UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 2404

September Term, 2015

ROSALYN M. RUSSELL

v.

MARK H. WITTSTADT, et al.

Woodward,
Graeff,
Sharer, J. Frederick
(Senior Judge, Specially Assigned),

JJ.

Opinion by Graeff, J.

Filed: January 20, 2017

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

In this appeal, Rosalyn M. Russell, appellant, challenges an order of the Circuit Court for Prince George's County denying her exceptions to a foreclosure sale. Ms. Russell presents two questions for this Court's review, which we have rephrased slightly, as follows:

1. Did the circuit court abuse its discretion by overruling Ms. Russell's exceptions without a hearing?
2. Did the circuit court err in overruling Ms. Russell's exceptions on the merits?

For the reasons set forth below, we shall affirm the judgment of the circuit court.

FACTUAL AND PROCEDURAL BACKGROUND

On October 16, 2007, Ms. Russell refinanced her property, which was located at 13809 Bentwater Drive in Upper Marlboro, Maryland ("the Property"). To secure the loan of $274,811, Ms. Russell executed a deed of trust in favor of Homebridge Mortgage Bankers Corp., listing the Property as collateral. In April 2009, Ms. Russell defaulted on her loan.

On September 19, 2012, Homebridge assigned the deed of trust to Bank of America, N.A. On June 26, 2013, Bank of America appointed Mark H. Wittstadt, Gerard Wm. Wittstadt, Jr., and Deborah A. Holloway Hill as substitute trustees ("the Substitute Trustees"), appellees.

Ms. Russell stated in an affidavit that, in July 2013, she received a Notice of Intent to Foreclose, which listed Bank of America as the secured party. On October 24, 2013, the law firm of Morris, Hardwick & Schneider, LLC ("the Morris firm") initiated a foreclosure

action in the Circuit Court for Prince George's County on behalf of the Substitute Trustees.[1]

On three occasions in October and November 2013, a process server attempted to serve Ms. Russell with the foreclosure Order to Docket and associated paperwork, including a loss mitigation application and envelope addressed to the Morris firm. Ms. Russell could not be reached, however, so the process server posted the documents on Ms. Russell's front door and mailed additional copies to her. An affidavit was filed in November 2013 to that effect.

On February 14, 2014, Bank of America assigned the deed of trust to The Secretary of Housing and Urban Development. On March 25, 2014, The Secretary of Housing and Urban Development assigned the deed of trust to Bayview Loan Servicing, LLC ("Bayview").

On August 4, 2014, the Morris firm mailed a copy of a Final Loss Mitigation Affidavit and a Request for Mediation form to Ms. Russell, and on August 8, 2014, they filed an Affidavit of Compliance to that effect, which included copies of the documents. The Final Loss Mitigation Affidavit provided the following explanation why a loss mitigation analysis was not conducted: "Phone call attempts to contact customer have been made. Financial requirements have been sent. Customer has not returned any financial

[1] The record reflects that, at some point in late 2014, Morris, Hardwick & Schneider, LLC, became Morris, Schneider & Wittstadt, LLC. The firm's contact information, however, remained the same.

documents whatsoever." The Request for Mediation form listed Bayview as the secured party and included the company's address.

On October 30, 2014, the Property was sold at auction to Bayview for $160,100. A Report of Sale was filed on November 25, 2014. On December 15, 2014, the circuit court docketed a notice of ratification, indicating that the foreclosure sale of the Property would be ratified "unless cause to the contrary thereof be shown on or before the 15th day of January, 2015."

It appears that, at some point after the foreclosure sale, but prior to ratification, the Morris firm was acquired by Butler & Hosch, P.A., which was in turn acquired by Alba Law Group, P.A.. On July 23, 2015, the Alba Law Group, P.A. ("the Alba firm") filed a Notice of Appearance on behalf of the Substitute Trustees. Later that month, the Alba firm sent a letter to Ms. Russell, advising her that they represented Bayview, and they had "been instructed to institute foreclosure proceedings." The letter sought to collect on an outstanding loan amount of $416,788.95.

Perhaps due to the successive changes in appellees' representation, the proof of publication of the court's notice of ratification was not filed until August 28, 2015. On September 9, 2015, the circuit court docketed a memorandum and order declining to ratify the sale because of the following deficiencies: "Recorded Deed of Appointment of Substitute Trustees"; "Additional Bond Not Filed"; and "PRINTERS CERTIFICATION POST SALE NOTICE." The court ordered that the deficiencies be cured with 30 days of the entry of the order. On September 23, 2015, appellees filed a Response to Memorandum

and Order Finding Deficiency, providing the court with the requested deed, noting that appellees already had posted a bond and that no additional bond was needed because the property was purchased by the lender, noting that the printer's certification of post-sale notice was filed on August 28, 2015, and asking the court to find that the deficiencies have been cured.

On October 16, 2015, Ms. Russell filed exceptions to the sale of the Property and requested a hearing. She advanced two exceptions to the sale. First, she argued that the sale should have been set aside "because the lender engaged in extrinsic fraud by failing to provide . . . loss mitigation information prior to the sale, thereby preventing [her] from exercising her pre-sale right to pursue loss mitigation." In this regard, she contended that "Bayview took no action to notify [Ms. Russell] of her loss mitigation options," and she was "*never notified* as to how to pursue pre-sale loss mitigation efforts."

Second, Ms. Russell argued that the sale should have been set aside "because the sale price [was] grossly inadequate and should shock the conscience of the court." In this regard, she argued that, according to the Alba firm's letter, she owed approximately $416,789.95, but the foreclosure sale price was $160,100, which "constitutes a paltry 38.4% of that figure, and leaves [Ms. Russell] with a staggering deficiency figure of $256,688.95, more than one and a half times more than what the property sold for." In a footnote, Ms. Russell noted that she was "prepared to furnish an expert witness to testify as to market conditions and the actual property value upon [the circuit court] scheduling an evidentiary hearing."

Attached to her exceptions was an affidavit she signed, averring the following facts:

> 3) I received a Notice of Intent to Foreclose ("NOI") on or about July of 2013.
>
> 4) The NOI names Bank of America, N.A. as the secured party and the loan servicer. It also provided a telephone number for "Home Retention Services, Inc."
>
> 5) The NOI did not name Bayview Loan Servicing, LLC ("Bayview") as the loan servicer, and did not otherwise indicate that Bayview had any cognizable interest in the loan.
>
> 6) During the course of this case, the servicing of the loan was transferred to Bayview sometime during 2014.
>
> 7) I never received a loss mitigation solicitation letter from Bayview, and was not aware to whom I could send loss mitigation applications until after the sale occurred.
>
> 8) But for Bayview's failure to timely identify the person or department to whom a loss mitigation application could have been directed, I would have filed an application for a loan modification prior to the sale.

On October 16, 2015, appellees filed a response to Ms. Russell's exceptions.[2] With respect to Ms. Russell's exception regarding Bayview's alleged failure to provide her with loss mitigation options, appellees argued, *inter alia*, that Ms. Russell's assertions were "contrary to the [c]ourt's record." They contended that the record reflects that Bayview attempted to contact Ms. Russell, "who did not respond to the inquiries or return any information." Moreover, they asserted that "Bayview did in fact solicit [Ms. Russell] to engage in loss mitigation opportunities," she was given an opportunity, before the sale, for

[2] Appellees initially filed a response to Ms. Russell's exceptions on October 16, 2015. For unknown reasons, appellees filed a second copy on November 2, 2015.

mediation, and they provided her information regarding the State's "HOPE Hotline." Appellees included exhibits in support of these claims.

With respect to the purchase price, appellees questioned Ms. Russell's comparison of the sale price to her outstanding debt, as opposed to the market value of the property. They argued, however, that even if her valuation was correct, courts had upheld sales with smaller percentages of market values versus sales price. They contended that Ms. Russell's contention in this regard did not comply with Maryland Rule 14-305, which "requires that exceptions be set out with **particularity**," because she "offer[ed] no assertion within [her] filings of the fair market value of the property," but merely offered to provide an expert to testify about the market value of the property. In support of their claim that the sale price was not inadequate, appellees attached as an exhibit a printout from the State Department of Assessments and Taxation's website, which indicated that, for taxation purposes, the Department valued the Property's "base value" at $189,300, putting the sale price at approximately 84% of the value.

On November 5, 2015, the circuit court overruled Ms. Russell's exceptions and denied her request for a hearing. On December 17, 2015, the circuit court ratified the foreclosure sale.

STANDARD OF REVIEW

In *Johnson v. Nadel*, 217 Md. App. 455, 464 (2014), this Court set forth the standard of review of a circuit court's ruling on exceptions to a foreclosure sale:

> 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 (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." *Young v. Young*, 37 Md. App. 211, 220 (1977). Questions of law decided by the trial court are subject to a *de novo* standard of review. *See Liddy v. Lamone*, 398 Md. 233, 246-47 (2007).

(quoting *Jones v. Rosenberg*, 178 Md. App. 54, 68 (2008)) (parallel citations omitted).

DISCUSSION

Ms. Russell contends that the circuit court abused its discretion in denying her exceptions, for two reasons. First she argues that the court erred in denying her exceptions without first holding a hearing. She asserts that, pursuant to Maryland Rule 14-305(d)(2), a court is required to hold a hearing if one "is requested and the exceptions or any response clearly show a need to take evidence." She contends that there was "a need to take evidence" with respect to her assertion that "Bayview engaged in extrinsic fraud, preventing her from pursuing loss mitigation options prior to the sale by simply failing to provide her with relevant information." She cites her affidavit, filed with her exceptions, in which she stated that she never received a loss mitigation solicitation from Bayview. She further contends that, due to the court's "premature ruling," she was unable to "muster evidence to challenge" the appellees' evidence offered in their opposition, and she similarly was unable to present evidence of the inadequacy of the sale price. She argues that, "[b]ecause the Exceptions and the response thereto showed a plain need to take evidence," the circuit court abused its discretion in overruling her exceptions without a hearing.

Ms. Russell's second argument is that the "circuit court must be reversed because it was legally incorrect in overruling the exceptions on their merits." In this regard, she contends that "a lender must provide a means for a borrower to pursue loss mitigation options prior to a foreclosure sale, . . . the failure to do so is an inexcusable omission," and that failure is the "type of extrinsic fraud" that she was permitted to raise in post-sale exceptions.

Appellees argue that, with respect to Ms. Russell's loss mitigation exception, there "are no allegations in the Exceptions that [a]ppellees or the secured party dissuaded or misled [Ms. Russell] about her right to participate in mediation or to file a Motion to Stay or Dismiss." Nor does Ms. Russell "assert [or] claim that she did not receive the filings or notices required to be sent by the [a]ppellees." Most important, they argue,

> is the fact that [Ms. Russell's] assertions are contrary to the record. The [a]ppellees filed a Final Loss Mitigation Affidavit wherein the note holder states that it made phone calls and sent written solicitations to [Ms. Russell] who did not respond to the inquiries or return any information requesting a loss mitigation review. Filed with the loss mitigation affidavit are copies of a Request for Foreclosure Mediation sent to the Defendant at the Property. Attached to [Ms. Russell's] Exception as Exhibit 6 is a mortgage statement dated July 16, 2014, three months prior to the foreclosure sale, which includes contact information for Bayview and provides at the bottom left-hand of the statement a statement directing [Ms. Russell] to the HOPE Hotline.

With respect to Ms. Russell's exception regarding inadequate sale price, appellees concede that this is an "irregularity" that can properly be raised in a post-sale exception. They argue, however, that she failed "to establish with particularity that the foreclosure sale was not fairly and properly made." They assert that, "[a]ssuming for the sake of

argument that the balance due . . . constituted an accurate assessment of the Property's value at the time of the sale, Appellate Courts in this state have affirmed sales which yielded much less than 38.4% of [the] purported market value." Moreover, they assert that, in her exceptions, Ms. Russell failed to "offer her opinion of the value of the property despite the long standing rule that an owner can testify to the value of her property." Thus, they assert that Ms. Russell failed to meet her burden to establish inadequacy, i.e., "that the price was so inadequate as to shock the court."

Finally, appellees contend that the circuit court was "legally correct when it declined to schedule a hearing on [Ms. Russell's] exceptions." They note that, pursuant to Maryland Rule 14-305(d)(2), the court shall hold a hearing "if a hearing is requested **and** the exceptions or any response clearly show a need to take evidence." (emphasis added by appellees). They contend that, with respect to the purchase price argument, Ms. Russell failed to "meet her burden to set forth [an] alleged irregularity with particularity," and with respect to the loss mitigation fraud argument, Ms. Russell's argument "did not fit into the narrow portal available under exceptions even if the lower court were to assume the truth of [her] assertions." Therefore, they argue that the court "was legally correct in ruling on the Exceptions without conducting a hearing."

Maryland Rule 14-305 sets forth the procedures for filing exceptions to a foreclosure sale and for the ratification of such a sale. The Rule states, in pertinent part, as follows:

> (a) **Report of Sale**. As soon as practicable, but not more than 30 days after a sale, the person authorized to make the sale shall file with the court a complete report of the sale and an affidavit of the fairness of the sale and the truth of the report.
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> * * *
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> (c) **Sale of Interest in Real Property; Notice**. Upon the filing of a report of sale of real property . . . pursuant to section (a) of this Rule, the clerk shall issue a notice containing a brief description sufficient to identify the property and stating that the sale will be ratified unless cause to the contrary is shown within 30 days after the date of the notice. . . .
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> (d) **Exceptions to Sale**.
>
> > (1) How Taken. A party . . . may file exceptions to the sale. Exceptions shall be in writing, shall set forth the alleged irregularity with particularity, and *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. Any matter not specifically set forth in the exceptions is waived unless the court finds that justice requires otherwise.
> >
> > (2) Ruling on Exceptions; Hearing. *The court shall determine whether to hold a hearing on the exceptions* but it may not set aside a sale without a hearing. *The court shall hold a hearing if a hearing is requested and the exceptions or any response clearly show a need to take evidence*. . . .
>
> (e) **Ratification**. The court shall ratify the sale if (1) the time for filing exceptions pursuant to section (d) of this Rule has expired and exceptions to the report either were not filed or were filed but overruled, and (2) the court is satisfied that the sale was fairly and properly made. If the court is not satisfied that the sale was fairly and properly made, it may enter any order that it deems appropriate.

Md. Rule 14-305 (emphasis added).

Initially, we note that Ms. Russell's exceptions were not timely filed. As indicated, pursuant to Maryland Rule 14-305(d), exceptions "**shall be filed within 30 days** after the date of a notice [of ratification is] issued." (emphasis added). The record makes clear that

the court filed a notice of ratification on December 15, 2014, but Ms. Russell did not file her exceptions until October 16, 2015, approximately 10 months later. Under these circumstances, the circuit court acted within its discretion in denying the untimely exceptions.

In any event, the circuit court properly denied Ms. Russell's exceptions without a hearing because they are meritless. The claim regarding loss mitigation information was properly denied for two reasons. First, a claim that the lender failed to "to comply with pre-sale loss mitigation requests . . . must be raised ordinarily pre-sale in an effort to prevent the sale from occurring." *Bates v. Cohn*, 417 Md. 309, 328 (2010).[3] Second, appellees submitted documents showing that they provided Ms. Russell loss mitigation information, including a Final Loss Mitigation Affidavit detailing efforts to provide loss mitigation documents, a Request for Foreclosure Mediation, and a mortgage statement that included contact information for Bayview and the HOPE Hotline.

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[3] The Court of Appeals in *Bates v. Cohn*, 417 Md. 309, 328 (2010), noted that it would not address whether there would be an exception to this rule in the following circumstances:

> [W]hether a homeowner/borrower may assert under 14-305, as a post-sale exception, claims that a foreclosure sale was the product of the lender affirmatively and purposefully misleading the borrower in default that ultimately unsuccessful pre-sale loss mitigation or loan modification efforts would likely be successful (or protracting strategically the denial of those efforts) and therefore dissuading the borrower from seeking to assert pre-sale defenses in a timely manner.

No such scenario was asserted here.

Ms. Russell's argument regarding the sale price similarly is without merit. First, we agree with appellees that she failed to support her claims with particularity regarding the amount of the inadequacy because she did not submit any information about the market value of the property, instead choosing to highlight the amount of her *deficiency* and offering to provide an expert on market value *presuming* that a hearing would be granted. Even now, Ms. Russell fails to dispute appellees' valuation of the Property, and she has never contended that her expert would have offered a materially different number, even if she had been provided additional time to respond to appellees' opposition to her exceptions.

Second, "[i]nadequacy of price, in and of itself, will not justify a refusal to ratify a mortgage sale, unless the price is so inadequate as to 'shock the conscience of the court' or raise a presumption of fraud or irregularity." *Arban v. Rogers*, 262 Md. 738, 740 (1971). *Accord Hurlock Food Processors, Inv. Associates v. Mercantile-Safe Deposit & Trust Co.*, 98 Md. App. 314, 340-41 (1993), *cert. denied*, 334 Md. 211 (1994). Here, even if we were to equate Ms. Russell's outstanding debt with the actual market value of the Property and accept her calculation that the purchase price was 38.4% of that figure, that price was not so inadequate as to "shock the conscious of the court" or indicate fraud or irregularity. *See, e.g.*, *Hurlock*, 98 Md. App. at 347 ("[A]lthough the exceptors bitterly complain that the foreclosure prices have only yielded 35% of their asserted fair market value, prices that yielded a similarly small percentage of the asserted fair market value have not been found inadequate.").

Accordingly, even if Ms. Russell's exceptions were timely filed, they did not, on the record here, "clearly show a need to take evidence." Ms. Russell failed to adequately support her claims, and the record at the time the circuit court made its ruling contained sufficient evidence to deny Ms. Russell's exceptions without a hearing.

JUDGMENT OF THE CIRCUIT COURT FOR PRINCE GEORGE'S COUNTY AFFIRMED. COSTS TO BE PAID BY APPELLANT.