

Circuit Court for Prince George's County
Case No. CAE17-09394

UNREPORTED
IN THE COURT OF SPECIAL APPEALS
OF MARYLAND

No. 2289

September Term, 2018

ARNOLD P. POPKIN

v.

FEDERAL NATIONAL MORTGAGE
ASSOCIATION

Reed,
Shaw Geter,
Raker, Irma S.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Reed, J.

Filed: September 18, 2020

*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.

This case poses the question of whether a refinanced deed of trust should have priority over the Appellant’s lien. On August 1, 2018, the circuit court entered a declaratory judgment that permitted Federal National Mortgage Corporation (“Appellee”) to record a copy of its deed of trust, where the original instrument had been lost, establishing the deed of trust as a valid lien against the secured property as of the date of its execution, June 19, 2007. This appeal followed, wherein Appellant, the one-time attorney of Raphael Day, Jr. who holds a judgment and interest in the property, presents eight questions for our review, which seemingly represent a reiteration of the same question. Therefore, we have significantly condensed and rephrased the questions presented for clarity:¹

¹ Appellant presents the following questions:

1. Does Maryland Code, Real Property Article, Sections 4-106 and 4-109 render subject deed of trust invalid and of no force and effect?
2. Was the evidence legally insufficient and as the trial court clearly erroneous when it ruled that Appellee was entitled to a lien retroactive to June 19, 2007?
3. Was trial court clearly erroneous when it admitted a copy of deed of trust and Hud 1 Statement in violation of Maryland Rules 5-109, 5-1003 and 1004?
4. (a) Did Appellee prove by probative evidence that its conduct entitled it to a lien as an equitable subrogee?

(b) Did Appellee adduce evidence having probative value and evidential force that it anything more than a general creditor of Davy?
5. With Appellee offer no evidence of its paying any sum to satisfy predecessor lenders of Davy or any circumstances to show it an equitable subrogee, without applicability of Real Property Article, Section 3-201, was it clearly erroneous for trial court to have awarded Appellee a lien?
6. If Davy’s bankruptcy discharge order of February 26, 2010, made at a time when both Chevy Chase Bank and PHH Mortgage Corporation admittedly not lien

- I. Did the circuit court abuse its discretion when it entered the declaratory judgment finding that Appellee had a valid, first-priority lien on the Property over Appellant’s judgment lien?

While we have streamlined Appellant’s questions presented into one, we do intend to address the incidental aspects of each of Appellant’s questions presented, *infra*. And still, for the reasons discussed below, we affirm the circuit court’s entry of the declaratory judgment.

FACTUAL AND PROCEDURAL BACKGROUND

Raphael Davy, Jr. (“Davy”) was conveyed title to a property located at 2112 Parkside Drive Bowie, MD 20721 (“the Property”) on July 14, 2000. The deed for the Property was recorded in the Land Records of Prince George’s County (“the Land Records”). On March 9, 2006, Davy borrowed \$338,950.44 (“the Prior PHH Loan”) from PHH Mortgage Corp (“PHH”) and executed a deed of trust (“the Prior PHH Deed of Trust”), securing the Prior PHH Loan with a mortgage lien against the Property, which was also recorded in the Land Records. On March 23, 2007, Chevy Chase Bank F.S.B. (“Chevy Chase”) loaned Davy \$232,000 (“the Prior Chevy Loan”), who executed a deed of trust

holders, is it not absolute as a matter of law that Appellee’s claim for relief against Davy barred?

7. Does Appellee’s settled conduct to disclose no material facts to Appellant and trial court of its history with PHH Mortgage 2 and/or City Mortgage, constitute such unclean hands as a prelude to equitable relief?
8. In event Court of Special Appeals reverses Order of Trial Court, in order to have complete justice, must Appellate order also to defaulting parties?

(“the Prior Chevy Deed of Trust”) securing the Prior Chevy Chase Loan with a mortgage lien against the property which was also recorded in the Land Records. The debt secured by the Prior Chase Deed of Trust was fully paid off and discharged, but the release was not recorded in the land records of Prince George’s County.

On June 19, 2007, Davy borrowed \$383,170.80 (“the Refinance Loan”) from PHH and executed a promissory note (“the Note”) evidencing the terms of the Refinance Loan. On the same day, Davy also executed a deed of trust (“the Refinance Deed of Trust”) securing the loan with a mortgage lien against the Property. When Davy signed the Refinance Deed of Trust, Davy agreed to convey a first priority lien and security interest in the Property to the Refinance Loan’s owner. This was evidenced by the HUD-1 statement attached to the transaction, as the funds from the Refinance Deed of Trust were used to pay off the Prior PHH Deed of Trust. However, the Refinance Deed of Trust was not recorded in the Land Records of Prince George’s County. Furthermore, the original Refinance Deed of Trust was lost and cannot be located, preventing it from being recorded in the Land Records. The only evidence that remains of the Refinance Deed of Trust is a copy of the document. On the other hand, the original Note was not lost, and was endorsed-in-blank by PHH and transferred to Appellee, along with ownership of the Refinance Loan and the beneficial interest in the Refinance Deed of Trust on July 1, 2007. Appellee retained Seterus, Incorporated (“Seterus”) as the servicer of the Refinance Loan, and Seterus has the physical possession of the Note. In order to secure its interest in the property, Appellee advanced Davy’s real property taxes and insurance premiums for the Property.

On September 11, 2009, Davy filed a Chapter 7 Bankruptcy Petition (“the Bankruptcy”) in the US. Bankruptcy Court for the District of Maryland. On February 26, 2010, Davy received a bankruptcy discharge, and the bankruptcy was terminated on that same date. Nonetheless, the Trustee appointed within the Bankruptcy did not take any action to void the executed Refinance Deed of Trust. Davy continued to make payments on the Refinance Loan, but on December 1, 2012, he defaulted on this loan. On April 14, 2014, Arnold Popkin (“Appellant”) obtained a monetary judgment against Davy for unpaid legal fees in the District Court of Howard County in the amount of \$28,826.23. This judgment was recorded in the Circuit Court for Prince George’s County on August 18, 2014.

Because the original Refinance Deed of Trust was lost, Appellee sought equitable relief to allow a copy of the Refinance Deed of Trust to be recorded nunc pro tunc to the date that it was executed so that the land records could properly reflect the current encumbrances on the Property. On April 7, 2017, Appellee filed a Complaint against Davy, PHH, Capital One, N.A. (The successor by merger to Chevy Chase) (“Capital One”), Woodmore² and Appellant. Shortly after service of process, PHH and Capital One recorded Certificates of Satisfaction of the Prior PHH Deed of Trust and Prior Chevy Chase Deed of Trust in the Land Records, respectively, releasing their mortgage liens on the Property; they were subsequently dismissed from the action. Default judgments were entered against Woodmore and Davy when neither filed answers to the Complaint.

² Woodmore South Community Association, Inc. (“Woodmore”) also recorded two liens against the Property for unpaid homeowner association assessments.

Appellant, however, did answer the Complaint, in order to protect his own interest in the Property, and both parties engaged in discovery. On June 22, 2018, Appellee filed a Motion for Summary Judgment, asserting that there was no genuine dispute that the borrower and lender intended for the Refinance Deed of Trust to be recorded and establish a first priority lien and security interest in the Property, to which Appellant replied. On July 20, 2018, the circuit court held a hearing on Appellee's Motion for Summary Judgment and other ancillary motions and ordered Appellee to produce several additional documents. The circuit court reserved on Appellee's Motion for Summary Judgment.

On August 1, 2018, the circuit court held a Motions Hearing and Bench Trial. During the part of the hearing that dealt with motions, Appellant argued that Appellee had not provided all of their documentation regarding the chain of ownership and how the Refinance Deed of Trust ended up with Appellee. Appellee replied that they did in fact provide Appellant with its origination file, and contrary to Appellant's expectations, Appellees had provided all the documents it was in possession of, pursuant to the circuit court's July 10, 2018 order. Appellee also outlined that they did send a subpoena duces tecum to PHH for their origination file but did not receive a response. Without further argument, the circuit court decided to continue to a bench trial.

In their opening statement, Appellee outlined that they were the current holder of the Note and were the beneficiary under the Refinance Deed of Trust, which had never been paid in full. Appellee reiterated that because the original Refinance Deed of Trust was not recorded and uncertainty exists as to Appellee's interest in the Property, they are seeking declaratory judgment establishing Appellee's rights in the Property. In response,

Appellant argued several tangential things, asserting that the Refinance Deed of Trust was “fatally flawed” due to initialing issues, date inconsistencies and the lack of personal appearance.³ Appellant raised issues related to the “absence of clean hands.” Appellant also asserted that “there is so much going on that is sinister in this case ... and many things do not make sense,” so Appellee does not have a right to equitable subrogation.

Appellee offered the testimony of Rodrick Meadows (“Meadows”), a foreclosure litigation officer at Seterus. Meadows testified that one of his responsibilities was to serve as the custodian of records for loans that Seterus services in the regular course of business. He testified that Appellee is the current owner of the beneficial interest in both the Note and the Refinance Deed of Trust, and the Note was in the physical possession of Seterus, in Texas, while the company only possessed a copy the Refinance Deed of Trust. During cross-examination, Meadows testified that he knew that Seterus had the original Note in a vault due to his correspondence with the custodial department of evidence. When questioned about why there had been an assignment of the Refinance Deed of Trust, Meadows answered that “an assignment of mortgage is ... kind of like having a paper trail or having evidence on file to show when something or a mortgage is assigned to a different party and to memorialize what the situation is at the time.” Meadows testified that it was his personal knowledge that the copy of the Refinance Deed of Trust was an authentic and genuine copy of the original.

³ The signing apparently took place in New Jersey, following a Maryland settlement, where Appellant alleges personal appearance is required.

At the end of the Appellee's case, Appellant claimed that Meadows knew "absolutely nothing" about the transaction in the case. Appellant mentioned that there was no indication that there were any funds transferred from Appellee to PHH or PHH's intermediary. Appellant asserted that there was no proof that existing liens were satisfied through any amount of money paid by Appellee to liquidate or to satisfy preexisting liens. Hence, Appellant asked that the circuit court grant a Motion for Judgment, which the circuit court denied.

In his case-in-chief and *pro se*, Appellant testified that he represented Davy first in 2002, and then "unrelentfully" from 2005 to the fall of 2012, with respect to his family law matter. He asserted that after he tried to get his fees from Davy to no avail, he filed a lawsuit against Davy. Appellant then turned his testimony to the process of receiving the complaint in the case at bar and was "taken aback ... by the conspicuous absence of salient facts that explain how Appellee acquired an interest in the property." Appellant began to outline inconsistencies he found in the Complaint and throughout the discovery process. Appellant wanted the court to take judicial notice of "what was going on in the world" and "financial crisis of 2008," to which the circuit court declined to do. Appellee did not cross examine Appellant.

In closing arguments, Appellee reiterated that the Refinance Deed of Trust paid off the Prior PHH Deed of Trust, dated March 6, 2006, in the amount of \$378,191.75, which was reflected on the settlement statement entered into evidence. Appellee argued that even though the Refinance Deed of Trust was not recorded, it is still enforceable, as the parties to the loan expressly intended to have the deed of trust recorded and that Refinance Deed

of Trust would encumber the property with a lien. Appellee maintained that there was no basis for the circuit court to decline the recordation of the Refinance Deed of Trust and under equitable principles and subrogation, they are entitled to step into the shoes of the prior mortgagee. Appellee elaborated that priority statutes protect bona fide purchases and not judgment creditors. Appellee outlined that Appellant provided no evidence that he suffered any prejudice as a result of the failure to record the certificate or that the delay was unreasonable. Appellee also noted that they had been paying the taxes and insurance on the property to the extent of \$62,000, which also exceeds the value of Appellant's lien. Appellee concluded and requested that under these circumstances, the circuit court grant the primary relief requested in the Complaint and hold that the Refinance Deed of Trust have priority over Appellant's lien.

Appellant argued that Appellee was not entitled to equitable relief because Appellee failed to show that the Refinance Deed of Trust paid off the predecessor lien holder. Appellant conceded that he could not prove prejudice but stated that their situation was "bizarre." Appellant continued to assert that "there isn't any question that there's hanky panky in this case."

The circuit court made the following factual findings:

- Back in 2007, PHH gave a loan to Davy that was to refinance the property;
- The loan that PHH gave to Davy was used to pay off the prior mortgage or the prior note and lien and that the Refinance Deed of Trust was intended by the parties to be recorded;
- The Refinance Deed of Trust was inadvertently not recorded;

- Subsequently, the interests of PHH were transferred to Appellee, and thereafter, Appellant obtained a judgment; and
- The copy of the Refinance Deed of Trust was genuine, and the absence of the initials on several pages of the deed of trust was not of legal significance or relevance.

Despite allegations of “nefarious action, dirty hands, hanky panky, squirrely conduct, [or] any other pejoratives,” the circuit court found that the essential facts were established by Appellee and they were entitled to a valid, enforceable and perfected lien of first priority on the property, nunc pro tunc, to June 19, 2007. Appellant filed a timely appeal.

DISCUSSION

A. Parties’ Contentions

Appellant asserts that the absence of a sworn affiant at the time Davy allegedly executed the Refinance Deed of Trust invalidated Appellee’s request for equitable relief. Appellant argues that the evidence was legally insufficient for the circuit court to order that Appellee was entitled to a lien retroactive to June 19, 2007. Appellant states that all the pages of the Refinance Deed of Trust were not initialed, and there is no evidence that any funds were transferred from Appellee to PHH in order to satisfy through any amount of money paid by Appellee. Appellant submits that the circuit court erred when it admitted a copy of the Refinance Deed of Trust, without proving that the originals were lost or destroyed. Appellant maintains that Appellee failed to prove that its conduct entitled it to relief as an equitable subrogee or that it was more than a general creditor of Davy. Appellant further outlines that since Davy was granted an order of bankruptcy discharge on February 26, 2010, Appellee’s claim for lien status should be barred a matter of law. Finally, Appellant alleges that Appellee did not disclose all material facts and

circumstances pertaining to its history with PHH, reflecting unclean hands and barring equitable relief.

Appellee maintains that Appellant failed to establish that any of the circuit court’s factual findings were clearly erroneous. Appellee also contends that the trial court did not abuse its discretion by granting Appellee a declaratory judgment establishing an equitable mortgage on the property with priority over Appellant’s judgment.

B. Standard of Review

“In a declaratory judgment proceeding, the trial court sits not only to determine issues of law but as the trier of the facts, and its conclusions as to the facts will not be disturbed unless found to be clearly erroneous.” *Aetna Cas. & Sur. Co. v. Brethren Mut. Ins. Co.*, 38 Md. App. 197, 206 (1977). The trial court’s legal findings are reviewed *de novo*. *MBC Realty, LLC v. Mayor & City Council of Balt.*, 192 Md. App. 218, 233 (2010). However, appellate courts review the trial courts ultimate decision to grant or deny declaratory judgment under abuse of discretion. *Sprenger v. Public Service Com’n of Maryland*, 400 Md. 1, 21 (2007). Usually, we do not find abuse of discretion unless the circuit court’s decision is “well removed from any center mark imagined by the reviewing court and beyond the fringe of what the court deems minimally acceptable.” *North v. North*, 102 Md. App. 1, 14 (1994)). Abuse of discretion could also be found when:

[N]o reasonable person would take the view adopted by the [trial] court ... when the court acts without reference to any guiding rules or principles, or when the court’s conclusion is clearly against the logic and effect of facts and inferences before the court, and therefore violative of fact and logic.

Santo v. Santo, 448 Md. 620, 626 (2016) (internal citations omitted).

C. Analysis

“At common law a creditor had no remedy against the lands of his debtor. Judgments create liens only because the land is made liable by statute to be seized and sold on execution.” *Himmighoefer v. Medallion Indus., Inc.*, 302 Md. 270, 278 (1985) (citing *Messinger v. Eckenrode*, 162 Md. 63, 67 (1932)). The judgment creditor’s lien gives no attention to any other interests in the property in which the judgment is entered against. Our courts have also traditionally held that “the holder of an equitable title or interest in property, by virtue of an unrecorded contract of sale, has a claim superior to that of a creditor obtaining judgment subsequent to the execution of the contract.” *Himmighoefer*, 302 Md. at 279. The history of Maryland’s canon is rich with precedent that even if an instrument fails as a legal mortgage, due to a defect or lack of strict compliance with statutory requirements, a party’s interest does not de facto vanish. Under the doctrine of equitable mortgage, notwithstanding a defect or infirmity, “an equitable mortgage may be recognized, with priority over judgments subsequently obtained.” *Taylor Elec. Co. v. First Mariner Bank*, 191 Md. App. 482, 497–98, (2010). “The theory underlying the equitable mortgage doctrine is that an instrument which is intended to charge certain lands, even though defectively executed, is nevertheless considered to be evidence of an agreement to convey, and a court of equity should enforce the obligation despite the technical defects in the instrument.” *Lubin v. Klein*, 232 Md. 369, 371 (1963) (internal citations omitted).

In *Dyson v. Simmons*, an executed, acknowledged and recorded mortgage was argued to be defective because the clerk’s statutorily mandated certification was missing. *Dyson v. Simmons*, 48 Md. 207, 209 (1878). Regardless, the Court of Appeals held that

despite the flawed recordation, the security intended by the mortgage was valid and superseded subsequent judgment creditors. *Id.* at 218. Holding that a technical defect does not defeat mortgage validity, the Court stated:

The principle is now so well settled, that it would seem to be beyond all question and controversy, that if a party makes a mortgage, or affects to make one, but it proves to be defective, by reason of some informality or omission, such as failure to record in due time, defective acknowledgment, or the like, though even by the omission of the mortgagee himself, as the instrument is at least evidence of an agreement to convey, the conscience of the mortgagor is bound, and it will be enforced by a Court of equity. As against the mortgagor himself this proposition was never regarded as questionable, but as against judgment creditors of the mortgagor, obtaining their judgments subsequent to the date of the mortgage, there was formerly some dispute. The question, however, both in England and in this State, has been long since settled; and the cases, without an exception, so far as we are informed, hold that a judgment, being but a general lien, must be subordinated to the superior equity of a prior specific lien, created by a defective mortgage or conveyance.

Dyson, 48 Md. at 214-215. The Court of Appeals expanded on this jurisprudence in *Adam v. Avirett*, where, like in the current case, the deed of trust was alleged to be invalid because the acknowledgement did not conform with Maryland’s statutory provisions. *Adam v. Avirett*, 252 Md. 566, 568 (1969). Finding that it is the parties’ intent that validates the mortgage, the Court outlined that “[t]he law of Maryland is therefore that where one who has the right and power to do so intends by a writing to create a lien on his land to secure another but fails to create a statutorily valid security instrument, his expressed intention may be enforced in equity by the other party to the instrument.” *Id.* at 571.

Additionally, the interests secured by a bona fide purchaser will always supersede a judgment creditor, since, as stated *supra*, the entry of judgment takes no notice of any other interest in the property at issue. As reiterated in *Himmighoefer*, “a judgment creditor is not

in the position of a *bona fide* purchaser, and his claim is subject to prior, undisclosed equities. He is neither in fact nor in law a *bona fide* purchaser, and must stand or fall by the real, and not the apparent rights of the defendant in the judgment.” *Himmighoefer*, 302 Md. at 280 (internal citations omitted). These doctrines are echoed in Maryland’s legislative regulations. With respect to the effective date of a recorded deed of trust, Md. Code Real Prop. (“Real Prop.”) § 3-201 outlines:

The effective date of a deed is the date of delivery, and the date of delivery is presumed to be the date of the last acknowledgment, if any, or the date stated on the deed, whichever is later. Every deed, when recorded, takes effect from its effective date as against the grantor, his personal representatives, every purchaser with notice of the deed, and every creditor of the grantor with or without notice.

Therefore, when the circuit court grants equitable relief by way of a declaratory judgment, permitting a party to record their interest, where the parties’ intent to give a secured interest is clear, that interest would be effective on the date in which the instrument was executed. This also endorses the notion that regardless of when a deed of trust is recorded, it will always supplant any rights claimed by a judgment creditor. *See also Chicago Title Ins. Co v. Mary B.*, 190 Md. App. 305, 316 (2010).

Here, the circuit court found that PHH gave a Refinance Loan to Davy, which is demonstrated by the Note and the Refinance Deed of Trust, which were offered as exhibits during the bench trial. When Davy accepted the Refinance Loan, he provided a security interest in the Property in the form of a mortgage lien. Various provisions in both documents reflected these terms. The circuit court found that the loan was used to pay off the Prior PHH Loan, and this was supported by the Refinance Loan’s settlement terms,

which outlined that the Refinance Loan's proceeds, in the amount of \$378,191.78 were used to pay off the Prior PHH Loan. Additional evidence of this pay off was that the Prior PHH Deed of Trust was released in the Land Records. Based on the terms of the Refinance Deed of Trust, the circuit court determined that it was clear that the parties intended that the deed of trust be recorded. In looking at the Refinance Deed of Trust, there was evidence that Davy executed the instrument, identified the Property, and irrevocably granted the Property to the lender's trustee. In numerous paragraphs of the Refinance Deed of Trust, Davy agreed to maintain the Property, provide the lender with the right to protect its interest and provided the lender with the right to foreclose on the Property in the event of default.

The circuit court also acknowledged that the Refinance Deed of Trust was inadvertently not recorded, and Meadows testified to this fact, stating that based on his review of the business records, the Refinance Deed was never recorded. In finding that PHH's interest in the Refinance Deed of Trust was transferred to Appellee, the circuit court relied on Meadow's testimony that Appellee was the owner of both the Refinance Loan and the beneficial interest in the Refinance Deed of Trust, and that the copies of the Note were true and correct copies of the original Note, which was in Seterus' possession. As to the genuineness of the copy of the Refinance Deed of Trust, Meadows testified that it was in fact a true and correct copy of the Refinance Deed of Trust. Meadows also explained that since Appellee had acquired the Refinance Loan, it accepted mortgage payments from Davy and advanced property tax payments and insurance premiums to protect its secured interest in the Property. Records of the payments advanced for the property taxes and insurance premiums were also entered into evidence. Appellant testified that he obtained

his judgment against Davy in the district court of Howard County, and he entered into evidence a copy of the judgment. We find nothing clearly erroneous about the circuit court’s factual findings.

In his numerous questions presented, Appellant raised several technical arguments, none of which we find to be persuasive. First, Appellant asserts that the Refinance Deed of Trust was invalid because a name was omitted from the Affidavit of Consideration on the Refinance Deed, pursuant to Real Prop. § 4-106. However, we agree with Appellees that under the doctrine of “substantial compliance,” the Refinance Deed of Trust would not automatically become invalid due to this error, given the consideration provided by Davy and stated in the Refinance Deed of Trust. *See also Adams*, 252 Md. at 571. We disregard Appellant’s argument that Appellee is a general creditor because the original lender of the Refinance Loan paid off the Prior PHH Loan, and not Appellee, since mortgage lenders who secure their interest with a mortgage or deed of trust are protected as bona fide purchasers for value, contrary to Appellant’s belief. *See Washington Mut. Bank v. Homan*, 186 Md. App. 396, 974 (2009). With respect to the copies of the Refinance Deed of Trust and the Note being entered into evidence, we find that Appellant has waived this issue, since he made no objection at the trial level when these documents were entered into evidence. *See Md Rule 8-131(a)*

Because Appellee’s lien, was unperfected at the time of Davy’s Chapter 7 Bankruptcy, we reject Appellant’s contention that Davy’s bankruptcy barred Appellee from seeking relief. In this case, Appellee sought *in rem* remedies, requesting a declaration of its rights with respect to the Property, rather than remedies *in personam*, which are

typically discharged during a bankruptcy. *See also Johnson v. Home State Bank*, 501 U.S. 78, 79 (1991). Furthermore, Davy’s bankruptcy Trustee was aware of the Refinance Loan as a security interest against the property, but the Trustee took no affirmative action to avoid the lien. We also decline to consider Appellant’s unsubstantiated claims of unclean hands, absent any evidence of such behavior and outside the allegations of Appellees “predatory lending practices,” which the circuit court also declined to consider.

CONCLUSION

We hold that the circuit court did not abuse its discretion in granting Appellee's request for equitable relief by way of a declaratory judgment, establishing the Refinance Deed of Trust as a valid first-priority lien on the Property.

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