UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 2100

September Term, 2014

NATIONAL INSTITUTES OF HEALTH
FEDERAL CREDIT UNION

v.

GERALD J. BUTLER, ET UX.

Hotten,
Reed,
Salmon, James P.
(Retired, Specially Assigned),

JJ.

Opinion by Reed, J.

Filed: December 3, 2015

This case arises from a residential mortgage agreement between Appellant, the National Institutes of Health Federal Credit Union (hereinafter "the Credit Union"), and Appellees, Gerald J. and Catherine Butler (hereinafter "the Borrowers"). The Credit Union has its headquarters in Montgomery County, Maryland, while the Borrowers reside in the District of Columbia. The mortgage loan, the original amount of which was $338,632.00, is evidenced by a promissory note, which is in turn secured by a first-priority lien in the form of a deed of trust on the Borrowers' property. The Borrowers have defaulted on their mortgage payments, and instead of filing a foreclosure action, the Credit Union filed an *in personam* action against the Borrowers in the Circuit Court for Montgomery County to enforce the terms of the promissory note. The circuit court, however, dismissed the case on the grounds that it lacked subject matter jurisdiction. The Credit Union timely appealed and presents four questions for our review, which we reduced to two and rephrased:[1]

[1] Appellant presents the following questions *verbatim*:

1. Whether the Circuit Court erred in ruling that the sole and exclusive remedy to collect on a loan in default is to foreclose on collateral securing the repayment of the loan?

2. Whether the Circuit Court erred in ruling that Maryland does not have jurisdiction [sic] over the Borrowers when the Borrowers entered into a loan agreement with a Credit Union located in Maryland, made payments at the Credit Union in Maryland as required by the loan agreement, and made numerous purposeful contacts with people in Maryland to negotiate multiple modifications to the loan agreement?

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1. Did the circuit court err in considering the Second Motion to Dismiss?

2. Did the circuit court err in granting the Second Motion to Dismiss for lack of subject matter jurisdiction?

For the following reasons, we answer the first question in the negative and the second question in the affirmative. Therefore, we reverse the judgment of the circuit court and remand to that court for further proceedings consistent with this opinion.

FACTUAL AND PROCEDURAL BACKGROUND

Mr. and Mrs. Butler received a mortgage loan from the National Institutes of Health Federal Credit Union on November 21, 2008, in the principal amount of $338,632.00. As noted above, the loan was evidenced by a promissory note (hereinafter "the Note"). The Note, which was signed by both Borrowers on the same date they received the mortgage loan, was secured by a deed of trust on their residential property located at 788 Columbia Road NW, Washington, D.C. 20001.

After some period of time, the Borrowers began to default on their monthly loan payments. Therefore, they contacted the Credit Union's loss-mitigation staff, and on

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3. Whether the Circuit Court's failure to apply the minimum contacts analysis deprived the parties the opportunity to conduct discovery?

4. Whether the Circuit Court erred in considering a second Motion to Dismiss from the Borrowers on an issue that was already decided by the Court in a prior Order?

June 2, 2010, they entered into a forbearance agreement, which reduced their total monthly payment by $692.02. Despite these more generous terms, the Borrowers again began to miss payments. They entered into a second forbearance agreement on January 23, 2014; however, this agreement was only in effect for six days before the Borrowers informed the Credit Union that they would not be making the newly modified payments but instead desired to re-open negotiations. On May 14, 2014, rather than initiating foreclosure proceedings, the Credit Union filed a Complaint and Motion for Summary Judgment in the Circuit Court for Montgomery County against the Borrowers, who are currently owing on their payments dating back to September of 2012, in an effort to hold them personally liable for failing to adhere to the terms of the Note.

The Borrowers moved to dismiss the Credit Union's Complaint *via* a *pro se* Motion to Dismiss for Lack of Personal Jurisdiction filed on July 17, 2014. This motion, however, was denied by court Order dated October 9, 2014. Thereafter, counsel entered her appearance on behalf of the Borrowers, and on October 24, 2014, the Borrowers filed a Second Motion to Dismiss. In their second attempt at obtaining a dismissal, the Borrowers re-alleged lack of personal jurisdiction and also alleged that the Credit Union was forum shopping, had bypassed the proper remedy in a residential mortgage default situation, and had filed the case in bad faith.[2] The court, by Order dated December 8, 2014, granted the

[2] The four arguments made in the Second Motion to Dismiss were:

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Second Motion to Dismiss, and on December 10, 2014, the Credit Union filed its Notice of Appeal.

PARTIES' CONTENTIONS

The Credit Union argues that *in personam* actions to enforce promissory notes secured by real property are permitted in Maryland outside the context of a foreclosure. The Credit Union contends that neither the Borrowers nor the circuit court cited any statutory or case law requiring creditors to pursue foreclosure as their exclusive remedy when a debtor defaults on a mortgage loan. The Credit Union contends that no matter how hard the Borrowers look, they will be unable to find legal support for their position. This is because, as *Wellington Co. Profit Sharing Plan & Trust v. Shakiba*, 180 Md. App. 576 (2008), and *Washington Metro. Area Transit Auth. v. One Parcel of Land in Prince George's Cnty.*, 197 F. Supp. 2d 339 (D. Md. 2002), allegedly indicate, "[t]he law in

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1. [The circuit court] does not have jurisdiction over the Butlers [and] therefore this case must be dismissed.

2. The Plaintiff is forum shopping [and] therefore this case must be dismissed, or [in the] alternative, summary judgment must be denied.

3. The Plaintiff has bypassed the proper remedy for mortgage default and therefore summary judgment must be denied.

4. The Plaintiff has filed this unjustified action in bad faith.

Maryland is clear [that] the ability to foreclose on a Deed of Trust does not eliminate or restrict the existing remedies to sue on a note."

Furthermore, the Credit Union argues that the circuit court had personal jurisdiction over the Borrowers because the Borrowers made payments on the loan in Maryland as required by the Note and engaged in "extensive communications" with Credit Union employees located in Maryland before entering into multiple loan modification agreements. The Credit Union contends that even if the Borrower's assertion about never having visited Maryland for the purpose of transacting business relating to the Note is true, the circuit court nonetheless had personal jurisdiction over the Borrowers pursuant to *Mininberg v. Kresch*, 863 F. Supp. 261 (D. Md. 1994), because the contract at issue–the Note–required performance in Maryland. Additionally, while it believes that Maryland law applies, the Credit Union asserts that the issue of whether this case is governed by District of Columbia or Maryland law is irrelevant with respect to whether the circuit court can exercise personal jurisdiction over the Borrowers because "choice-of-law analysis . . . is distinct from minimum-contact jurisdictional analysis." *Lieberman v. Mayavision, Inc.*, 195 Md. App. 263, 284 (2010) (quoting *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 481 (1985)).

The Credit Union's final two arguments are directly related to its contention that the circuit court erred in ruling that Maryland courts do not have personal jurisdiction over the Borrowers. First, the Credit Union argues that pursuant to *Androutsos v. Fairfax Hosp.*, 323 Md. 634 (1991), it should have been allowed to perform discovery on the issue of

personal jurisdiction before the court ruled on the Second Motion to Dismiss. Such discovery, according to the Credit Union, would have "reveal[ed] that, on several occasions, one of the Borrowers physically entered Maryland to deposit funds into an account at one of the Lender's branches, and then called the Lender's Rockville, Maryland office to instruct the Lender to use those funds to make payments on the Subject Loan." The Credit Union asserts that instead, the circuit court based its decision to dismiss for lack of personal jurisdiction on statements in the Second Motion to Dismiss that were merely conclusory and not supported by any evidence or testimony in the record.

The second contention the Credit Union makes in connection with the dismissal for–according to the Credit Union–lack of personal jurisdiction is that the circuit court erred in considering the Borrowers' Second Motion to Dismiss in the first place. The Credit Union points out that the Borrowers' original Motion to Dismiss, which was filed on July 17, 2014, and denied on October 9, 2014, alleged lack of personal jurisdiction. Therefore, based on Md. Rule 2-322(f), which states that "[i]f a party makes a motion . . . but omits any defense or objection then available to the party[,] . . . the party shall not thereafter make a motion based on the defenses or objections so omitted except as provided in Rule 2-324," the Credit Union argues that if the Borrowers wanted to re-raise the issue of personal jurisdiction, then they should have done so in a Motion for Reconsideration rather than a Second Motion to Dismiss. Furthermore, the Credit Union asserts that the remainder of the defenses raised in the Second Motion to Dismiss were prohibited by Rule 2-322(f) from being brought therein after not having been raised in the July 17, 2014, Motion to Dismiss.

While the Credit Union would like us to reverse the judgment below and allow this case to proceed in the Circuit Court for Montgomery County, the Borrowers urge us to affirm the lower court's dismissal. First and foremost, the Borrowers argue that even if neither subject matter nor personal jurisdiction was lacking, the circuit court properly dismissed the case because the Credit Union failed to provide them with the notices required by paragraph 22 of the Deed of Trust when their loan entered default. As such, notwithstanding the following jurisdictional arguments, the Borrowers assert that the case was properly dismissed because the procedures agreed to between the parties in contract were not followed.

The Borrowers also contend that *in personam* actions prior to foreclosure are prohibited by Maryland law and "not encouraged" by D.C. law. The Borrowers argue that in Maryland, pursuant to *Wellington Co. Profit Sharing Plan & Trust*, 180 Md. App. 576, courts may enter *in personam* judgments only in the form of "deficiency decrees" when the proceeds of a foreclosure sale are insufficient to satisfy a debt. Regarding D.C. law, the Borrowers assert that the Credit Union has "failed to provide any applicable law to support its position that foreclosure of the subject property is not the sole and exclusive remedy to collect outstanding amounts due on loan[s] after default in light of the D.C. Saving Homes from Foreclosure Act of 2010." Therefore, the Borrowers contend that regardless of which law governs, the circuit court's dismissal of the Credit Union's action was proper.

The Borrowers counter the Credit Union's contention that the motivating factor behind the dismissal was lack of personal jurisdiction with the argument that the dismissal

was based solely on choice of law and forum considerations. Particularly, the Borrowers assert that the proper remedy exists in the District of Columbia because that is where the property that is the subject of the mortgage loan is located. They concede that the choice of law analysis is distinct from the jurisdictional analysis, but argue that the trial judge determined that the case should be brought in the District of Columbia because both D.C. and Maryland law require that D.C. law be applied.

The Borrowers assert that the issue of personal jurisdiction was neither a part of the trial judge's oral ruling at the hearing on the Second Motion to Dismiss nor a part of the written Order issued on December 8, 2014. However, they contend for the sake of argument that they do not meet the personal jurisdiction requirements of § 6-103 of the Courts and Judicial Proceedings Article because they live in the District of Columbia, closed on the loan in the District of Columbia, mailed their payments from the District of Columbia, never entered Maryland for any purpose related to the loan, and did not know when they called the Credit Union's 800 number that they were speaking with someone in Maryland. Furthermore, they argue that the assertion of personal jurisdiction over them by a Maryland court would not satisfy the due process requirement that there be "certain minimum contacts with [the forum state] such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'" *Int'l Shoe Co. v. State of Wash., Office of Unemployment Comp. & Placement*, 326 U.S. 310, 316 (1945) (citations omitted). The Borrowers assert that "[o]ther than the fact that the Lender's headquarters is located in Maryland, Maryland has nothing to do with the underlying loan or the collection action."

The Borrowers do not agree that the Credit Union was deprived of the ability to conduct discovery or that the trial court erred in considering the Second Motion to Dismiss. Regarding the issue of discovery, the Borrowers do not read *Androutsos v. Fairfax Hosp.* as requiring the trial court to provide additional time for discovery before ruling on the existence of personal jurisdiction. The Borrowers also assert that the Credit Union had plenty of time–7 months–during which the discovery period was open yet failed to propound discovery. Additionally, the Borrowers contend that the Credit Union could have provided an affidavit from one of its employees documenting any meaningful contacts that would have been relevant to personal jurisdiction or brought said employee to the hearing to testify.

Finally, the Borrowers argue that the trial court did not err in considering the Second Motion to Dismiss because although lack of personal jurisdiction was also raised as a defense in the original Motion to Dismiss, the Second Motion to Dismiss presented three additional defenses: that the Credit Union was forum shopping, that the proper remedy was a foreclosure action in the District of Columbia, and that the suit was filed in bad faith because the Credit Union was seeking a judgment in the amount of $750,000.00 even though the unpaid principal balance on the loan as of May 2014 was only $370, 360.40. The Borrowers assert that the trial court granted the Second Motion to Dismiss on newly-raised issues, and that if they had "filed their Second Motion to Dismiss and omitted the personal jurisdiction argument, the trial court's ruling would have been exactly the same."

DISCUSSION

As noted above, the Credit Union presents four questions for our review. These include whether the circuit court erred in ruling that foreclosure is the exclusive remedy, whether the circuit court erred in ruling that it did not have personal jurisdiction over the Borrowers, whether the circuit court wrongfully denied the opportunity to conduct discovery, and whether the circuit court erred in considering the Second Motion to Dismiss. However, this litany of questions is over-inclusive because the circuit court did not grant the Second Motion to Dismiss for lack of personal jurisdiction, but rather for lack of subject matter jurisdiction. Therefore, as we will explain in more detail below, our resolution of this case simply depends on whether the circuit court erred in considering the Second Motion to Dismiss, and if not, then on whether the circuit court was correct in that it lacked subject matter jurisdiction over the Credit Union's claim.

I. CONSIDERATION OF THE SECOND MOTION TO DISMISS

A. Standard of Review

Maryland Rule 2-322 states the following regarding the raising of defenses in preliminary motions:

> **(a) Mandatory.** The following defenses shall be made by motion to dismiss filed before the answer, if an answer is required: (1) lack of jurisdiction over the person, (2) improper venue, (3) insufficiency of process, and (4) insufficiency of service of process. If not so made and the answer is filed, these defenses are waived.
>
> **(b) Permissive.** The following defenses may be made by motion to dismiss filed before the answer, if an answer is required: (1) lack of jurisdiction over the subject matter, (2)

> failure to state a claim upon which relief can be granted, (3) failure to join a party under Rule 2-211, (4) discharge in bankruptcy, and (5) governmental immunity. If not so made, these defenses and objections may be made in the answer, or in any other appropriate manner after answer is filed.

The Rule goes on to provide:

> **(f) Consolidation of Defenses in Motion.** A party who makes a motion under this Rule may join with it any other motions then available to the party. No defense or objection raised pursuant to this Rule is waived by being joined with one or more other such defenses or objections in a motion under this Rule. *If a party makes a motion under this Rule but omits any defense or objection then available to the party that this Rule permits to be raised by motion, the party shall not thereafter make a motion based on the defenses or objections so omitted except as provided in Rule 2-324.*

(emphasis added).

The Credit Union argues that the circuit court should not have entertained the Borrowers' Second Motion to Dismiss because it "was merely an attempt to reargue [the issue of personal jurisdiction] that had already been briefed and decided by the Circuit Court in the October 9, 2014 Order." The Credit Union bases its argument on Rule 2-322(f), which, as the Credit Union correctly points out, "prohibit[s] a Defendant from filing a Motion to Dismiss based on defenses which were omitted in a prior motion." Whether the circuit court erred in considering the Second Motion to Dismiss depends on what is or is not prohibited by Section 2-322(f) of the Maryland Rules. We review this type of question under a *de novo* standard of review. *See Davis v. Slater*, 383 Md. 599, 604 (2004) ("Because our interpretation of . . . provisions of the . . . Maryland Rules are

appropriately classified as questions of law, we review the issues *de novo* to determine if the trial court was legally correct in its rulings on these matters").

B. Analysis

In their original Motion to Dismiss, which the Borrowers filed *per se* on July 17, 2014, the Borrowers argued that the case should be dismissed solely because the circuit court lacked personal jurisdiction over them. This Motion was ultimately denied. Instead of filing a Motion to Reconsider, the Borrowers filed a Second Motion to Dismiss on October 24, 2014, in which they re-alleged lack of personal jurisdiction and, in addition, argued that the Credit Union was forum shopping, had bypassed the proper remedy for a mortgage default situation, and had filed its action in bad faith. The Credit Union takes exception to the Borrowers' course of action. It argues that the circuit court's decision to consider the Second Motion to Dismiss was incorrect and should be overturned because "[t]he Borrowers did not file a Motion to Reconsider the October 9, 2014 [denial] and did not show any compelling reason why they should be permitted to file a second Motion to Dismiss arguing the same issue which had already been decided in the October 9, 2014 Order." The Credit Union is correct in that the issue of lack of personal jurisdiction had already been decided and should not have been reconsidered in the context of a Second Motion to Dismiss. However, looking at the Second Motion to Dismiss as a whole, we decline to hold that the circuit court erred in its consideration thereof.

The Credit Union's argument on this issue is two-pronged. First, it asserts that the court erred in granting the Second Motion to Dismiss based on lack of personal jurisdiction,

an issue which had already been raised and decided upon without a Motion for Reconsideration. Second, the Credit Union contends that the remainder of the defenses raised in the Second Motion to Dismiss were prohibited by Rule 2-322(f). In so arguing, the Credit Union fails to acknowledge the entire scope of Rule 2-322(f). While the Credit Union is correct in that Rule 2-322(f) "prohibit[s] a Defendant from filing a Motion to Dismiss based on defenses which were omitted in a prior motion," it overlooks the fact that the Rule's prohibition applies "*except as provided in Rule 2-324*." Md. Rule 2-322(f) (emphasis added).

Maryland Rule 2-324 states, in its entirety:

> **(a) Defenses Not Waived.** A defense of failure to state a claim upon which relief can be granted, a defense of failure to join a party under Rule 2-211, an objection of failure to state a legal defense to a claim, and a defense of governmental immunity may be made in any pleading or by motion for summary judgment under Rule 2-501 or at the trial on the merits.
>
> **(b) Subject Matter Jurisdiction.** Whenever it appears that the court lacks jurisdiction of the subject matter, the court shall dismiss the action.

Therefore, the defenses of failure to state a claim upon which relief can be granted and lack of subject matter jurisdiction, among others, are not waived when they are omitted from a previously-filed preliminary motion. Md. Rule 2-324(a) and (b); *see Burnside v. Wong*, 412 Md. 180, 195 (2010) ("The defense of lack of personal jurisdiction, unlike **subject matter jurisdiction**, is **waived** unless raised in a mandatory preliminary motion") (emphasis in original). This is important because the Borrowers assert on page 10 of their

Second Motion to Dismiss[3] that "[t]here is no statutory authority [in the District of Columbia or Maryland] that permits a mortgage lender to bypass the foreclosure process and proceed directly to a money judgment except in cases of deficiency." Thus, the Borrowers were making the argument that the circuit court lacks subject matter jurisdiction over *in personam* actions relating to mortgage defaults unless the action is for a deficiency judgment after the foreclosure sale. As this defense is not waived when omitted from an earlier motion, we hold that the circuit court did not err insofar as considering the Second Motion to Dismiss.

II. SUBJECT MATTER JURISDICTION

A. Standard of Review

We recently summarized the standard of review that applies when a party challenges a trial court's decision to grant a motion to dismiss:

> "The proper standard for reviewing the grant of a motion to dismiss is whether the trial court was legally correct." *Higginbotham v. Public Service Comm'n of Maryland,* 171 Md.App. 254, 264, 909 A.2d 1087 (2006) (quoting *Britton v. Meier,* 148 Md.App. 419, 425, 812 A.2d 1082 (2002)). *Accord Reichs Ford Road Joint Venture v. State Roads Comm'n of the State Highway Administration,* 388 Md. 500, 509, 880 A.2d 307 (2005) ("We review the grant of a motion to dismiss *de novo.*"). We will find that dismissal was proper only "if the alleged facts and permissible inferences, so viewed, would, if proven, nonetheless fail to afford relief to the plaintiff." *Sprenger v. Public Service Comm'n of Maryland,* 400 Md. 1, 21, 926 A.2d 238 (2007) (quoting *Pendleton v. State,* 398 Md. 447, 459, 921 A.2d 196 (2007)) (citations omitted). Dismissal

[3] The Borrowers titled this motion "DEFENDANT'S SECOND MOTION TO DISMISS AND OPPOSITION TO MOTION FOR SUMMARY JUDGMENT AND MEMORANDUM OF POINTS AND AUTHORITIES AND MOTION FOR SANCTIONS AND REQUEST FOR HEARING."

> of an action on a preliminary motion for lack of subject matter jurisdiction is proper only if the facts and allegations establish a lack of subject matter jurisdiction. *Lewis v. Murshid,* 147 Md.App. 199, 203, 807 A.2d 1170 (2002).

Unger v. Berger, 214 Md. App. 426, 432 (2013).

B. Analysis

The Credit Union argues that the circuit court granted the Borrowers' Second Motion to Dismiss for lack of personal jurisdiction. The Borrowers assert that "[n]either the written order nor the oral ruling from [the trial court] make any mention or reference indicating that the Court considered whether Maryland had personal jurisdiction over the Borrowers." For the following reasons, we agree with the Borrowers that the dismissal was not based on lack of personal jurisdiction.

A hearing was held on December 3, 2014, on the Borrowers' Second Motion to Dismiss and the Credit Union's Motion for Summary Judgment. At the conclusion of that hearing, the trial court made an oral ruling granting the Second Motion to Dismiss. The hearing began with arguments by counsel for the Borrowers and the Credit Union, which were followed by the court's oral ruling:

> THE COURT: I meant to do this earlier this morning and then got sidetracked, so didn't do it. So I can't tell you the name of the case at the moment, but sometime after the economic and mortgage crisis that occurred in the last five or six years, Judge Cathell, who's now retired from the Court of Appeals, wrote an opinion about an issue having to do with the mortgage foreclosure – not really relevant here today what the subject of that case was. What is relevant, though, is what Judge Cathell said about the result in that case, which was, essentially, that the – the lender had to start over is a short summary of that case. But what he did say was that, in part, the reason why the

> process with regard to a lender recovering when a lender has made a mortgage loan is so complicated is that the behavior ahead of time of the mortgage lending industry put it in that place.
>
> I'm convinced by the evidence in the jacket and really what everyone has said here today that this is a mortgage loan. It is in default, and the remedy for that is a foreclosure in the District of Columbia. I am going to grant the motion to dismiss, and I think that moots everything else. I've done an order. Thank you.
>
> [Counsel for the Credit Union]: Your Honor, can I –
>
> [Counsel for the Borrowers]: Thank you, Your Honor.
>
> [Counsel for the Credit Union]: – can I just ask, what is the, what is the – is Judge Cathell's case, is that the basis for ruling that that's –
>
> THE COURT: No, sir. It's – no. I merely stated that just to remind us how we got whether we are now and there I am convinced that the appropriate remedy here is in the District of Columbia and that your client does not have jurisdiction to proceed, as it is, here today. So I have granted the motion to dismiss. I don't think you have jurisdiction, and I do think the remedy is in the District of Columbia.
>
> [Counsel for the Credit Union]: So it's a dismissal without prejudice on the basis of jurisdiction?
>
> THE COURT: No, sir, it's not a dismissal without prejudice. It's a dismissal of the case for lack of jurisdiction.

Although this is a somewhat lengthy explanation, the trial court boiled its basis for granting the Second Motion to Dismiss down to "I don't think you have jurisdiction, and I do think

the remedy is in the District of Columbia."[4] It is important to note that when the trial court made that statement, it was addressing counsel for the Credit Union. Therefore, the trial court was stating that it was the Credit Union's claim–not the Borrowers' claim of lack of personal contacts with the State of Maryland–that destroyed jurisdiction. Furthermore, the trial court indicated earlier in its explanation that "I'm convinced by the evidence in the jacket and really what everyone has said here today that this is a mortgage loan. It is in default, and the remedy for that is a foreclosure in the District of Columbia." This statement makes it even clearer that the trial court's dismissal was for lack of subject matter jurisdiction. By determining that "the remedy . . . is a foreclosure in the District of Columbia," the circuit court ruled that it did not have subject matter jurisdiction over this pre-foreclosure, *in personam* action to enforce a debt secured by real property located in another State.

Therefore, while we agree with the Borrowers that the court did not grant the Second Motion to Dismiss for lack of personal jurisdiction, we do not agree with their assertion that the case was dismissed for choice of law and forum considerations. Instead, as we

[4] As we determine the reasoning behind the decision to grant the Second Motion to Dismiss, we are limited to considering the oral ruling because the written Order was bare-bones:

> Upon full consideration of Plaintiff's Motion for Summary Judgment, and the Defendants' opposition thereto, and Defendants' Second Motion to Dismiss, and Motion for Sanctions, and opposition thereto, it is by the Circuit Court for Montgomery County this 3rd day of December 2014,
>
> ORDERED that Defendants' Second Motion to Dismiss is hereby GRANTED.

explained *supra*, we read the trial court's oral ruling and its explanation therefor to mean that the Credit Union's claim was dismissed for *lack of subject matter jurisdiction*. We now turn our attention to whether "the facts and allegations establish a lack of subject matter jurisdiction." *Unger*, 214 Md. App. at 432 (quoting *Lewis,* 147 Md.App. at 203).

Our analysis of whether the circuit court erred in its ruling on subject matter jurisdiction is two-pronged. First, we must determine whether a Maryland court has jurisdiction over a promissory note that is secured by a mortgage on out-of-state real property. Second, if a Maryland court does have jurisdiction over such a note, then we must determine whether subject matter jurisdiction has been stripped by a statutory scheme that prohibits *in personam* actions relating to mortgage defaults except for such actions seeking post-foreclosure deficiency judgments.

Fink v. Pohlman, 85 Md. App. 106, 108 (1990), was a case in which a sister sued her brothers for breach of contract relating to the division of their deceased mother's estate. *Id.* at 110. The estate consisted, in part, of a promissory note secured by a mortgage on the mother's home, which was located in Florida. *Id.* Despite the location of the home out-of-state, the sister brought suit against the brothers in the Circuit Court for Baltimore County. *Id.* at 108. The portion of the *Fink* opinion in which we addressed the issue of subject matter jurisdiction is particularly relevant to the present case:

> In the count for breach of trust, appellant seeks a constructive trust of one-quarter of the estate in the possession of the brothers to the extent it is either converted into cash or is personal property over which the court has jurisdiction. Alternatively, she seeks damages.

> Lack of subject matter jurisdiction, however, could defeat jurisdiction where the remedy sought is a constructive trust on property. *See Texaco,* 242 Md. at 338, 219 A.2d 80. "A court cannot exercise jurisdiction over the title to land located in another state." *Dobbyn v. Dobbyn,* 57 Md.App. 662, 668 n. 1, 471 A.2d 1068 (1984); *see Wilmer v. Philadelphia & Reading Coal & Iron Co.,* 130 Md. 666, 675, 101 A. 538 (1917). Moreover, courts have "no jurisdiction of an action in rem where the property in controversy lies without the territorial limits of its jurisdiction." 21 C.J.S. *Courts* § 43 (1940).
>
> The Court of Appeals has stated, however, that "the *situs* of personal property is the domicile of the owner...." *Loney v. Penniman,* 43 Md. 130, 133–34 (1875). In *Loney,* the assets consisted of debts—choses in action—or, in other words, personal property owed a business firm. *Loney,* 43 Md. at 133. While *Loney* does not support appellant's contention that there is jurisdiction over the real property at issue, it clearly supports subject matter jurisdiction over the mortgage and promissory note. As chattel paper, the mortgage and promissory note are personal property. Subject matter jurisdiction is available at the situs of personal property. That situs is the domicile of the owners. *Loney,* 43 Md. at 133–34. Both appellees are domiciled in Maryland. Therefore, to the extent the property is either in Maryland or reduced to cash, we hold there is subject matter jurisdiction.

Id. at 118-19. Therefore, because a "mortgage and promissory note are personal property," *id.* at 119, subject matter jurisdiction over them is available where the owner is domiciled. *Id.* In the present case, the owner of the promissory note is the Credit Union, which is domiciled in Montgomery County, Maryland. Therefore, the ability of the Circuit Court for Montgomery County to exercise subject matter jurisdiction over the promissory note at issue is not undermined by the fact that the Note is secured by a mortgage on a home located in the District of Columbia.

However, as we indicated above, our analysis does not end here. *Fink* did not involve an *in personam* suit *in lieu* of foreclosure. If this type of suit–an *in personam* suit before the initiation of foreclosure proceedings–is barred by statute, then, because "courts have 'no jurisdiction of an action *in rem* where the property in controversy lies without the territorial limits of its jurisdiction,'" *id.* at 118 (quoting 21 C.J.S. *Courts* § 43 (1940)), the circuit court would still have been correct that it lacked subject matter jurisdiction.[5] Therefore, we now turn to whether such an action is legally permissible.

The parties disagree regarding whether Maryland or D.C. law governs this case. However, choice of law is nonessential to our resolution of the Credit Union's appeal because our holding would be the same regardless of which law applies.

Both the Borrowers and the Credit Union make extensive arguments regarding whether *Wellington Co. Profit Sharing Plan & Trust*, 180 Md. App. 576, stands for the proposition that the Credit Union's action is prohibited under Maryland law. Although the issue in *Wellington* was whether the appellant could bring an action to enforce a Deed of Trust despite the expiration of the statute of limitations on the corresponding promissory note, the appellee in that case made an analogous argument to one being advanced by the Borrowers: "According to [the appellee], appellant's remedy with respect to the Deed of Trust was limited to a foreclosure action, coupled with the right, under Title 14 of the

[5] In other words, because Maryland courts do not have jurisdiction over foreclosure proceedings relating to real property located in another state, the applicable law must allow mortgage creditors to file personal actions against their debtors without first having initiated foreclosure proceedings.

Maryland Rules, for a beneficiary to bring a deficiency action in the foreclosure proceeding." *Id.* at 590. We addressed the appellee's argument as follows:

> The circuit court cited *Kirsner* and apparently relied on the italicized language above to support its conclusion that appellant's sole remedy in regard to the Deed of Trust was to bring a foreclosure action and seek a deficiency decree against appellees. But, as we have seen, the statute at issue in *Kirsner*—Code, Art. 16, § 232—conferred on a court of equity the authority to enter an *in personam* deficiency decree as part of its jurisdiction over foreclosure proceedings. The statute did not abrogate common law remedies that already existed, such as the power of the obligee of a debt instrument to bring an action at law against the obligor to recover money damages. To the contrary, the statute provided that a decree was permitted in all cases in which there could be a recovery on the covenants of the mortgage in a suit at law. As we see it, that statement constitutes recognition of the existence of such remedies at law. Art. 16, § 232 did not eliminate or restrict these existing remedies. Rather, it merely placed another weapon in a creditor's arsenal: the deficiency decree in equity.

Id. at 597 (citing *Kirsner v. Cohen*, 171 Md. 687 (1937)). The Borrowers read this section of *Wellington* to mean that *in personam* actions are only allowed in the form of actions seeking deficiency judgments if the proceeds of a foreclosure sale are insufficient to satisfy the debt. We disagree. As we stated in *Wellington*, "the power of the obligee of a debt instrument to bring an action at law against the obligor to recover money damages [has not been abrogated in Maryland]." *Wellington*, 180 Md. App. at 597.

Likewise, *in personam* actions such as the one filed by the Credit Union are not prohibited under the law of the District of Columbia. Interestingly, the Borrowers do not contend that pre-foreclosure, *in personam* actions are so prohibited. Instead, they merely assert that "District of Columbia law ***does not encourage*** creditor[s] of a secured loan to

pursue an *in personam* judgment in advance of foreclosing on the collateral." (emphasis added). However, despite the Borrowers' contention, D.C. law allows the lender to "seek both a judgment against a maker or guarantor of the deed of trust note and a foreclosure (judicial or nonjudicial) pursuant to the deed of trust, and may do so in any sequence." *Szego v. Kingsley Anyanwutaku*, 651 A.2d 315, 317 (D.C. 1994).

Because the law of both Maryland and the District of Columbia permit the type of suit filed by the Credit Union in this case, we hold that the trial court erred in granting the Second Motion to Dismiss for lack of subject matter jurisdiction. We remand to the trial court with instructions to rule on the merits of the Credit Union's claim.

JUDGMENT OF THE CIRCUIT COURT FOR MONTGOMERY COUNTY REVERSED. CASE REMANDED FOR FURTHER PROCEEDINGS CONSISTENT WITH THIS OPINION. COSTS TO BE PAID BY APPELLEES.