for foreclosure against Wilbert Epps, appellant, in the Circuit Court for Baltimore County after Mr. Epps failed to make payments on a loan secured by a lien on real property located in Reisterstown, Maryland. Mr. Epps filed a counterclaim against Bank of America in which Mr. Epps alleged violations of the Real Estate Settlement Procedures Act. In response, Bank of America filed a motion to strike Mr. Epps's counterclaims. The circuit court granted Bank of America's motion to strike, and, while the foreclosure action remained unresolved, this appeal followed. Bank of America moved to dismiss the appeal as prematurely filed. Because there was no final judgment disposing of all claims in the case, we will dismiss the appeal.

QUESTIONS PRESENTED

Epps presents the following three questions for our review:

> I. Did the Circuit Court err in striking appellant's counterclaims which were expressly permitted by the holdings in *Fairfax Sav., F.S.B. v. Kris Jen Ltd. P'ship*, 338 Md. 1, 22 (1995) and *Higgins v. Barnes*, 310 Md. 532, 552 (1987)?
>
> II. Did the Circuit Court impermissibly disregard the rights preserved to Appellant by the General Assembly by the enactment of Real Prop. § 7-105.1(m)(3)?
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> III. Is an order striking a borrower's counterclaim and jury trial against the mortgage servicer in a foreclosure case a final order for appeal purposes?

As mentioned, Bank of America moved to dismiss the appeal because there is no final judgment disposing of all claims. We agree that the appeal is premature and must be dismissed.

BACKGROUND

In 2007, Wilbert Epps, appellant, borrowed money from Bank of America, appellee, to purchase real property located at 17 Mission Wood Way Unit A, Reisterstown, MD 21136. The loan was secured by a deed of trust lien against the property. Mr. Epps has made no payments on this loan since January 1, 2010; Bank of America claims he currently owes in excess of $165,000. In October 2014, Bank of America appointed Carrie M. Ward, *et al.*, as substitute trustees (the "Substitute Trustees") under the deed of trust, vesting them "with all of the right, title and interest and clothed with all the rights, power and privileges of the trustee(s) by the terms of said Deed of Trust and by applicable law."

In December 2014, the Substitute Trustees initiated this case by filing a foreclosure action in the Circuit Court for Baltimore County. Along with the order to docket, the Substitute Trustees filed a Preliminary Loss Mitigation Affidavit. Shortly thereafter, in January 2015, the Substitute Trustees filed a Final Loss Mitigation Affidavit. In February 2015, Mr. Epps requested foreclosure mediation before the Office of Administrative Hearings. The parties were unable to reach an agreement at this mediation session.

Following this failed mediation session, in June 2015, Mr. Epps filed, as a counterclaim in the foreclosure action, a "Class Action Counter Complaint & Jury Demand" (the "counterclaims"), along with a request for a jury trial, naming Bank of America as the counter defendant. Bank of America was not previously a named party to

the foreclosure action. Mr. Epps alleged that, following the unsuccessful mediation session, Bank of America invited Epps "to apply for appropriate loss mitigation." In response to this invitation, Mr. Epps "submitted a complete application to [Bank of America] to be considered for loan modification . . . which would bring his loan current and reduce the monthly payment thereafter to an affordable sum." Mr. Epps further alleged that, while this loan modification application was pending, Bank of America violated regulations under the Real Estate Settlement Procedures Act ("RESPA"), 12 U.S.C. § 2605, *see* 12 C.F.R. § 1024.41, by engaging in a practice known as "dual-tracking." According to Mr. Epps, Bank of America "dual-tracked" him in violation of RESPA by "simultaneously moving toward foreclosure sale of [Epps's] property and reviewing [Epps's pending] homeowner's application for loss mitigation . . . ." The Substitute Trustees were "[n]ot named as a party in this Counter Complaint . . . ."

Bank of America responded to the counter complaint by filing a motion to strike, and argued that the claims were untimely and invalid. Mr. Epps opposed this motion, and Bank of America responded to Epps's opposition to its motion to strike. The circuit court took no action on Mr. Epps's motion until a year later, when the court clerk issued a Notice of Contemplated Dismissal for Lack of Prosecution. Bank of America, along with the Substitute Trustees, filed a Motion to Defer, which the circuit court granted. At that point, the circuit court also granted Bank of America's earlier motion to strike Mr. Epps's counterclaims. Mr. Epps filed a notice of appeal, even though the underlying foreclosure action was (and is) still pending.

DISCUSSION

Bank of America contends, and we agree, that Mr. Epps prematurely appealed from a non-final judgment. In its brief, Bank of America states: "In this case, it is plain that the order from which [Epps] purported to take this appeal did not 'dispos[e] of all claims against all parties' because the trustees' foreclosure action against Appellant remains pending." Moreover, Bank of America notes that it is not the only party to the action, and "the order presently under appeal did not adjudicate the rights of the trustees or dispose of all claims brought by them." Bank of America asserts that, contrary to Mr. Epps's arguments, Mr. Epps's participation in the case did not begin and end with Mr. Epps's counterclaim. And, Mr. Epps "remained the defendant to the foreclosure proceeding even after the Court struck the counterclaim."

Bank of America also contends that the order is not appealable under the "collateral order doctrine." It asserts that this doctrine is limited to a "'small class' of cases," and would require Mr. Epps to satisfy the strict four factor test outlined in *Pittsburgh Corning Corp. v. James*, 353 Md. 657, 660-61 (1999). Bank of America argues that Mr. Epps cannot satisfy the last two factors in this analysis because the order striking Mr. Epps's counterclaim neither resolves an issue "'completely separate from the merits of the action,'" nor renders the issue "'effectively unreviewable if the appeal had to await the entry of a final judgment.'"

In response, Mr. Epps contends that the circuit court's order striking his counterclaims *is* a final appealable order. In support of this contention, Mr. Epps argues

that Bank of America was only made a formal party to this case by virtue of said counterclaims. Therefore, Mr. Epps argues: "[W]hen the Circuit Court struck Epps' counterclaims, Epps and [Bank of America's] only meaningful participation in the case was terminated." Because Bank of America's only participation as a named party in the case ended with the circuit court's dismissal of the counterclaims, Mr. Epps asserts, the order disposing of his counterclaims should be considered final, citing *St. Joseph Medical Center, Inc. v. Cardiac Surgery Associates, P.A.*, 392 Md. 75, 88-89 (2006). In the alternative, Mr. Epps argues that his appeal is nonetheless appropriate because of the "collateral order doctrine."

In *Addison v. State*, 173 Md. App. 138, 152-53 (2007), we highlighted the three essential attributes of a final judgment:

> A "final judgment" from which a party may appeal is "one which settles the rights of the parties or concludes the cause . . . and has been entered on the docket." *Mitchell Properties v. Real Estate Title,* 62 Md. App. 473, 482, 490 A.2d 271 (1985) (internal quotes and citations omitted). A judgment must possess three qualities in order to qualify as a final, appealable judgment:
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> > "If a ruling of the court is to constitute a final judgment, it must have at least three attributes: (1) it must be intended by the court as an unqualified, final disposition of the matter in controversy, (2) unless the court properly acts pursuant to Md. Rule 2-602(b), it must adjudicate or complete the adjudication of all claims against all parties, and (3) the clerk must make a proper record of it in accordance with Md. Rule 2-601."
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> *Board of Liquor v. Fells Point Cafe,* 344 Md. 120, 129, 685 A.2d 772 (1996) (reconsideration denied) (quoting *Rohrbeck v. Rohrbeck,* 318 Md. 28, 41, 566 A.2d 767 (1989)).

As the Court of Appeals noted in *Waterkeeper Alliance, Inc. v. Maryland Department of Agriculture*, 439 Md. 262, 278 (2014), "[r]equiring cases to have reached final judgment before permitting appeal reflects Maryland's long-established policy against piecemeal appeals."

In situations involving multiple claims or parties, Maryland Rule 2-602 provides further guidance regarding the finality of judgments disposing of fewer than all claims:

> **(a) Generally.** Except as provided in section (b) of this Rule, **an order** or other form of decision, however designated, **that adjudicates fewer than all of the claims in an action** (whether raised by original claim, **counterclaim**, cross-claim, or third-party claim), or that adjudicates less than an entire claim, or that adjudicates the rights and liabilities of fewer than all the parties to the action:
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> (1) is not a final judgment;
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> (2) does not terminate the action as to any of the claims or any of the parties; and
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> (3) is subject to revision at any time before the entry of a judgment that adjudicates all of the claims by and against all of the parties.
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> **(b) When Allowed.** If the court expressly determines in a written order that there is no just reason for delay, it may direct in the order the entry of a final judgment:
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> (1) as to one or more but fewer than all of the claims or parties; or
>
> (2) pursuant to Rule 2-501(f)(3), for some but less than all of the amount requested in a claim seeking money relief only.

(Emphasis added.)

In *Schuele v. Case Handyman and Remodeling Services, LLC*, 412 Md. 555, 568-69 (2010) (internal quotations omitted), the Court of Appeals explained that a "'claim,' regardless of whether it is the original claim, a counterclaim, or a third-party claim, is defined as a 'substantive cause of action,' that encompasses all rights arising from common operative facts." We further elaborated on the definition of a claim in *Carl Messenger Service, Inc. v. Jones*, 72 Md. App. 1, 5 (1987):

> **A "claim" is the facts giving rise to a judicial action,** *Edmonds v. Lupton,* 253 Md. 93, 100-101, 252 A.2d 71 (1969)**, not the different items of damages or different remedies sought because of those facts,** *Biro v. Schombert,* 285 Md. 290, 295-97, 402 A.2d 71 (1979) **and a single set of operative facts gives rise to only one claim**, *Diener Enterprises v. Miller,* 266 Md. 551, 556-57, 295 A.2d 470 (1972). This is true whether those facts are asserted by the plaintiff as giving grounds for several remedies or by several parties as giving grounds for one remedy apiece.

(Emphasis added.)

With respect to counterclaims in particular, the Court of Appeals stated in *East v. Gilchrist*, 293 Md. 453, 461 (1982): "The view that a complaint and counterclaim constitute all one claim if they involve the same facts or the same cause of action, would seem to be more in accord with the position taken by this court in *Biro, Diener* and other cases."

In the present case, the circuit court's order striking Mr. Epp's counterclaims was not a final judgment because the order adjudicated "fewer than all of the claims in [the] action," and "adjudicate[d] the rights and liabilities of fewer than all the parties to the action." Rule 2-602. Despite the circuit court's decision to strike Mr. Epps's counterclaims in their entirety, the foreclosure action remains pending in the circuit court.

It is the ratification of the sale which constitutes the final judgment in a foreclosure action. *See Baltimore Home Alliance, LLC v. Geesing*, 218 Md. App. 375, 383 n.5 (2014) (noting that a "court must act to ratify the sale before the foreclosure sale is complete . . . .").

Furthermore, because Mr. Epps's counterclaims arise from the same loan transaction that is at issue in the underlying foreclosure action, they arise from common operative facts, and are part of the same "claim" for the purposes of determining finality and appealability. Here, Mr. Epps's counterclaims stem directly from Bank of America's management of his loan transaction. It is immaterial that Mr. Epps's counterclaim seeks different relief—*i.e.*, monetary damages—than that sought by the Substituted Trustees in the underlying foreclosure action. It is not the relief sought which determines the finality of a judgment; rather, it is the set of operative facts from which these claims are derived which drives our analysis. *See Carl Messenger Service, Inc.*, 72 Md. App. at 5. Consequently, the circuit court's order was not immediately appealable as a final judgment.

In the instant case, an interlocutory appeal to determine whether the circuit court erred in striking Mr. Epps's counterclaims is not expressly allowed by statute, *see* CJ § 12-303, or permitted under Rule 2-602. Such an interlocutory appeal would, therefore, be permitted only if it met the requirements of the common law collateral order doctrine. We explained the limited availability of this exception in *Addison*, *supra*, 173 Md. App. at 153-54:

> The collateral order doctrine, recognized by the Supreme Court in *Cohen v. Beneficial Industrial Loan Corporation,* 337 U.S. 541, 69 S.Ct. 1221, 93 L.Ed. 1528 (1949), permits the prosecution of an appeal from a "narrow class of orders, referred to as collateral orders, which are offshoots of the principal litigation in which they are issued and which are immediately appealable as 'final judgments' without regard to the posture of the case." *Harris v. David S. Harris, P.A.,* 310 Md. 310, 315, 529 A.2d 356 (1987). *See In re Franklin P.,* 366 Md. 306, 326, 783 A.2d 673 (2001). **For a non-final judgment to be appealable under this narrow collateral order exception, each of the following four elements must be satisfied**:
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> > (1) it must conclusively determine the disputed question;
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> > (2) it must resolve an important issue;
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> > (3) it must be completely separate from the merits of the action; and
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> > (4) it must be effectively unreviewable on appeal from a final judgment.
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> *County Com'rs for St. Mary's County v. Lacer,* 393 Md. 415, 428, 903 A.2d 378 (2006). *Accord Baltimore City Department of Social Services v. Stein,* 328 Md. 1, 10-11, 612 A.2d 880 (1992). **In Maryland, "the four requirements of the collateral order doctrine are very strictly applied, and appeals under the doctrine may be entertained only in extraordinary circumstances."** *Lacer,* 393 Md. at 428, 903 A.2d 378 (quoting *In re Foley,* 373 Md. 627, 634, 820 A.2d 587 (2003)). *Accord St. Joseph, supra,* 392 Md. at 86, 896 A.2d 304.

(Emphasis added.)

Mr. Epps contends that the circuit court's order does satisfy all four requirements of the collateral order doctrine. First, Mr. Epps argues that the circuit court's order conclusively determined the disputed question as to whether Mr. Epps may maintain a counterclaim and jury demand in this foreclosure proceeding. Next, Mr. Epps asserts that this order resolves an important issue: his "fundamental right" to a jury trial. Third, Mr.

Epps characterizes his proposed counterclaims as "separate and apart" from the merits of the underlying foreclosure action itself because, unlike the ratification of sale sought by the Substituted Trustees, the counterclaims request class-action monetary relief pursuant to alleged federal RESPA violations. Finally, Mr. Epps contends that the circuit court's order would be "effectively unreviewable" on appeal because the Substituted Trustees "control when a final decision may be entered and [have] effectively prevent[ed] . . . Epps from vindicating the rights of the putative class members . . . by never pursuing any ratification of any foreclosure sale."

It is not necessary for us to address all four elements, however, because Mr. Epps fails to satisfy the third requirement of a collateral order. Mr. Epps's counterclaims are not "completely separate" from the issues that are the subject of the foreclosure action. As noted above, Mr. Epps's counterclaims stem directly from Bank of America's management of the underlying loan transaction, including the manner in which it pursued foreclosure. In fact, Mr. Epps's asserted that his counterclaims would provide a *defense* to the very foreclosure action Mr. Epps now seeks to distance himself from for the purposes of satisfying this required element of the collateral order doctrine. In Mr. Epps's opposition to Bank of America's motion to strike the counterclaims, he stated:

> **Mr. Epps' counter-claim involving the RESPA violations by [Bank of America] is indeed comprised of allegations that would be a 'defense' to any foreclosure in this Court**, as [Bank of America's] ability to maintain the foreclosure proceedings is contingent on its adherence to the requirements of RESPA and its implementing regulations, which it did not observe in this case. Second, and more importantly, the basic fact that Mr. Epps could have filed a different complaint than he did is entirely irrelevant.

(Emphasis added.)

Because Mr. Epps's counterclaims are inextricably intertwined with the underlying transaction giving rise to the foreclosure action, he is unable to satisfy each of the four requirements of a collateral order.[1]

Consequently, the circuit court's order is not immediately reviewable, and the appeal must be dismissed.

APPELLEE'S MOTION TO DISMISS IS GRANTED.
APPEAL DISMISSED. COSTS TO BE PAID BY APPELLANT.

[1] Mr. Epps also makes the additional argument that the circuit court's order should be considered final pursuant to the Court of Appeals's holding in *St. Joseph Med. Ctr., Inc. v. Cardiac Surgery Assocs., P.A.*, 392 Md. 75 (2006). Mr. Epps asserts: "Here, like in *St. Joseph*, the Circuit Court's order striking Epps' counterclaims removed Epps and [Bank of America] from the only substantive proceedings to which they had appeared . . . the counterclaims." He further suggests that the case "recognized that the common-law recognition of a final order may apply to permit an appeal which would otherwise not meet the traditional situation." Mr. Epps's reliance on *St. Joseph* is misplaced.

We explained *St. Joseph's* limited holding as follows in *Addison*, *supra*, 173 Md. App. at 154-55: "In *St. Joseph*, *supra*, the Court of Appeals distilled the limited scope of the collateral order doctrine to the 'one very unusual situation' that 'involves trial court orders permitting depositions of [non-party] high level governmental decision makers' under certain circumstances." The present case, however, does *not* involve this "unusual situation." *Id*. Indeed, this case involves neither discovery orders nor appeals taken by non-parties, which was the distinctive factor that enabled non-party St. Joseph to pursue an immediate appeal. Mr. Epps remains a party to the foreclosure action, even after the disposition of his counterclaims. We agree with Bank of America's assertion in its brief: "Here, it is one of *the parties* to the underlying action . . . who claims to be aggrieved . . . . [Mr. Epps] need only wait until the action advances to a final judgment, and he can challenge the interlocutory order then."