

Circuit Court for Anne Arundel County
Case No. C-02-CV-15-3083

UNREPORTED
IN THE COURT OF SPECIAL APPEALS
OF MARYLAND

No. 2189

September Term, 2016

JOSHUA O'DELL, *et al.*

v.

KRISTINE BROWN, *et al.*

Berger,
Beachley,
Kenney, James A., III
(Senior Judge, Specially Assigned),

JJ.

Opinion by Kenney, J.

Filed: June 1, 2018

*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.

Appellants, Joshua O’Dell and Bobbie Jo Smiler, filed exceptions challenging the foreclosure sale of their home in the Circuit Court for Arundel County. The circuit court overruled their exceptions and ratified the sale. On appeal, appellants ask:

Whether a substitute trustee in foreclosure action can invoke the jurisdiction of the court prior to recording the Appointment of Substitute Trustee[s]?¹

For the reasons that follow, we affirm the judgment of the court below.

FACTUAL AND PROCEDURAL BACKGROUND

On or about February 19, 2014, appellants/mortgagors borrowed \$540,000 (the “Loan”) from Carrington Mortgage Services, LLC. The Loan was evidenced by a promissory note and secured by a purchase-money deed of trust (the “Deed of Trust”), which was recorded. The Deed of Trust named an individual as trustee (the “original trustee”²) and encumbered certain real property known as 207 Arabian Court, Gambrills, Maryland (the “Property”). On April 5, 2015, appellants defaulted on the Loan, and a notice of intent to foreclose, dated July 1, 2015, was issued to appellants.

On September 30, 2015, appellees initiated the foreclosure proceeding by electronically filing an Order to Docket in the Circuit Court for Arundel County, pursuant to Maryland Rules 14-204 and 14-207. The Order to Docket included a copy of the executed Appointment of Substitute Trustees, which was signed and dated September 22,

¹ The substitute trustees (and the appellees in this case) are Kristine D. Brown, William M. Savage, Gregory N. Britto, Lila Z. Stitely, R. Kip Stone, and Jordy B. Hirschfeld, “any one of whom may act.” They frame the question differently: “Did the Circuit Court err in denying Appellants’ untimely challenge to the appointment of substitute trustees?”

² The original trustee was Tom Croft.

2015, in addition to an Appointment of Substitution of Trustees’ Affidavit. Under the terms of the Deed of Trust, the present holder of the note, J.P. Morgan Mortgage Acquisition Corp. (“J.P. Morgan”), removed the original trustee and appointed appellees as substitute trustees. The Appointment of Substitute Trustees was not recorded in the land records of Anne Arundel County until October 2, 2015, two days after the Order to Docket was filed.

The Order to Docket and copy of the appointment were served upon appellants on October 20, 2015. On June 21, 2016, the Property was sold at a foreclosure sale to J.P. Morgan for the sum of \$474,042. The Report of Sale was filed on July 6, 2016.

On August 8, 2016, appellants filed exceptions to the Report of Sale, arguing the recordation issue and that there was lack of notice of the sale. Appellants amended their exceptions on August 22, 2016 and abandoned the notice issue. After a hearing before the circuit court on November 1, 2016, the parties submitted written memoranda in lieu of oral argument.

The circuit court entered an order denying the appellants’ exceptions on December 20, 2016. The court found that appellants’ post-sale exceptions were “too late” because they did not “challenge the [foreclosure] sale or its procedures, but rather . . . the substitute trustees’ actions and filings prior to the sale.” The court, citing *Bates v. Cohn*, 417 Md. 309, 326 (2010), explained that post-sale exceptions may only challenge “procedural irregularities at the sale or . . . the statement of indebtedness.” As to appellants’ jurisdictional argument, the order stated:

Assuming that Defendants are, as they assert, entitled to challenge the initial jurisdiction of the substitute trustees to bring this action, based on a “late” recordation of the Deed of Appointment of Substitute Trustees, Defendants still would not prevail. Md. Code Ann., Real Prop. § 4-107 holds that:

(a) Every power of attorney executed by any person authorizing an agent or attorney to sell and grant any property shall be executed in the same manner as a deed and recorded:

(1) Before the day on which the deed executed pursuant to the power of attorney is recorded;

(2) On the same day as the deed executed pursuant to the power of attorney;
or

(3) Subject to subsection (b) of this section, after the day on which the deed executed pursuant to the power of attorney is recorded.

Here, the Order to Docket was filed on September 30, 2015, including the Deed of Appointment of Substitute Trustees. That deed was not recorded among the land records of Anne Arundel County until October 2, 2015. Pursuant to Md. Code Ann., Real Prop. § 4-107, however, the Deed of Appointment would only need to be recorded on or before the day that Deed of Trust is conveyed and recorded by the buyer from the June 21, 2016 sale. Therefore, the Deed of Appointment was recorded well in advance of the § 4-107 deadline.

Appellants filed this timely appeal.

DISCUSSION

Standard of Review

Regarding exceptions to a foreclosure sale:

The party putting forth the exceptions to the sale must prove the substance of his contentions in respect to the irregularity in the manner in which the sale was held. The invalidity of a mortgage sale, like other judicial sales, is not presumed, and the burden of proving the contrary is on the one attacking the sale.

Greenbriar Condominium v. Brooks, 387 Md. 683, 742 (2005) (internal citations and quotations omitted). On appeal, we review de novo questions of law decided by the trial

court in its ruling on exceptions to a foreclosure sale. *Burson v. Capps*, 440 Md. 328, 342 (2014).

Contentions

Appellants contend that the appellees could not initiate the foreclosure action on September 30, 2015 because a substitute trustee cannot invoke the jurisdiction of the court prior to recording the appointment of the substitute trustee. Because the circuit court’s lack of subject matter jurisdiction can be raised “at any point in the proceedings,” they argue that it may be raised as a post-sale exception.

Categorizing the appellants’ challenge as one of standing, and not subject matter jurisdiction, appellees contend that the appellants’ post-sale challenge to the foreclosure sale was properly disposed of by the circuit court as untimely. They note that the Appointment of Substitute Trustees was properly executed and notarized in advance of the filing of the Order to Docket and prior to the sale. And, even if the appointment was defective, there was no substantial prejudice to appellants that would require setting aside the foreclosure sale.

Analysis

Subject matter jurisdiction is “the court’s ability to adjudicate a controversy of a particular kind.” *John A. v. Bd. of Educ. for Howard Cty.*, 400 Md. 363, 388 (2007) (“If, by the law that defines the authority of the court, a judicial body is given the power to render a judgment over that class of cases within which a particular case falls, the court

has subject matter jurisdiction.”) “Standing is concerned with whether the parties have the right to bring suit.” *Lamb v. Kontgias*, 169 Md. App. 466, 473 (2006).

The foreclosure process is divided into two distinct parts, pre-sale and post-sale, and “[a] borrower’s ability to challenge a foreclosure sale is in part determined by whether relief is requested before or after the sale.” *Thomas v. Nadel*, 427 Md. 441, 443 (2012). Pre-sale a borrower may challenge the validity of the lien instrument or the right of the moving party to foreclose. *Id.* A successful pre-sale challenge may result in the dismissal of the foreclosure action. Md. Rule 14-211.

But, “a homeowner/borrower ordinarily must assert known and ripe defenses to the conduct of a foreclosure sale prior to the sale, rather than in post-sale exceptions.” *Bates v. Cohn*, 417 Md. 309, 328 (2010). As the *Bates* Court explained, “Rule 14-305 [which governs post-sale exceptions] is not an open portal through which any and all pre-sale objections may be filed as exceptions, without regard to the nature of the objection or when the operative basis underlying the objection arose and was known to the borrower.” *Id.* at 327.

By conflating the substitute trustees’ standing or right to file the Order to Docket to the circuit court’s subject matter jurisdiction over the case, appellants seek to avoid the pre-sale/post-sale procedural divide. They argue that “where there is no standing to invoke the jurisdiction of the court the actions are *void ab initio* and can either be attacked directly or collaterally.”

Their argument rests factually on the recording of the Appointment of Substitute Trustees two days after the Order to Docket was filed, and, legally, on Real Property (“R.P.”) § 3-101(a) of the Maryland Code Annotated, which reads, “Except as otherwise provided in this section, no estate of inheritance or freehold, declaration or limitation of use, estate above seven years, or deed may pass or take effect unless the deed granting it is executed and recorded.” And, because a deed of trust must be recorded, they assert, without citation, that the appointment of substitute trustees “is a change to the Deed of Trust in this case through a declaration of use and must be recorded to take effect.” But, as we held in *Svrcek v. Rosenberg*, 203 Md. App. 705, 729 (2012), the appointment of substitute trustees “is not a conveyance of an interest in property, but merely serves to appoint new trustees to exercise the lender’s power under the deed of trust to foreclose the right of redemption” As the Deed of Trust in this case expressly provides, the successor trustees “succeed to all the title, power, and duties conferred upon” the original trustee “[w]ithout conveyance of the Property.” Because the document appointing substitute trustee “merely authorized the trustees to foreclose the right of redemption and exercise the power of sale, [R.P.] § 4-107³ was not implicated.” *Id.*

Under Maryland Rule 14-204(a), “any individual authorized to exercise a power of sale may institute an action to foreclose the lien.” The action is initiated by “filing an order to docket.” Md. Rule 14-207(a). The required exhibits include a copy of any

³ The circuit court in its order referenced powers of attorney and R.P. § 4-107. We agree with appellants that the appointment of substitute trustees is not a power of attorney governed by R.P. § 4-107. But, the transfer of actual title by the substitute trustees upon completion of the foreclosure sale would require a document satisfying R.P. § 3-101(a).

“appointment of substitute trustees supported by an affidavit that it is a true and accurate copy of . . . the deed of appointment.” Md. Rule 14-207(b)(4). The rules do not require the recording of the deed of appointment prior to the filing of an order to docket, and the jurisdiction of the court over the property “attaches when an action to foreclose is filed.” Md. Rule 14-203. We are persuaded that the substitute trustees had the authority to file the Appointment of Substitute Trustees for recording along with the Order to Docket and to invoke the jurisdiction of the circuit court. In short, we agree with the circuit court that appellants’ post-sale challenge to the right of the substitute trustees to foreclose came “too late.”

Moreover, and even if the Appointment of Substitute Trustees was somehow defective⁴, appellants have failed to demonstrate any prejudice. Maryland appellate courts will not invalidate or set aside a foreclosure sale without a showing of prejudice to the excepting party. *See Hood v. Driscoll*, 227 Md. App. 689, 697 (2016) (“The party excepting to the sale has the twin burden of showing that the sale was invalid and that any claimed errors caused prejudice.”); *accord Fagnani v. Fisher*, 418 Md. 371, 384 (2011); *Bachrach v. Washington United Co-op.*, 181 Md. 315, 320 (1943) (“[N]o court shall set aside a foreclosure sale merely because of harmless errors or irregularities

⁴ To the extent that any defect in the Appointment of Substitute Trustees and their standing to file the Order to Docket persisted before recordation, that defect was cured on October 2, 2015, two days after the Order to Docket was cured. Generally, Maryland trial courts allow a lack of standing to be “cured” during the course of the trial, including, for example, with a timely motion to intervene by a party with standing to bring the suit on his or her own. *See* Md. Rule 2-214; *e.g.*, *Benning v. Allstate Ins. Co.*, 90 Md. App. 592, 597-99 (1992).

committed in connection with the exercise of the power of sale, or for any slight or frivolous reasons not affecting the substantial rights of the parties.”) As the Court of Appeals has explained:

The ratification of a foreclosure sale is, however, presumed to be valid. It is settled law that, there is a presumption that the sale was fairly made, and that the antecedent proceedings, if regular on the face of the record, were adequate and proper, and the burden is upon one attacking the sale to prove the contrary. The party excepting to the sale bears the burden of showing that the sale was invalid, and must show that any claimed errors caused prejudice. Additionally, in reviewing a court’s ratification of a foreclosure sale, we will disturb the circuit court’s findings of fact only when they are clearly erroneous.

Burson v. Capps, 440 Md. 328, 342-43 (2014) (quoting *Fagnani*, 418 Md. at 384)) (cleaned up).

Here, appellants do not dispute the default of the Loan, the validity of the lien instrument, or the sale of the Property itself. The Appointment of Substitute Trustees, executed on September 22, 2015, was recorded on October 2, 2015, two days after the Order to Docket was filed. Appellants were then served with the foreclosure filings and had proper notice of the sale, which took place months later, on June 21, 2016. There is no claim, much less evidence, that the substantive rights of appellants were affected or that they were in any way prejudiced by the two day delay between the filing of the Order to Docket and the recording of the Appointment of Substitute Trustees. Thus, there is no reason to undo the foreclosure sale in this case.

**JUDGMENT OF THE CIRCUIT COURT
FOR ANNE ARUNDEL COUNTY
AFFIRMED; COSTS TO BE PAID BY
APPELLANTS.**