UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 02144

September Term, 2014

VICTOR de la OLIVA,

v.

LAURA H.G. O'SULLIVAN, ET AL.
SUBSTITUTE TRUSTEES

Woodward,
Friedman,
Thieme, Raymond G., Jr.,
(Retired, Specially Assigned),

JJ.

Opinion by Friedman, J.

Filed: December 3, 2015

Before a foreclosure sale, a homeowner may challenge the legitimacy of the foreclosure procedure, including whether the debt is owed, whether the lien is valid, and whether the lender has the right to foreclose. After a foreclosure sale, by contrast, the appropriate grounds on which to challenge the sale are much, much more limited. For 30 days after the foreclosure sale, the homeowner may only challenge the manner in which the foreclosure sale was conducted. And, after that, a foreclosure sale is final and not subject to revision by the circuit court except in the very limited cases in which the judgment is procured by fraud, mistake, or irregularity. Md. Rule 2-535(b). Mr. de la Oliva's challenges to the sale of his home in foreclosure, even if true, came far too late.

FACTS

Victor de la Oliva is the former owner of 4700 Aspen Hill Road in Rockville, Maryland. The property is improved by a single family home which faces diagonally, toward the intersection of Aspen Hill Road and Oriental Street. We understand that Mr. de la Oliva purchased the property sometime in 1995. On July 24, 2006, Mr. de la Oliva refinanced his mortgage obligation through a $367,920 loan from East West Mortgage Co., Inc., the terms of which are reflected in an adjustable rate note and secured by a deed of trust. As was standard practice at the time, the note was securitized, sold, and resold through a complex chain of title. According to the Substitute Trustees, the Federal Home Loan Mortgage Corporation ("Freddie Mac") is now the owner of the loan and GMAC Mortgage LLC ("GMAC") is now the holder of the loan.

Mr. de la Oliva defaulted on July 2, 2009 and, on November 7, 2012, the Substitute Trustees filed a Residential Order to Docket, beginning the foreclosure process. On November 14, 2012, the Substitute Trustees served these pleadings on Mr. de la Oliva. On December 21, 2012, the Substitute Trustees filed a Final Loss Mitigation Affidavit. On February 13, 2013, the Substitute Trustees sold the property to Freddie Mac for $302,500. The Substitute Trustees filed the Report of Sale, and the circuit court ratified the foreclosure sale on April 17, 2013. On June 19, 2013, the auditors filed their report, which the circuit court ratified on July 3, 2013.

Only after the entire foreclosure sale was complete did Mr. de la Oliva take action, filing what he captioned as a motion to deny, stay, or dismiss the foreclosure (but which the circuit court treated as exceptions to the foreclosure sale pursuant to Rule 14-305(d)). In that motion, Mr. de la Oliva sought to challenge whether Freddie Mac and GMAC are, respectively, the owner and the holder of the loan, and whether their Substitute Trustees are entitled to foreclose on the property. On October 9, 2013, the Circuit Court for Montgomery County denied Mr. de la Oliva's motion and, on October 25, 2013, granted Freddie Mac possession of the property. Almost a year later, on September 23, 2014, Mr. de la Oliva renewed and expanded these same arguments in a motion to vacate foreclosure. After a hearing, the circuit court (Thompson, J.) denied the motion. Mr. de la Oliva's timely appeal followed.

CONTENTIONS

Mr. de la Oliva does not dispute that he hasn't paid his mortgage, he only contests to whom the debt is owed (and, thus, who has the right to foreclose). This challenge takes three forms. *First*, he argues that the loan belongs to an entity known as Morgan Stanley Loan Trust 2006-13ARX and not GMAC. *Second*, he asserts that the allonge, an extra slip of paper on which additional endorsements may be (and in this case are) made, is not sufficiently affixed to the note to prove the endorsements thereon. *Third*, he claims that a 2012 assignment of the deed of trust from Mortgage Electronic Registration System ("MERS") as nominee of East West Mortgage to GMAC was invalid because MERS had no rights in the deed of trust for it to assign. Mr. de la Oliva further asserts that these three defects were the result of fraud, that the fraud was an extrinsic fraud, and thus, remains cognizable under Maryland Rule 2-535(b).

The Substitute Trustees, by contrast, argue that there is no evidence of extrinsic fraud and, absent extrinsic fraud, it is now too late for Mr. de la Oliva to challenge the legitimacy of the foreclosure. Additionally, they argue that even if this Court was to consider Mr. de la Oliva's challenge to the legitimacy of the foreclosure, his challenges are based on misunderstandings of the foreclosure process and that there was nothing wrong with the securitization, the manner by which the allonge is affixed, or the chain of title of the note. We will not consider the merits of Mr. de la Oliva's challenges because we conclude that he brought them far too late in the process.

ANALYSIS

Recent appellate decisions make much of the distinction between pre-sale and post-sale challenges to foreclosure sales. *See, e.g.*, *Devan v. Bomar*, ___Md. App. ___, No. 1625, Sept. Term, 2014, slip op. at *3 (Oct. 2, 2015) (explaining the distinction between pre- and post-sale, which is "not simply a difference in **WHEN** challenges may be raised but as a difference in **WHAT** challenges may be raised") (emphasis in original). This case doesn't fit within that neat dichotomy. Instead, this case concerns what happens even later, during the period that we might call post- post-sale.

Before the foreclosure sale, a homeowner may use the procedure set forth in Maryland Rule 14-211 to challenge the legitimacy of the proposed foreclosure, including, for example, "the validity of the lien" or "the right of the [lender] to foreclose." *Devan*, slip op. at *4 (quoting *Bates v. Cohn*, 417 Md. 309, 318-19 (2010)). Contentions, like Mr. de la Oliva's, that a party lacks the authority to institute foreclosure proceedings, are appropriate to file during the pre-sale period. But Mr. de la Oliva did not file a pre-sale challenge.

For the 30 days after the foreclosure sale, the topics about which a homeowner can challenge a foreclosure sale, through a procedure established by Maryland Rule 14-305(d), are much narrower. During this period the homeowner is limited to challenges to "the procedures employed in the execution of the sale process itself." *Devan*, slip op. at *6. Thus, a challenge to the notice of the sale or the manner in which the trustees conducted

the sale would be appropriate at this stage. But Mr. de la Oliva's challenges are not at all related to the conduct of the foreclosure sale. For this reason, the trial court did not err when it denied his post-sale exceptions on October 9, 2013. Moreover, Mr. de la Oliva did not note a timely appeal from that decision. Correctly, then, he does not claim in this appeal that the trial court erred in denying his post-sale exceptions.

After the 30-day period during which a homeowner may file post-sale exceptions has elapsed, the foreclosure sale is a final judgment and unless an appeal from the denial of the exceptions is taken, the completed foreclosure is entitled to the same *res judicata* effect of all similar final, unappealed judgments. *See Jones v. Rosenberg*, 178 Md. App. 54, 72 (2008) ("The effect of a final ratification of sale is *res judicata* as to the validity of such sale, except in the case of fraud or illegality."). By this we mean that after the 30-day post-sale window, a homeowner may only challenge the completed foreclosure through the exacting rubric of Maryland Rule 2-535(b): "On motion of any party filed at any time, the court may exercise revisory power and control over the judgment in case of fraud, mistake, or irregularity." Moreover, and as Mr. de la Oliva's brief seems to recognize, not just any old fraud will do. To be cognizable under Rule 2-535(b), the fraud alleged must be "extrinsic fraud." *Hamilos v. Hamilos*, 297 Md. 99, 106 (1983); *Manigan v. Burson*, 160 Md. App. 114, 121 (2004). Extrinsic fraud are those types of fraud that actually preclude the adversarial process. *Id.* For example, a fraud that prevented Mr. de la Oliva from getting to the courthouse might count as an extrinsic fraud. But the allegations here, of wrong

parties, unaffixed allonges, and improper chains of title, even if true and even if conducted with fraudulent intent, are in the nature of intrinsic fraud, and are not cognizable under Rule 2-535(b). Thus, the circuit court did not err in denying Mr. de la Oliva's post- post-sale motion under Rule 2-535(b) and we affirm.

JUDGMENT OF THE CIRCUIT COURT FOR MONTGOMERY COUNTY AFFIRMED. COSTS TO BE PAID BY APPELLANT.