UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 2180

September Term, 2015

BWI MRPC HOTELS, LLC.

v.

JOSEPH N. SCHALLER and EDWARD U. LEE, III, TRUSTEES

Berger,
Kehoe,
Harrell, Glenn T., Jr.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Harrell, J.

Filed: February 15, 2017

FACTS AND LEGAL PROCEEDINGS

Appellant, BWI MRPC Hotels, LLC (BWI), owned undeveloped property at 1200 Old Elkridge Landing Road, Linthicum, Maryland (the Property). A secured creditor, Crown Bank, initiated a foreclosure action as to the Property following MRPC Christiana LLC's (an entity related to Appellant) default on loans for which the Property served as collateral. Appellees, Joseph N. Schaller and Edward U. Lee, III (successor Trustees for the creditor), filed in the Circuit Court for Anne Arundel County, on 12 March 2015, an Order to Docket the foreclosure action.

The Trustees retained Alex Cooper Auctioneers to advertise the public auction sale. The auctioneer ran an advertisement of the April 23 auction in *The Baltimore Sun* on 7, 14, and 21 April 2015, as well as on its website. Cooper sent additionally a mass email to thousands of potentially-interested persons, alerting them to the auction.

The Property sold at the April 23 auction for $500,000 to Crown Real Estate Holdings, Inc., an entity owned by Crown Bank. BWI filed timely[1] its written Exceptions to Sale and Request for Hearing, arguing exclusively that the sale should be set aside because the difference between the Property's sale price and its alleged value of $2.8 million should shock the conscience of the court. Initially, the circuit court denied

[1] Md. Rule 14-305(d)(1) states that written exceptions "shall be filed within 30 days after the date of a notice issued pursuant to section (c) of this Rule or the filing of the report of sale if no notice is issued." The Notice of Report of Sale and the Trustees' Report of Sale were filed on 7 May 2015, within 30 days of BWI's June 4 exceptions filing.

ratification of the sale because the record did not contain evidence of sufficient publication prior to sale, Md. Rule 14-303(b), or an Affidavit of Purchaser, Md. Rule 14-305(b). On July 15 and 23, the Trustees filed motions for reconsideration, requesting ratification of the sale or, alternatively, a hearing.[2] BWI responded, requesting a hearing and incorporating its earlier written exceptions. The Trustees moved, on September 10, to overrule BWI's exceptions and to ratify the foreclosure. A hearing was rescheduled, at Trustees' request, from October 16 to December 3.

At the hearing, BWI produced Chirag Patel, Trustee of the trust that owns BWI, to testify as to the value of the Property. Patel was permitted conditionally (over the Trustees' objection) to provide several numbers suggestive of the Property's value. In 2012, according to Patel, the Property was appraised at $2.8 million for the purpose of using the Property as collateral on two mortgages, each in the amount of $990,000. Patel testified additionally that the Trust purchased the Property for $1.1 million, and that, in his opinion, it would be worth $2 million, assuming the development, construction, and operation of a proposed hotel on it.

Trustees' counsel's objection to receipt and consideration of Patel's testimony was explained as follows: ". . . I think what is occurring here . . . is that an expert opinion as

[2] At the later exceptions hearing, counsel for Trustees explained that "when the filing of the Court occurred with the electronic filing, two of the exhibits [a copy of *The Sun* advertisement and dates it ran, and the affidavit of the purchaser] somehow did not get uploaded. And what we then did when we got the notice from the Court, that if it was deficient, is we provided the two notices."

to a value of this property is attempting to be put in without an individual coming in and offering expert testimony as to the fact that this property is valued at that." The court determined that, although he was not offered as an expert, Patel was testifying as a "quasi expert." The judge stated, ". . . I will accept this conditionally and then I am not going to be persuaded just because I see the number, I still have to figure out whether that is an admissible number. . . . I will accept it in evidence as I said, subject to the redaction or striking later . . . ." Under cross-examination, counsel for the Trustees confronted Patel with a Maryland State Department of Assessment and Taxation document that suggested, for the purpose of tax assessment, the base value of the Property was $1,015,000, and as of 1 January 2014, the property was valued at $1,419,000. With respect to the Property's value, the court concluded ultimately:

> So you know I am not convinced that the property was worth 2.8 [million dollars]. I don't know what the situation was at the time and that might have made some assumptions and quite candidly I have seen a lot of bank committees accept high appraisals because they want to make a loan and that doesn't necessarily bear out what the actual value is.
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> I do see that according to SDAT, the property was worth 1.4 [million dollars].

On 7 December 2015, the circuit court denied BWI's Exception to Sale and ratified the 23 April 2015 foreclosure sale. BWI filed timely its Notice of Appeal, offering the following questions for our consideration:[3]

[3] On 29 December 2015, BWI filed a motion to stay enforcement of the ratification of the foreclosure sale pending appeal. The circuit court granted the stay on 21 March 2016.

1. Did the Circuit Court abuse its discretion by overruling BWI MRPC Hotels, LLC Exceptions and ratifying the foreclosure sale despite the fact that the sale was not conducted for the purpose of obtaining the highest price possible under the circumstances and the sale price of the property "shocks the conscience?"

2. Did the Circuit Court abuse its discretion by refusing to recognize Mr. Chirag Patel as a witness competent to provide testimony pertaining to the value of the Property sold at foreclosure and/or by precluding Mr. Patel from testifying to such matters?

STANDARD OF REVIEW

> In ruling on exceptions to a foreclosure sale and whether to ratify the sale, trial courts may consider both questions of fact and law. *See S. Md. Oil, Inc. v. Kaminetz*, 260 Md. 443, 451, 272 A.2d 641 (1971) (explaining questions of fact and law may be raised in exceptions to foreclosure sales). In reviewing a trial court's finding of fact, we do not substitute our judgment for that of the lower court unless it was clearly erroneous and give due consideration to the trial court's opportunity to observe the demeanor of the witnesses, to judge their credibility and to pass upon the weight to be given their testimony. Questions of law decided by the trial court are subject to a *de novo* standard of review.

Jones v. Rosenberg, 178 Md. App. 54, 68, 940 A.2d 1109, 1117 (2008), *cert. denied*, 405 Md. 64, 949 A.2d 652 (2008) (quotation marks and some internal citations omitted).

DISCUSSION

BWI argues first that: 1) the foreclosure sale price of the property was so inadequate as to shock the conscience; 2) the Trustees failed to fulfill their duties; 3) a mortgagee's purchase of its own property at foreclosure requires close scrutiny; and, 4) inadequate advertising and bidding led to a grossly inadequate sale price of the Property. Second, BWI contends that the circuit court abused its discretion by prohibiting Patel from testifying as to the property's fair market value.

In response to BWI's first argument, the Trustees assert that: 1) there was no irregularity in the foreclosure sale; 2) an inadequate foreclosure sale price alone does not justify a resale, absent a concomitant irregularity; and, 3) the Trustees did not act in bad faith and the advertising was proper. The Trustees argue also that the circuit court rejected properly Patel's testimony, whether considered as an expert, "quasi-expert," or a lay witness, and that speculative property estimates cannot be the basis to overturn an otherwise proper foreclosure sale.

I. BWI Failed to Allege or Prove a Concomitant Irregularity Required to Overturn a Foreclosure Sale Where the Only Claim Made is That the Sale Price Shocks Allegedly the Conscience.

BWI points to "[t]he leading case of inadequacy of sale price," *Pizza v. Walter*, 345 Md. 664, 694 A.2d 93 (1997), *mandate withdrawn,* 346 Md. 315, 697 A.2d 82 (1997), to bolster its argument that "[t]he law is well-settled that a trustee sale must be set aside where the sale price is so grossly inadequate as to shock the conscience of any court." The *Pizza* Court stated,

> Pizza contends that the property was sold for an inadequate price. The law is well settled that inadequacy of price alone, unless it indicates fraud, unfairness or some misconduct or mistake for which the purchaser should be held responsible, ordinarily is not a sufficient ground to set aside a sale. Although inadequate price alone does not ordinarily necessitate setting aside a sale, when inadequate price is coupled with other evidence of irregularity the sale may be set aside, even if the price might not shock the conscience of the court.

Pizza v. Walter, 345 at 677, 694 at 99 (citations omitted).

An inadequate foreclosure sale price, therefore, even if it is asserted that such shocks the court's conscience, is insufficient typically, without further irregularity, to

authorize a court to overturn the ratification of a foreclosure sale. *See, e.g.*, *Hurlock Food Processors, Inv. Assocs. v. Mercantile-Safe Deposit & Trust Co.*, 98 Md. App. 314, 345, 633 A.2d 438, 453 (1993) ("In all of the cases on which the exceptors rely for their claim that the prices realized here were inadequate, . . . the court found significant problems with the foreclosure sales other than inadequate price."). "Such procedural allegations [of irregularity] may charge that 'the advertisement of sale was insufficient or misdescribed the property, the creditor committed a fraud by preventing someone from bidding or by chilling the bidding, challenging the price as unconscionable, etc.'"[4] *Bates v. Cohn*, 417 Md. 309, 327, 9 A.3d 846, 857 (2010) (quoting *Greenbriar Condo., Phase I Council of Unit Owners, Inc. v. Brooks*, 387 Md. 683, 741, 878 A.2d 528, 563 (2005), *superseded by rule,* Md. Rule 14–305).

In the present case, BWI alleged no irregularity (as the law explains what this word means in the present context) in its written exceptions, and conceded at the exceptions hearing that the foreclosure sale raised no issue of irregularity.

[4] Although Maryland appellate cases suggest occasionally that an inadequate or unconscionable foreclosure sale price is an irregularity in itself, the better-reasoned case law is clear that such a contention is to be considered properly as "a strong auxiliary argument in connection with circumstances which cast doubt or suspicion upon the correctness of the sale[,]"*Pizza v. Walter*, 345 Md. 664, 677, 694 A.2d 93, 99 (1997) *mandate withdrawn,* 346 Md. 315, 697 A.2d 82 (1997) (quoting *Walker v. Williams*, 218 Md. 312, 316, 146 A.2d 203, 205 (1958)), not a grounds in itself to refuse or overrule a ratification, "unless the price be so grossly inadequate as to, in and by itself, indicate mistake, fraud, or other unfairness in the conduct of the sale." *Pizza*, 345 Md. at 677, 694 A.2d at 99 (quoting *Waters v. Prettyman*, 165 Md. 70, 166 A. 431, 432 (1933)).

> THE COURT: . . . [W]e started with that premise that you were not quarreling with the way in which the sale [occurred] and I guess I will make that clear for the record too, so if there is an appeal I want to make sure that there is no misunderstanding at the appellate level that it is not your contention that there was an irregularity beyond the price that was shot really low according to your client.
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> [COUNSEL FOR BWI]: I guess it depends on the definition of irregularity. There is no procedural irregularity –
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> THE COURT: Other than the price issue, you are not saying that they didn't advertise the way they were supposed to or they suppressed a sale or any number of things that could have happened, right?
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> [COUNSEL FOR BWI]: Right. We are saying no rule was not adhered to.

During its closing argument at the exceptions hearing, however, BWI attempted to shoehorn into the proceedings an apparent irregularity-like argument, not raised in its written exceptions and which appears contrary facially to its earlier statement abandoning any pretense of alleging, let alone proving, an irregularity, that the Trustees failed to maximize diligently the Property's sale price.[5]

[5] Md. Rule 14-305(d) authorizes holders of subordinate interests in a lien subject to a foreclosure sale to file exceptions to the sale, which "shall be in writing [and] shall set forth the alleged irregularity with particularity . . . . Any matter not specifically set forth in the exceptions is waived unless the court finds that justice requires otherwise." BWI's written exceptions alleged only that "[t]he $500,000.00 foreclosure sale price of Defendant's property secured at public auction should be set aside because the sale price is so grossly inadequate as to shock the conscience," based on the Property's alleged appraisal value of $2.8 million. BWI did not allege in its written exceptions any of the corollary sub-arguments it mounts in its brief before us.

During closing arguments at the exceptions hearing, BWI argued (for the first time) that the Trustees failed to perform their duty of due diligence to treat the Property, in the course of advertising the foreclosure sale, as though it was their own. The trial court entertained (briefly) and then rejected this argument. Under Md. Rule 14-305(d), the circuit court may allow this tardy supplementation if justice so requires. Granting the benefit of the doubt to both BWI and the lower court, we infer that the court believed that

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Having wedged its toe in the judicial doorway in the circuit court, BWI attempts now to barge through that door by offering, in addition to the "shocks the conscience" argument, two additional contentions—that trustees must treat a foreclosure as a sale of their own property and that courts must scrutinize closely the purchase of foreclosure property by the mortgagee—and the further charge that the sale in this case involved inadequate advertising and bidding. BWI's mash-up of these arguments, therefore, appears to be that the alleged inadequacy of advertising and bidding may constitute: 1) an irregularity in the context of the "shocks the conscience" standard; 2) evidence that the Trustees violated their duty to treat the Property as their own; and/or, 3) evidence of bad faith in the context of a mortgagee purchasing its own property at foreclosure, or some combination of the totality of the above. We conclude that the Property's sale price was not "so grossly inadequate as to, in and by itself, indicate mistake, fraud, or unfairness," *Pizza*, 345 Md. at 677, 694 A.2d at 99 (quoting *Waters v. Prettyman*, 165 Md. 70, 166 A. 431, 432 (1933)). Nor do we find any evidence of such irregularities in the Trustees' advertising and sale of the Property as to bar ratification. Accordingly, none of BWI's

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the interest of justice required consideration of BWI's auxiliary, unwritten arguments. Accordingly, it is before us to decide whether the trial judge abused his discretion in rejecting the argument. Without such benefit of the doubt, it would appear that BWI was trying to have its cake, and it eat too, by injecting the missing essential element of irregularity into its "shocks the conscience" argument, after failing to do so in its written exceptions. Our generosity of spirit ends here, however.

arguments demonstrate that the circuit court judge abused his discretion in ratifying the sale.

Trustees' Advertising and Bidding Entailed No Irregularity, Violation of Trustees' Duties, or Bad Faith.

Md. Rule 14-210, Foreclosure of Lien Instruments, Notice Prior to Sale, states

> **(a) By Publication.** Before selling property in an action to foreclose a lien, the individual authorized to make the sale shall publish notice of the time, place, and terms of the sale in a newspaper of general circulation in the county in which the action is pending. Notice of the sale of an interest in real property shall be published at least once a week for three successive weeks, the first publication to be not less than 15 days before the sale and the last publication to be not more than one week before the sale. Notice of the sale of personal property shall be published not less than five days nor more than 12 days before the sale.

Similarly, Md. Rule 14-303, Judicial Sales, Procedure Prior to Sale, states

> **(b) Public Sale--Advertisement.** Unless otherwise ordered by the court, a trustee proposing to make a public sale shall give notice by advertisement of the time, place, and terms of sale in a newspaper of general circulation in each county where any portion of the property is located. The notice shall describe the property to be sold sufficiently to identify it and shall be given as follows:
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> (1) for the sale of an interest in real property, at least once a week for three successive weeks, the first publication to be not less than 15 days before the sale and the last publication to be not more than one week before the sale; or
>
> (2) for the sale of personal property, not less than five days nor more than 12 days before the sale.

The record indicates that, prior to the foreclosure sale, the Trustees, through Alex Cooper Auctioneers, advertised the auction in *The Baltimore Sun* for three consecutive weeks, on 7, 14, and 21 April 2015, in compliance with the Rules. Going beyond this bare regulatory requirement, Alex Cooper advertised on its website the Property's

forthcoming sale, and sent an "e-mail blast" to thousands of potential buyers, advertising the auction. At the exceptions hearing and in its brief before us, BWI conceded that the Trustees satisfied all relevant regulatory requirements.

BWI maintains, nonetheless, that "[a]s a result of the inadequate advertising, bidding on the Property was practically non-existent" because only two people submitted bids for the Property. And yet, because the Trustees satisfied the legal requirements for advertising, the only way to arrive at the conclusion that the advertising was inadequate is by inference from the "practically non-existent" amount of bidding. This reasoning is circular, and, in any event, the circuit court judge observed that the presence of only two bidders "is two people more than usually [show up]." The judge continued,

> Because I frankly expected the scenario to be that nobody bid in except for the lender and that they just chose an arbitrary price. But it looks to me that it started at 3 [hundred thousand dollars] and went a little bit higher, a little bit higher and then the other two kind of flaked out and then he was left with the purchase. And I also would suggest that there is no particular reason that I have heard that your client couldn't have drummed up some support for this property also.

Irregularities sufficient to deny ratification of a foreclosure sale include insufficient advertising, advertisements that misdescribe the property, the prevention or chilling of bidding, and an unconscionable sale price. *Bates v. Cohn*, 417 Md. 309, 327, 9 A.3d 846, 857 (2010) (quoting *Greenbriar Condo., Phase I Council of Unit Owners, Inc. v. Brooks*, 387 Md. 683, 741, 878 A.2d 528, 563 (2005), *superseded by rule,* Md. Rule 14–305). Here, the advertisements were legally sufficient and accurate, there was no evidence that bids were chilled or prevented, and the sale price, although *perhaps*

arguably below market value, was not unconscionable. Thus, we find no allegation or proof of irregularity sufficient to reverse the trial judge for abuse of discretion, based on the "shocks the conscience" argument.

With respect to the duties of the Trustees, BWI argues that "the trustee . . . must conduct the sale for the sole purpose of obtaining as large a price as is possible, just he/she would if the property being sold was his/her own." In 2011, the Court of Appeals described the duties of a trustee in these circumstances:

> When a foreclosure sale is held pursuant to the terms in a deed of trust, trustees must adhere to certain standards in carrying out their duties. Trustees are under a duty "to exercise the same degree of prudence, care, diligence and judgment, that a man of ordinary business judgment and experience would exercise, in selling his own property." *Webster,* 176 Md. at 254, 4 A.2d at 438 [*Webster v. Archer*, 176 Md. 245, 4 A.2d 434 (1939)]. In performing their obligations, trustees have "discretion to outline the manner and terms of the sale, provided their actions are consistent with the deed of trust and the goal of securing the best obtainable price." *Simard,* 383 Md. at 312, 859 A.2d at 200 (2004) [*Simard v. White*, 383 Md. 257, 859 A.2d 168 (2004)] (relying on *Waters v. Prettyman,* 165 Md. 70, 75, 166 A. 431, 433 (1933)). Further,
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> > Unless the precise method of sale is prescribed by contract or decree, some discretion is necessarily granted to the trustee, attorney or assignee, making the sale, as to the manner in which the property will be offered. That discretion will naturally be affected by the character and location of the property and other circumstances peculiar to the case, so that it is impossible to lay down a hard and fast rule . . . .
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> *Webster,* 176 Md. at 254–55, 4 A.2d at 438.

Fagnani v. Fisher, 418 Md. 371, 384–85, 15 A.3d 282, 290 (2011).

Because the Trustees complied fully with the law, and went beyond the requirements by advertising online and via email, we see no breach of duty on the part of the Trustees. The Trustees did not violate their duties of prudence, care, diligence, and

judgment in the sale of the Property, so we see no grounds, pursuant to this argument, to hold that the trial judge abused his discretion.

BWI argues next that "when a mortgagee purchases its own property at foreclosure, the court must closely scrutinize the sale for impropriety and is required to set aside the sale upon 'slight evidence of partiality, unfairness or want of the strictest good faith.'" (quoting *S. Maryland Oil, Inc. v. Kaminetz*, 260 Md. 443, 450, 272 A.2d 641, 645 (1971)). The Trustees' actions in the advertising and sale of the Property raise no hint of partiality, unfairness, or bad faith. We hold that, despite the "slight evidence" of impropriety required under this standard, the mortgagee's purchase of its own property alone provides no reason to hold that the circuit court judge abused his discretion.

Because a below market sale price alone does not warrant typically overturning a foreclosure sale, and because the Trustees advertised and sold the Property without a trace of irregularity, breach of duties, or bad faith, we are satisfied that the court did not abuse its discretion in upholding ratification of the foreclosure sale.

II. We Need Not Resolve the Question Regarding Patel's Testimony.

BWI argues that "the circuit court abused its discretion by prohibiting Mr. Patel from testifying as to the Property's fair market value" because his business experience qualified him as an expert witness under Md. Rule 5-702 and relevant case law. The Trustees answer that Patel's testimony satisfies neither "the applicable Maryland Rules regarding expert opinions or case law regarding lay owner testimony," and in any event, "Mr. Patel's testimony lends nothing to the procedural irregularity argument . . . ."

Even if the circuit court abused its discretion by giving ultimately no weight to Patel's testimony, we agree with the Trustees that, even if we accepted any of the valuations tossed out by Patel, we would be no closer to finding the requisite evidence of irregularity, breach of trustee duties, bad faith, or a price so objectionable that it constitutes inherently one of the above. Thus, we need not address fully this issue, and accordingly, we hold that the circuit court judge did not abuse his discretion in ratifying the foreclosure sale of the Property.[6]

[6] Even had we concluded that it was necessary to confront the dispute as to the trial judge's weighing of Patel's testimony, we can visualize clearly that he had good reasons to place no faith in that testimony. First, BWI did not offer Patel as an expert. Second, even had it done so, Patel would not qualify as an expert.

> The admissibility of expert testimony generally is subject to evaluation according to three requirements: (1) the witness qualifies as an expert on the topic about which he or she intends to testify; (2) the subject is appropriate for expert testimony; and (3) there is an adequate factual basis supporting the testimony. Md. R. 5–702. The last factor includes two sub-issues: factual basis and methodology. [S]imply because a witness has been tendered and qualified as an expert in a particular occupation or profession, it does not follow that the expert may render an unbridled opinion which does not otherwise comport with Maryland Rule 5–702. Instead, sufficient facts must underlie the expert's opinions that indicate the use of reliable principles and methodology in support of the expert's conclusions so that the opinion constitutes more than mere speculation or conjecture.

Exxon Mobil Corp. v. Ford, 433 Md. 426, 477–78, 71 A.3d 105, 135–36, *as supplemented on denial of reconsideration*, 433 Md. 493, 71 A.3d 144 (2013) (quotation marks and some citations omitted). Patel's speculative valuations relied on a third-party assessment performed for different purposes and his own shaky assumptions about the future development, construction, regulatory compliance, and operation of a hotel on the property (including an assumption that BWI could acquire two additional parcels to round-out an assemblage). Third, even if Patel could testify as an informed lay person (a "quasi expert," as coined by the trial judge) as to the value of the Property sold at foreclosure, the flaws and gaps in his testimony justified the judge finding no persuasive

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JUDGMENT OF THE CIRCUIT COURT FOR ANNE ARUNDEL COUNTY AFFIRMED. CASE REMANDED TO THE CIRCUIT COURT TO REMOVE THE STAY. COSTS TO BE PAID BY APPELLANT.

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force in his testimony. In some cases, property owners are competent presumptively to testify about the value of their properties (e.g. condemnation and property tax assessment appeals cases) because they are familiar necessarily with said properties, but that principle does not apply when the valuation "is only a future prospect" that depends on the occurrence of certain future events, such as development. *Ray v. Mayor & City Council of Baltimore*, 430 Md. 74, 99, 59 A.3d 545, 559 (2013).