UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 2177

SEPTEMBER TERM, 2014

ANTHONY DOWE, PERSONAL REPRESENTATIVE OF THE ESTATES OF HENRY KING, JR. AND LILLIAN V. KING

v.

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

Eyler, Deborah, S.,
Arthur,
Salmon, James P.
(Retired, Specially Assigned),

JJ.

Opinion by Eyler, Deborah, S., J.

Filed: November 20, 2015

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This is an appeal by Anthony Dowe, personal representative of the Estates of Henry King, Jr., and Lillian King, the appellant, from the denial by the Circuit Court for Prince George's County of his exceptions to the foreclosure sale of a property owned by the estates. The foreclosure action was brought by Laura H. G. O'Sullivan, Erin M. Brady, Diana C. Theologou, Laura L. Latta, Jonathan Elefant, Chastity Brown, and Laura T. Curry, the appellees, as Substitute Trustees on a deed of trust. Dowe asks whether the court erred in overruling his exceptions and ratifying the sale.[1] For the following reasons, we shall affirm the order of the circuit court.

FACTS AND PROCEEDINGS

Henry King, Jr. ("Henry"), now deceased, was Dowe's stepfather. Henry's wife, Lillian King ("Lillian"), also now deceased, was Dowe's mother.

Henry and Lillian owned residential real property located at 500 Sentry Lane, in Fort Washington ("the Property"). On March 10, 2008, Henry refinanced his purchase money loan on the Property, borrowing $162,250 from National City Mortgage, a

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[1] The questions as posed by Dowe are:

> 1. When certified mail notices are deemed, "undeliverable as addressed" and regular first class mailings are not sent, nor received announcing notice of a foreclosure sale, is the failure to take any additional steps to notify the property owner excused?
>
> 2. Because Appellant, had no knowledge of the foreclosure sale, is it constitutionally fair that, Appellant was denied an opportunity to exercise his rights prior to the sale?

division of National City Bank (the "Lender").[2] In doing so, he executed a promissory note (the "Promissory Note") and a deed of trust (the "Deed of Trust"). The Deed of Trust was recorded among the Land Records for Prince George's County and created a lien upon the Property. At some point not reflected in the record, the Lender indorsed the Promissory Note to Federal Home Loan Mortgage Corp. ("FHLMC"). FHLMC authorized PNC Bank ("PNC") to be the holder of the Promissory Note for the purposes of pursuing the instant foreclosure action.

On November 11, 2011, Henry died. In December of 2011, his estate defaulted under the terms of the Promissory Note and the Deed of Trust.

On or about May 22, 2012, PNC Bank appointed the Substitute Trustees.

On September 5, 2012, Dowe was appointed the personal representative of the Estate.

On October 26, 2013, PNC mailed three notices of intent to foreclose to the Property address by certified mail. The notices were addressed to Henry's estate, Lillian, and to Henry's estate "c/o Andrew [sic] Dowe."[3] The notice stated that it was for an "Owner-Occupied Property" and informed the recipients that "a foreclosure action may

[2] Lillian was not a party to the refinance transaction. It is unclear whether she was a borrower on the original purchase money loan.

[3] Md. Code (1974, 2010 Repl. Vol.), section 7-105.1(c)(1) of the Real Property Article ("RP"), states that "at least 45 days before the filing of an action to foreclose a mortgage or deed of trust on residential property, the secured party shall send a written notice of intent to foreclose to the mortgagor or grantor and the record owner."

be filed in court as early as 45 days from the post mark date of this Notice." Included with the notices was an information sheet explaining "possible workout options for the loan," as well as an application for a loss mitigation program and a list of organizations that might be able to assist them.

On January 22, 2013, the Substitute Trustees filed in the circuit court an order to docket a foreclosure action against the Property, with attachments, including a preliminary loss mitigation affidavit. The affidavit, dated January 9, 2013, stated that the Property was owner-occupied, that the loan might be eligible for loss mitigation, but that the Substitute Trustees had been unable to "obtain all documentation and information necessary to conduct the loss mitigation analysis," specifically, a hardship letter, financial information, and verification of income.

On January 25, 2013, Dowe was personally served at the Property with notice of the foreclosure action. According to the affidavit of service, Dowe stated that he lived at the Property with Lillian. Sometime after that date, Lillian died.

On August 20, 2013, the Substitute Trustees filed with the circuit court a final loss mitigation affidavit. It stated that while loss mitigation analysis was pursued, it had been unsuccessful because the "trial plan payments" were not made. As a result, the loan workout had been "closed." The affidavit also stated that the Property was not owner-occupied because the "borrower [was] deceased." Attached to the affidavit was a "Request for Foreclosure Mediation" form and instructions addressed to Henry's estate and Lillian. The affidavit and the request for mediation documents were sent by first

class mail and by certified mail, return receipt requested, to Henry's estate, Lillian, and Dowe at the Property address and to Henry's estate and Lillian at an address in Washington, D.C.

On September 6, 2013, Dowe filed with the circuit court a request for foreclosure mediation on behalf of Henry's estate.

On November 12, 2013, Dowe and the Substitute Trustees attended mediation before an administrative law judge ("ALJ") at the Office of Administrative Hearings. On November 18, 2013, the ALJ filed a "Notification of Status" stating that the parties had participated in mediation, but that "no agreement was reached."

On November 22, 2013, the circuit court entered an order permitting the Substitute Trustees to schedule a foreclosure sale, subject to the right of the borrower to move to stay the sale and dismiss the action.

On February 18, 2014, the Property was sold at auction for $106,777. FHLMC was the high bidder.

On March 13, 2014, the Substitute Trustees filed the Report of Sale. Pursuant to Rule 14-210, they attached an "Affidavit of Notice" and an "Affidavit of Mailing Notice to Occupants." As relevant here, Brady, one of the Substitute Trustees, averred that on January 31, 2014, she "mailed or caused to be mailed, by certified mail return receipt requested and by first-class mail, postage prepaid, to the Mortgagors and to the present record owner . . . notice of the time, place and terms of the sale scheduled for February 18, 2013." She averred that on the same date she mailed a notice to all occupants of the

Property by first class mail. Brady further averred that she caused notice of the sale to be published in the Prince George's County Post on January 30, 2014, February 6, 2014, and February 13, 2014.

Attached to the affidavits was a "TrackRight Transactions Report" that listed all of the mailing dates, the "Article Number," the "USPS Service Type," the "Status," and the postage for the notices.[4] It showed that on January 31, 2014, the Substitute Trustees sent six notices by first class mail addressed to Henry's estate, Lillian, and Dowe at the Property address and two notices addressed to Henry's estate and Lillian at the address in Washington, D.C. Also on that date, they sent five notices by certified mail, return receipt requested addressed to Henry's estate, Lillian, and Dowe at the Property address and two notices addressed to Henry's estate and Lillian at the address in Washington, D.C. Finally, they sent a notice addressed to the "Occupant" of the Property by first class mail advising of the foreclosure sale. For the first class mailings, the "Status" column stated that all of the notices sent to the Property address, with the exception of the notice addressed to "Occupant," were "Unclaimed." The status for the notice addressed to "Occupant" was listed as "Walz Event – Mailed." The certified mailings all list a status of "Walz Event – Mailed." There was no explanation of the meaning of those statuses.

[4] It appears that the Substitute Trustees utilized a private mailing service, the "Walz Group, Inc.," and that this report was generated by that company.

Thereafter, on March 25, 2014, the clerk of the circuit court issued a notice of the sale pursuant to Rule 14-305(c).

Within thirty days of that notice, on April 22, 2014, Dowe filed exceptions to the foreclosure sale. He stated that Henry and Lillian both were deceased and that he was the personal representative of their estates.[5] He alleged that he had not received proper notice of the foreclosure sale pursuant to Rule 14-210. He asserted that he had never received "notification of the foreclosure sale by certified mail, nor by first class mail and [he] reside[d] at the property." He alleged that he only learned of the sale when a "post card advertisement" from a law firm was sent to him at the Property advising of the sale and offering to represent him. Dowe asserted that the lack of proper notice had prejudiced him because he had been "[d]enied the legal right to file a Motion to Stay Sale and Dismiss the Foreclosure Action."

He alleged moreover that PNC failed to engage in good faith loss mitigation efforts. He alleged that while he was "supposed to have been granted a forbearance (trial plan) for three months," he never received that plan in writing. He alleged that he had learned that the workout plan had mistakenly been mailed to one Danette Fredericks, who was the special administrator of the Estate prior to Dowe's appointment as personal representative. Dowe also questioned why the preliminary loss mitigation affidavit stated

[5] It is unclear from the record when Lillian died, but, as mentioned, it was apparently after Dowe was served with notice of the foreclosure action. The record also does not reflect whether an estate was opened for Lillian and whether Dowe was, in fact, appointed the personal representative of her estate.

that the Property was owner-occupied, while the final loss mitigation affidavit did not, given that PNC knew that Henry was deceased prior to initiating the foreclosure action.

Dowe attached to his exceptions fourteen exhibits, including the mailer from the law firm advising him of the foreclosure sale postmarked January 25, 2014; the "Track Right Transaction Report" that had been attached to the Report of Sale showing the dates and addressees on the mailings sent by the Substitute Trustees; and printouts showing USPS tracking reports for some of those same mailings. He requested an evidentiary hearing and for the court to set aside the foreclosure sale.

On August 21, 2014, the Substitute Trustees responded to Dowe's exceptions. They maintained that Dowe was afforded more than adequate notice of the foreclosure sale because he was personally served in the foreclosure action, had attended mediation, and numerous notices of the sale were mailed to him at the Property. They argued, moreover, that because Dowe admitted that he was on actual notice of the sale date based on the post card mailing he received from a law firm he could not have been prejudiced by any deficiency in the notice by the Substitute Trustees. Finally, they maintained that Dowe's assertion that the Substitute Trustees failed to engage in good faith loss mitigation was not properly raised in post-sale exceptions.

Dowe moved to strike the Substitute Trustees' response to his exceptions as untimely and filed a reply.

By memorandum and order entered November 12, 2014, the court overruled Dowe's exceptions and denied the motion to strike. The court reasoned that Dowe had

failed to identify any "legitimate procedural irregularity" with regard to the foreclosure sale. The court found that Dowe was served in the foreclosure action and attended mediation "where no agreement was reached," putting him on notice that "foreclosure proceedings would move forward and in due course."

On November 24, 2014, the court entered a final order ratifying the sale.

This timely appeal followed.

DISCUSSION

"[A]fter a foreclosure sale, 'the debtor's later filing of exceptions . . . may challenge only procedural irregularities at the sale or . . . the statement of indebtedness.'" *Bates v. Cohn*, 417 Md. 309, 327 (2010) (quoting *Greenbriar Condo. v. Brooks*, 387 Md. 683, 688 (2005)). The types of "procedural irregularities" that may properly be raised in post-sale exceptions include "'allegations [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'" or an allegation that the lender failed to give proper notice. *Jones v. Rosenberg*, 178 Md. App. 54, 69 (2008) (quoting *Greenbriar*, 387 Md. at 741).

Real Property sections 7-105.2 and 7-105.9 and Rule 14-210 govern notice prior to a foreclosure sale. Those provisions require that notice be afforded to interested parties in three ways: publication in a newspaper, first class mail, and certified mail. Md. Rule 14-210(a) & (b). With regard to the mailings, Rule 14-210 states, in pertinent part:

> Before selling the property subject to the lien, the individual authorized to make the sale shall also send notice of the time, place, and terms of sale (1)

> by certified mail and by first-class mail to (A) the borrower, (B) the record owner of the property, and (C) the holder of any subordinate interest in the property subject to the lien and (2) by first-class mail to "All Occupants" at the address of the property. . . . The mailings shall be sent not more than 30 days and not less than ten days before the date of the sale.

Md. Rule 14-210(b); *see also* RP § 7-105.2 (requiring notice to record owner of property at not more than thirty days and not less than ten days prior to foreclosure sale by first class mail and certified mail); RP § 7-105.9 (requiring notice to occupants of residential property not more than thirty days and not less than ten days prior to foreclosure sale).

In *Griffin v. Bierman*, 403 Md. 186 (2008), the Court of Appeals considered a challenge to this notice scheme. There, the property owner, Griffin, alleged that she had failed to receive "advance notice of the [foreclosure] sale" and that this amounted to a violation of her "right to due process of law, guaranteed by the Fourteenth Amendment to the United States Constitution and Article 24 of the Maryland Declaration of Rights." *Id*. at 195-96. The Court first considered Griffin's argument as a facial challenge to the notice scheme. It explained that the notice scheme contemplates multiple means of notifying a property owner, tenant, or other occupant of a residential property prior to a foreclosure sale, including first class mail, certified mail, and publication, and that these methods, taken together, "are calculated reasonably to inform interested parties of the pending foreclosure action." *Id*. at 212.

The Court then addressed Griffin's argument that the notice scheme was unconstitutional "as-applied" in her case. *Id*. at 208. It noted that the circuit court had found as a fact that Griffin "did not receive actual notice" prior to the foreclosure sale,

relying on evidence that the certified mailings all were returned unclaimed and crediting Griffin's testimony at the exceptions hearing that she never had received any of the notices sent by first class mail. *Id*. The Court opined, however, that it is "well settled that due process of law is not violated in application because the interested party did not receive actual notice." *Id*. Given that there was no dispute that the trustees had sent notice in compliance with the law, the Court held that Griffin was not denied due process of law because she never received those notices.

In the instant case, Dowe contends the trial court erred by overruling his exceptions because the evidence showed that no first class mailings were sent to the Property and that the certified mailings all were "undeliverable as addressed." With respect to the former argument, he asserts that because the Tracking Report showed that the first class mailings sent to the Property were "Unclaimed" these mailings could not have been sent by first class mail. With respect to the certified mailings, he points to the USPS tracking reports he attached to his exceptions as evidence that the certified mailings sent to the Property address all were deemed "undeliverable as addressed." According to Dowe, the Substitute Trustees were obligated to take additional steps to notify him of the pending foreclosure sale in light of the undelivered mailings.

The Substitute Trustees respond that there was no procedural defect in the sale because they sent the notices required by law. Moreover, they note that Dowe does not even allege that he was actually unaware of the foreclosure sale, only that he was not afforded proper notice by the Substitute Trustees.

As discussed, the Substitute Trustees filed an affidavit averring that they sent the notices required under Rule 14-210 and the RP Article. The Tracking Report attached to the Substitute Trustees' Report of Sale showed that notices of the pending sale were sent by first class mail and certified mail on January 31, 2014, to all occupants of the Property, to Lillian at the Property, to Henry's estate at the Property, and to Henry's estate "c/o Anthony Dowe" at the Property. For the reasons stated in *Griffin*, even if Dowe did not receive any of the first class mailings or the certified mailings sent to the Property, the Substitute Trustees afforded him the notice required by law. Those notice procedures were "calculated reasonably to inform interested parties of the pending foreclosure action" and were not violative of Dowe's due process rights. *Griffin*, 403 Md. at 212.[6] Thus, the circuit court did not err by overruling Dowe's exceptions and ratifying the sale.

FINAL ORDER OF RATIFICATION AFFIRMED. COSTS TO BE PAID BY THE APPELLANT.

[6] It is worth noting that, by Dowe's own admission, he was on actual notice of the sale by means of the legal mailer. Thus, it is difficult to imagine how he could be prejudiced by any deficiency in the notices sent by the Substitute Trustees.