UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 2172

September Term, 2015

WALTER KILLIAN, ET AL.

v.

MATTHEW W. OAKEY, ET AL.

Arthur,
Shaw Geter,
Thieme, Raymond G. Jr.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Thieme, J.

Filed: February 15, 2017

*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 appeal arises out of a foreclosure action initiated in the Circuit Court for Howard County by substitute trustees, Matthew W. Oakey, David G. Sommer, and Robert R. Kern, Jr., against Walter Killian and Deborah Killian, appellants. On appeal, appellants ask whether the circuit court erred in denying their exceptions to the foreclosure sale.

For the following reasons, we affirm.

I.

In March 2008, Mr. Killian entered into a "business relationship" with Myron F. Steves, Jr. ("Steves") to "design new insurance products, wherein [Mr.] Killian would provide his expertise and know-how, and Steves would provide financial support in the form of monthly payments to [Mr.] Killian." As part of the business arrangement, Steves agreed to arrange for a refinancing of appellants' property located at 12314 Fawn River Way in Ellicott City (the "Property"), and to serve as guarantor for the mortgage loan. On March 9, 2008, appellants signed a note in favor of Amegy Mortgage Company, LLC ("Amegy Mortgage") for the loan in the amount of $1,150,000, secured by a deed of trust against the Property. Amegy Mortgage subsequently assigned the loan, note and deed of trust for the Property to Amegy Bank N.A. On March 23, 2010, Amegy Bank assigned the loan, note and deed of trust to 409 West 13th, Inc. ("409 West"). Steves is the President of 409 West.

According to appellants, Steves began reducing Mr. Killian's compensation in April 2009, and by September 2009, appellants were unable to afford their monthly mortgage payment, and they defaulted on the loan. According to Steves, during the period of their business venture from January 2008 to December 2010, Steves paid Mr. Killian "over

$579,000 in monthly payments as advances towards future revenues to be generated from the business venture. Ultimately, Mr. Killian was unable to develop the contemplated insurance products, and Steves terminated the relationship between [sic] as of December 2010." On September 16, 2013, substitute trustees, on behalf of 409 West, initiated a foreclosure action.

The foreclosure sale of the Property was initially scheduled for January 14, 2014, but was cancelled when Mr. Killian filed for bankruptcy on the day before the sale. Mr. Killian's bankruptcy petition was subsequently dismissed by the United States Bankruptcy Court for the District of Maryland ("Bankruptcy Court") due to Mr. Killian's failure to file the required schedules and documents. The foreclosure sale was rescheduled, and prior to the sale date, Mr. Killian filed a second bankruptcy petition, which again was dismissed for failure to file the required schedules. The foreclosure sale was scheduled for a third time, but it was postponed when Mrs. Killian filed for bankruptcy on the day before the scheduled sale. 409 West then petitioned the Bankruptcy Court for relief from the automatic stay in Mrs. Killian's case, which the Bankruptcy Court granted, permitting 409 West to proceed with the foreclosure sale.

On April 3, 2015, the Property was sold at auction to 409 West, the prevailing bidder. On June 8, 2015, appellants filed "objections" to the foreclosure sale. The circuit court deemed the "objections" to be exceptions to the foreclosure sale under Maryland Rule 14-305, and held a hearing on the exceptions. At the hearing, appellants argued that the sale of the Property should be set aside because the refinance loan was the product of fraud. Finding that fraud was not addressed in appellants' written objections, the circuit court

postponed the hearing and permitted the parties to file supplemental memoranda to address the issue of whether, as a matter of law, appellants were precluded from raising fraud in their post-sale exceptions. On October 2, 2015, the court held a hearing to address appellants' fraud claim. The court denied appellants' exceptions, finding that Mr. Killian "was aware of what he's [now] characterizing as fraud long ago, back in 2009" and that "he never litigated it," and pursuant to Md. Rule 14-211, appellants were required to raise the fraud allegation prior to the foreclosure sale.

II.

Appellants argue that it was error for the circuit court to deny their exceptions to the foreclosure sale because Steves "defrauded [them] into obtaining the mortgage" and then "purposefully undercut [their] ability to pay [the mortgage] by reducing [Mr.] Killian's compensation." Appellants further claim that "[a]s part of Steves' plan, he then purchased the mortgage from the original lender (Amegy) through a company he controlled and operated; namely 409 West."

Substitute trustees contend that appellants have failed to raise one of the "narrow categories of defenses" that may be considered by the court post-sale, and therefore the court properly overruled appellants' exceptions. In addition, substitute trustees argue that appellants' challenge to the foreclosure sale is untimely because appellants were aware of their grounds for challenging the sale prior to the sale, however, they failed to raise their defenses prior to the sale in accordance with Md. Rule 14-211.

Pursuant to Title 14 of the Maryland Rules, there are three ways that an owner of real property may challenge a foreclosure sale: 1) by obtaining a pre-sale injunction, 2) by

filing post-sale exceptions, and 3) by filing exceptions to the auditor's statement of account. *Wells Fargo Home Mortg., Inc. v. Neal*, 398 Md. 705, 726 (2007). Md. Rule 14-211(a)(3)(B) provides that a borrower must raise issues relating to a lender's right to foreclose prior to the foreclosure sale through a motion to stay or dismiss which:

> state[s] with particularity the factual and legal basis of each defense that the moving party has to the validity of the lien or the lien instrument or to the right of the plaintiff to foreclose in the pending action.

Before any foreclosure sale is authorized, all knowable challenges to the legitimacy of the foreclosure action must be raised in a motion to dismiss and, if possible, litigated prior to sale. *Devan v. Bomar*, 225 Md. App. 258, 265 (2015). A borrower "ordinarily must assert known and ripe defenses to the conduct of a foreclosure prior to the sale, rather than in post-sale exceptions." *Bates v. Cohn*, 417 Md. 309, 328 (2010). *Accord Thomas v. Nadel,* 427 Md. 441, 445 (2012).

After the foreclosure sale, the means by which a litigant may challenge a foreclosure become increasingly limited. Post-sale, a borrower's remedy generally is limited to filing exceptions challenging procedural irregularities in the sale or the statement of indebtedness. *Bates*, 417 Md. at 327. A debtor may file exceptions to the foreclosure sale within 30 days after notice of a sale, which must "set forth the alleged irregularity with particularity." Md. Rule 14-305(d)(1). Such procedural irregularities may include challenges that the description of the property or the advertisement of the sale were insufficient, that the sale price was unconscionable, or that a creditor prevented someone from bidding. *Bates*, 417 Md. at 327 (citation omitted). "A post-sale exception to a foreclosure sale is not an appropriate vehicle to challenge the broad equities of the entire

foreclosure proceeding itself. It is, rather, a narrow challenge to the procedures employed in the execution of the sale process itself." *Devan*, 225 Md. App. at 267.

Appellants rely exclusively on *Bierman v. Hunter*, 190 Md. App. 250 (2010), for the proposition that their allegations of fraud could be raised in exceptions to the foreclosure sale. In *Bierman*, a homeowner filed exceptions to the sale, claiming that her signature had been forged on the loan, and the loan was therefore fraudulent. *Id*. at 254. The trial court sustained her exceptions and set aside the sale. *Id*. at 255. This Court affirmed, holding that because the fraud claim challenged the underlying validity of the lien instrument, the claim could be raised as a post-sale objection. *Id*. at 264 (distinguishing *Greenbriar Condominium, Phase I Council of Unit Owners, Inc. v. Brooks,* 387 Md. 683, 688 (2005))(holding that in the case of a debtor's right of redemption, a post-sale filing of exceptions may challenge only procedural regularities in the sale or the statement of indebtedness), *superseded by rule*, Md. Rule 14-305, *as recognized in Thomas, supra*, 427 Md. at 445.

Following *Bierman, supra*, the Court of Appeals rejected the premise that courts of equity had authority under Maryland Rule 14-305(e) to "determine all objections to the foreclosure sale," explaining that Maryland Rule 14-305 limited the scope of post-sale exceptions to irregularities in the sale. *Bates*, 417 Md. at 327. In *Bates, supra,* the Court of Appeals held that the borrower's claim that the lender failed to comply with loss mitigation requirements, which was raised for the first time in post-sale exceptions, absent any allegation of fraud, was not a basis for setting aside the sale. *Id.* at 327-28. The Court observed that "Rule 14-305 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. But the Court in *Bates* left open the question of whether fraud involving the debt instrument could be raised in post-sale exceptions: "[w]e do not rule here on whether a homeowner may raise under [Md. Rule] 14-305, as a post-sale exception, allegations that a deed of trust was the product of fraud, and, therefore, the sale was invalid and incapable of passing title." *Id.* at 327-28.

In *Thomas, supra*, the Court considered the question left open in *Bates* as to whether fraud infecting the underlying debt instrument may be raised in a post-sale exception. 427 Md. at 454. The borrowers in *Thomas* alleged that "certain defects" in the chain of title to their promissory note constituted a "fraud on the judicial system." *Id.* at 443. The Court declined to provide an answer to the "distinct question" as to whether fraud in the debt instrument could be raised in post-sale exceptions, holding that "the facts alleged do not amount to the kind of fraud that might induce this Court to qualify the general rule limiting the nature of post-sale exceptions." *Id*. at 450.

As this Court noted in *Devan*, *supra*, "all fraud is not the same" and "society's interest in finality and repose may be stronger with respect to certain types of fraud than it is with respect to others." 225 Md. App. at 277-78. Although the circumstances surrounding the foreclosure in *Devan* involved a claim that the homeowner was wrongly prevented from making mortgage payments, we determined that those circumstances did not amount to fraud relating to the underlying loan or debt instrument, and therefore, the question of whether a claim of a fraudulent mortgage or deed of trust might be raised in a

post-sale exception was not before us. *Id.* at 277. We reiterated, however, that claims challenging the foreclosure process that arise prior to the sale, and are known to the homeowner prior to the sale, must be raised pre-sale. *Id.* at 268.

In the instant case, we consider whether the fraud alleged by appellants fits within the "distinct question" left open in *Bates,* and we conclude that it does not. Appellants argue that their mortgage was the "product of fraud; namely a fraud scheme to convince [them] to take out the subject mortgage, reduce [Mr. Killian's] compensation so he could not pay the mortgage, and then purchase the Property at foreclosure." These facts, as alleged by appellants, do not amount to the kind of fraud that might induce this Court to qualify the general rule limiting the nature of post-sale exceptions. *Accord Thomas*, 427 Md. at 450. Appellants' claim that they were victims of a "fraud scheme" to "convince" them to take out the mortgage, although sounding of a fraud in the inducement claim,[1] fails to detail any false misrepresentation upon which appellants relied in making the loan.

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[1] "The elements of civil fraud based on affirmative misrepresentation are that:

> (1) the defendant made a false representation to the plaintiff,
> (2) the falsity of the representation was either known to the defendant or the representation was made with reckless indifference to its truth,
> (3) the misrepresentation was made for the purpose of defrauding the plaintiff,
> (4) the plaintiff relied on the misrepresentation and had the right to rely on it, and
> (5) the plaintiff actually suffered damage directly resulting from such fraudulent misrepresentation.

Rozen v. Greenberg, 165 Md. App. 665, 674-75 (2005)(citations omitted).

Appellants fail to describe any false statement or misrepresentation that would establish the first element of a fraud in the inducement claim or establish that the mortgage or deed of trust was the product of fraud. What appellants have described is a failed business deal, but they have failed to set forth any facts demonstrating that the loan was fraudulent at the time it was originated. "It is the settled rule that [one] seeking any relief on the ground of fraud must distinctly state the particular facts and circumstances constituting the fraud and the facts so stated must be sufficient in themselves to show that the conduct complained of was fraudulent. General charges of fraud or that acts were fraudulently committed are of no avail[.]" *Thomas*, 427 Md. at 453 (quoting *Spangler v. Sprosty Bag Co.,* 183 Md. 166, 173 (1944)).

Moreover, the facts indicate that as of November, 2009, appellants knew, or had reason to know, of Steves' alleged elaborate plan to defraud them when appellants could no longer afford their mortgage because Steves had reduced Mr. Killian's compensation and requested that appellants sell their Property to him. Once the foreclosure action was initiated in 2013, appellants were obligated to raise the alleged fraud scheme as a defense prior to the sale. In fact, the foreclosure sale was postponed on three occasions, finally taking place on April 3, 2015. At no time during the pendency of the foreclosure action did appellants attempt to challenge the underlying loan or the right of 409 West to foreclose. Appellants had ample opportunity, over more than five years, to challenge the validity of the loan prior to the foreclosure sale, and they simply failed to do so. The proper means by which to raise such a defense was by a motion to dismiss or motion to stay under

Md. Rule 14-211 prior to the sale. Such a defense was not an appropriate basis for a post-sale exception under Rule 14-305(d)(1).

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