

Circuit Court for Prince George's County
Case No. CAL20-15337

UNREPORTED
IN THE COURT OF SPECIAL APPEALS
OF MARYLAND

No. 0101

September Term, 2021

RENE MITCHELL

v.

U.S. BANK NATIONAL ASSOCIATION,
et al.,

Reed,
Beachley,
Zic,

JJ.

Opinion by Reed, J.

Filed: August 23, 2022

*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.

On September 2, 2020, Appellant, Rene Mitchell, filed an action against Appellees, U.S. Bank National Association, U.S. Bank National Association as Trustee under Pooling and Servicing Agreement dated as of November 1, 2005 MASTR Asset Backed Securities Trust 2005-FRE1, Mortgage Pass-Through Certificates, Series 2005-FRE1, Ocwen Servicing, LLC, PHH Mortgage Corporation, and Ocwen Financial Corporation (collectively, “Mortgagee Appellees”) and Keith Yacko, Robert Frazier, Gene Jung, Jason Hamlin, Thomas Gartner, and Glen Tschirgi and Brock & Scott, PLLC (collectively, “Substitute Trustees”) alleging: (1) Malicious Use of Process; (2) Abuse of Process; and (3) Tortious Interference with Contractual Relations in relation to a foreclosure action on real property located at 9003 Harness Way, Bowie, Maryland, 20715. The Appellees subsequently filed two Motions to Dismiss. The Mortgagee Appellees filed their Motion to Dismiss, or in the Alternative, for Summary Judgment on October 21, 2020. The Substitute Trustees filed their Motion to Dismiss on November 20, 2020.

Following the Appellees’ filing of the two Motions to Dismiss, the Appellant filed two extensions to respond in December and January of 2021. Both extensions were granted. On February 17, 2021, the Appellant filed a Voluntary Notice of Dismissal under Maryland Rule 2-506(a) without prejudice. On March 1, 2021, the circuit court entered the dismissal of the case with prejudice. On March 10, 2021, the Appellant filed a Motion to Amend Judgment, which was denied by the circuit court on April 6, 2021. The Appellant filed their timely appeal on March 21, 2021.

In bringing their appeal, the Appellant presents one question for appellate review,

restated as follows for clarity:¹

- I. Did the circuit court err in ordering the Appellant’s case to be dismissed with prejudice after the Appellant, under Maryland Rule 2-506(a), filed a voluntary motion for dismissal without prejudice?

For the following reasons, we hold that the circuit court erred in ordering the case to be dismissed with prejudice under Maryland Rule 2-506(a).

FACTUAL & PROCEDURAL BACKGROUND

On June 8, 2005, the Appellant, Rene Mitchell, signed a sales contract for a conventional fixed rate 30-year mortgage loan through a lender, Fremont Investment and Loan (“Fremont”), to purchase real property at 9003 Harness Way, Bowie, Maryland 20715 (“Property”). *Yacko v. Mitchell*, 249 Md. App. 640, 651, 655 (2021). On July 11, 2005, at the closing for the Property, the Appellant started to sign documents for an adjustable-rate mortgage (“ARM”). *Id.* at 655. When the Appellant realized the discrepancy between the previously agreed upon conventional loan and the ARM documents presented at closing, the Appellant requested the documents be returned to her, marked “VOID”, and the closing be terminated. *Id.* Each document signed by the Appellant was marked “VOID” by one of the settlement agents, Barbara Licon (“Ms. Licon”), and the Appellant and Ms. Licon initialed next to each void mark. *Id.* Ms. Licon retained the

¹ The Appellant presents the following question:

Did the Circuit Court err in ordering Case No.: CAL20- 15337 to be dismissed with prejudice while MD Rule 2-506(a) freely provides “a party who has filed a complaint ... may dismiss all or part of the claim without leave of court by filling [sic] (1) a notice of dismissal at any time before the adverse party files an answer”?

signed pages of the documents to shred them. *Yacko*, 249 Md. App. at 656. Following the document signing session, the Appellant wrote a follow up letter stating the Appellant’s declination of the ARM, the request to void the documents, and the request for a new mortgage. *Id.* at 657. Fremont agreed to void the ARM paperwork and cancel the ARM mortgage. *Id.* The ARM was canceled the day after the Appellant informed Fremont of the issue. *Id.* Fremont offered to issue a new, conventional fixed rate 30-year mortgage (“Mortgage”) and deed of trust. *Id.* at 658. However, no new loan documents were executed. *Yacko*, 249 Md. App. at 658. On July 15, 2005, Fremont returned the deed of trust and note with the “VOID” marks. *Id.*

A deed of trust to the Property was recorded in Prince George’s County land records on July 14, 2005. *Id.* at 659. The deed erroneously reflected the ARM and was not marked “VOID”. The following day, Fremont noted on copies of each of the voided documents that the loan had been canceled. After obtaining copies reflecting the loan had been canceled, Appellant attempted to obtain documents reflecting a conventional fixed rate 30-year loan but was unsuccessful.

Fremont transferred the Mortgage and deed of trust of the Property to U.S. Bank. *Id.* at 658. In 2010, Ocwen Financial and its subsidiary, Ocwen, took over the servicing of the Appellant’s mortgage on the Property. *Id.*

I. The August 2015 Foreclosure Action

In January of 2013, the Appellant failed to make a payment on her Mortgage loan and continued to miss installment payments. *Yacko*, 249 Md. App. at 659. In October of 2014, the Appellant began receiving notices of intent to foreclose on the Property from the

Substitute Trustees. *Id.* On August 24, 2015, the Substitute Trustees filed an Order to Docket a Foreclosure Action (“Foreclosure Action”) in the Circuit Court for Prince George’s County. *Id.* at 653. The note and deed of trust within the order to docket included an adjustable-rate rider. *Id.* The documents did not have any void or cancelation marks. *Id.* On August 25, 2015, the Appellant responded with a Motion to Dismiss the Order to Docket on the ground that the order to docket did not contain copies of a valid and enforceable note or deed of trust. *Yacko*, 249 Md. App. at 653. However, the circuit court denied the Appellant’s motion without a hearing on February 11, 2016, and the Appellant appealed.

II. Mitchell Appeal I

In the first appeal the Appellant filed with this Court (“*Mitchell Appeal I*”), we held that the circuit court erred in denying the Appellant’s motion without a hearing and remanded the case back to the circuit court. *Mitchell v. Yacko*, 232 Md. App. 624, 643 (2017). We based our holding on the documents submitted in the foreclosure action and held that the documents presented in the Substitute Trustees’ order to docket were “‘clearly false and materially altered to look genuine,’ citing the removal of the ‘VOID’ markings and notations added on the date of closing and by adding a stamp with the marking ‘REDACTED’.” *Id.* at 627, 632-33, 642-43. As a result, the Appellant presented a “valid defense to the validity of the lien instrument” and thus, the circuit court erred in denying the Appellant’s motion to stay the sale and dismiss the foreclosure action without a hearing. *Id.* at 643.

On remand, the circuit court held nine evidentiary hearings on the validity and

authenticity of the documents between November 21, 2017, and August 20, 2019. The circuit court concluded that the lien and lien instruments were invalid and that the Substitute Trustees had no right to foreclose on the Property. *Yacko*, 249 Md. App. at 675-76. The circuit court signed a Memorandum Opinion and Order of Court on September 5, 2019, granting the Appellant’s motion to dismiss the foreclosure proceedings.

III. Substitute Trustees Appeal II

The Substitute Trustees appealed the circuit court’s decision on remand from *Mitchell Appeal I* (“*Substitute Trustees Appeal II*”). *Id.* at 676. On February 26, 2021, this Court issued a reported opinion. *Id.* at 640. After considering the four issues presented by the Substitute Trustees, we determined that:

- (1) sufficient evidence supported the finding that the loan grantor voided documents for the ARM;
- (2) conflicts in the testimonies between the Appellant and Appellee did not present physical impossibility, but rather inconsistencies that were ordinarily entrusted to the circuit court to resolve;
- (3) Substitute Trustees were not entitled to pre-hearing discovery because they acquiesced by verbally accepting the circuit court’s decision to proceed with the evidentiary hearing without pre-hearing discovery on two occasions;
- (4) the trial court was not required to consider the asserted claim for equitable mortgage because it was untimely; and
- (5) the Appellant’s expert testimony was properly excluded because proper notice and disclosure was not given.

Id. at 683; 688; 690; 694-95; 695. Ultimately, we affirmed the circuit court’s judgment. *Id.* at 696.

IV. Mitchell Appeal III

While the *Substitute Trustees Appeal II* was still pending with this Court, the Appellant filed an action on September 2, 2020, against the Substitute Trustees and Mortgagee Appellees in the Circuit Court for Prince George’s County. The Appellant’s Complaint and Demand for a Jury Trial alleges: (1) Malicious Use of Process; (2) Abuse of Process; and (3) Tortious Interference with Contractual Relations against the Appellees in relation to the Foreclosure Action on the Property. In their brief, the Appellant notes that the Appellees did not file an answer to the Appellant’s complaint.

On October 21, 2020, the Mortgagee Appellees filed a Motion to Dismiss (“Mortgagee Preliminary Motion”) the Appellant’s complaint pursuant to MD Rule 2-322, or in the alternative, a Motion for Summary Judgment pursuant to MD Rule 2-501. The Mortgagee Appellant’s preliminary motion to dismiss, or in the alternative, motion for summary judgment was based upon: (1) res judicata; (2) ripeness; (3) collateral estoppel; (4) the rule against claim splitting; and (5) failure to plead a viable claim. The Mortgagee Appellees contended that the Appellant failed to satisfy the legal elements of her claim for Malicious Use of Process and thus, should fail as a matter of law.

On November 23, 2020, the Substitute Trustees filed a Motion to Dismiss (“Substitute Trustee Preliminary Motion”) for failure to state a claim. The Motion contends that the Appellant’s claims are barred by res judicata, collateral estoppel, defensive non-mutual collateral estoppel, and/or the Maryland statute of limitations for civil claims and

therefore should be dismissed by the Court with prejudice. In addition, the Substitute Trustees contended that the Appellant failed to satisfy the legal elements of her claims and thus, should fail as a matter of law. The Substitute Trustees contended that the Appellant’s claim for the Malicious Use of Process could not stand because the Foreclosure Action is still pending with this Court, stating since there has not been any “termination of the action in favor of the [Appellant], the [Appellant] cannot satisfy the fourth element of the claim.”

Following both the Mortgagee Preliminary Motion and Substitute Trustee Preliminary Motion, the Appellant filed two extensions of time to respond in January and February of 2021. Both extensions were granted. Then, on February 17, 2021, the Appellant filed a Voluntary Notice of Dismissal under Md. Rule 2-506(a) without prejudice.

On March 1, 2021, the circuit court dismissed the case with prejudice, entering the “[APPELLANT]’S NOTICE OF DISMISSAL . . . UNDER 2-506(a)”. The circuit court crossed out a portion of the order dismissing the case without prejudice to read instead that the case is dismissed “with prejudice”. The Appellant filed a motion to amend judgment on March 10, 2021. On March 15, 2021, the Appellees filed their opposition to the motion to amend judgment. On March 19, 2021, the Appellant filed their reply to the motion to amend. The Court denied the motion to amend on April 6, 2021 citing the court’s discretion to grant a voluntary dismissal with or without prejudice under *Skevofilax v. Aventis Pasteur, Inc.*, 167 Md. App. 1 (2006).

The Appellant timely filed this appeal on March 24, 2021.

STANDARD OF REVIEW

When reviewing a court’s grant of a motion to dismiss, the appropriate standard of review is “whether the trial court was legally correct.” *D.L. v. Sheppard Pratt Health System, Inc.*, 465 Md. 339, 350 (2019) (quoting *Davis v. Frostburg Facility Operations, LLC*, 457 Md. 275, 284 (2018)). When the circuit court’s order involves an interpretation and application of Maryland law, the Court must determine whether the lower court’s conclusions are legally correct under a de novo standard of review. *Nesbit v. Government Employees Ins. Co.*, 382 Md. 65, 72 (2004). Therefore, we “review the grant of a motion to dismiss de novo.” *D.L. v. Sheppard Pratt Health System, Inc.*, 465 Md. 339, 350 (2019).

Moreover, “[t]o interpret rules of procedure, we use the same canons and principles of construction used to interpret statutes.” *State ex rel. Lennon v. Strazzella*, 331 Md. 270, 274 (1993). “In our effort to discern the meaning of a rule, we look first to the words of the rule. When the words are clear and unambiguous, ordinarily we need not go further.” *Mustafa v. State*, 323 Md. 65, 73 (1991).

DISCUSSION

A. Parties’ Contentions

The Appellant contends that their Notice of Voluntary Dismissal under Maryland Rule 2-506(a) should have resulted in the case being dismissed “without prejudice”. The Appellant quotes language from the rule that states, “a party who files a complaint . . . may dismiss all or part of the claim *without leave of court* by filing . . . a notice of dismissal at any time before the adverse party files an answer.” Md. Rules 2-506(a) (emphasis added). The Appellant notes that neither the Substitute Trustees nor Mortgagee Appellees filed an answer to the Appellant’s complaint. Thus, because neither party filed an answer

to the Appellant’s complaint, the Notice of Voluntary Dismissal under Maryland Rule 2-506(a) should have resulted in the case being dismissed “without prejudice”. However, the circuit court ordered the dismissal to be “with prejudice” and thus the Appellant contends the court did not correctly apply Maryland Rule 2-506(a).

The Appellant cites Maryland case law stating that “the plain meaning of a rule controls its interpretation.” *Mustafa v. State*, 323 Md. 65, 73 (1991); *G. Heileman Brewing Co. v. Stroh Brewery Co.*, 308 Md. 746, 755 (1987); *In re Criminal Investigation No. 1-162*, 307 Md. 674, 685 (1986); *Comptroller of Treasury v. Fairchild Industries, Inc.*, 303 Md. 280, 284 (1985). The Appellant states that Maryland Rule 2-506(a) is clear and unambiguous in its intent stating that a party “may dismiss all or part of the claim *without leave of court* by filing . . . a notice of dismissal at any time before the adverse party files an answer.” The Appellant asserts that the construct of the entire Maryland Rule 2-506 supports their contention that Maryland 2-506(a) can be read and interpreted for its “plain meaning”.

The Mortgagee Appellees assert that they took no affirmative action or position as to the circuit court’s order and thus, they should not have to bear the cost of the action should the Appellant prevail in this order. However, the Mortgagee Appellees also reassert their argument in their preliminary motion stating that under *One Thousand Fleet Ltd. P’ship. v. Guerriero*, 346 Md. 29 (1997), the circuit court can dismiss an abuse of process count if the plaintiff fails to allege facts sufficient to satisfy any one element of a Malicious Use of Process case.

The Substitute Trustees contend that the arguments made in their motion to dismiss

would permit the circuit court to dismiss all the Appellant’s claims with prejudice, including: (1) res judicata; (2) collateral estoppel; (3) defensive non-mutual collateral estoppel; and (4) the Maryland statute of limitations for civil claims. Moreover, the Substitute Trustees assert that the Malicious Use of Process claim was insufficiently pled, also citing *One Thousand Fleet Ltd. P’ship. v. Guerriero*, 346 Md. 29 (1997).

B. Analysis

As stated in *Substitute Trustees Appeal II*, “[l]ike a boomerang . . . the mortgage transaction that was the subject of our [previous opinion] has returned.” *Yacko*, 249 Md. App. at 648. The question before the Court is a procedural one. The Appellees ask this Court to affirm the circuit court’s decision when it dismissed the Appellant’s case with prejudice, arguing that the underlying arguments made in their motion to dismiss would permit the circuit court to dismiss the motion with prejudice. The circuit court contended during the hearing that it has the discretion to dismiss cases with or without prejudice. In contrast, the Appellant contends that the circuit court erred in ordering the dismissal with prejudice because it did not correctly apply Maryland Rule 2-506(a). We agree.

Notably, the order issued by the circuit court on March 1, 2021, states clearly that the “[APPELLANT’S] NOTICE OF DISMISSAL UNDER 2-506(a) . . . is hereby ENTERED.” It is unclear to our Court if the circuit court meant to grant either of the Appellees’ motions to dismiss by dismissing the case with prejudice. The striking of the “without prejudice” to read “with prejudice” and handwriting “[d]efendants filed motions to dismiss all claims . . .” would suggest so. However, it is our view that if that were the

circumstance, the circuit court would have granted the Appellees’ prior filed motions to dismiss rather than entering the Appellant’s Notice of Dismissal Under 2-506(a).

Thus, consistent with the circuit court’s entered order of the “[APPELLANT’S] NOTICE OF DISMISSAL UNDER 2-506(a)” we will review this case through the lens of the circuit court’s dismissal under Maryland Rule 2-506(a).

Maryland Rule 2-506 for Voluntary Dismissal states in its entirety:

(a) By Notice of Dismissal or Stipulation. Except as otherwise provided in these rules or by statute, a party who has filed a complaint, counterclaim, cross-claim, or third-party claim may dismiss all or part of the claim without leave of court by filing (1) a notice of dismissal at any time before the adverse party files an answer or (2) a stipulation of dismissal signed by all parties to the claim being dismissed.

(b) Dismissal Upon Stipulated Terms. If an action is settled upon written stipulated terms and dismissed, the action may be reopened at any time upon request of any party to the settlement to enforce the stipulated terms through the entry of judgment or other appropriate relief.

(c) By Order of Court. Except as provided in section (a) of this Rule, a party who has filed a complaint, counterclaim, cross-claim, or third-party claim may dismiss the claim only by order of court and upon such terms and conditions as the court deems proper. If a counterclaim has been filed before the filing of a plaintiff’s motion for voluntary dismissal, the action shall not be dismissed over the objection of the party who filed the counterclaim unless the counterclaim can remain pending for independent adjudication by the court. If a third-party claim has been filed before the filing of a plaintiff’s motion for voluntary dismissal, the court, in its discretion, may dismiss the action over the objection of the party who filed the third-party claim, but the court may not dismiss a third-party claim that is non-derivative and, if refiled, would be barred by an applicable statute of limitations.

(d) Effect. Unless otherwise specified in the notice of dismissal, stipulation, or order of court, a dismissal is without prejudice, except that a notice of dismissal operates as an adjudication upon the merits when filed by a party who has previously dismissed in any court of any state or in any court of the United States an action based on or including the same claim.

(e) Costs. Unless otherwise provided by stipulation or order of court, the dismissing party is responsible for all costs of the action or the part dismissed.

Md. Rules 2-506. In *Wilcox v. Orellano*, 443 Md. 177 (2015), the Court of Appeals stated

[f]or various reasons, a plaintiff in a civil action may choose to dismiss a claim – or an entire complaint – voluntarily. The process that a plaintiff must follow to do so—and the consequences of the dismissal—varies according to the stage of the proceeding and whether the plaintiff has previously dismissed the same claim, as elaborated in Maryland Rule 2–506 . . . According to the plain language of the rule, a plaintiff may voluntarily dismiss a complaint in one of three ways: by a notice of dismissal, by a stipulation, or by a court order.

Wilcox, 443 Md. at 181-82.

In this case, Appellant opted to voluntarily dismiss the complaint by notice of dismissal under Rule 2-506(a). Maryland Rule 2-506(a) is modeled after Federal Rule of Civil Procedure (“FRCP”) 41(a)(1). *Owens-Corning Fiberglas Corp. v. Fibreboard Corp.*, 95 Md. App. 345, 349 (1993). FRCP 41(a)(1) allows for the dismissal of “an action without a court order by filing a notice of dismissal before the opposing party serves either an answer or a motion for summary judgment.” Fed. R. Civ. P. 41. Similarly, Maryland Rule 2-506(a), like FRCP 41(a)(1), allows for voluntary dismissal by notice of dismissal before the adverse party files an answer, stating:

Except as otherwise provided in these rules or by statute, a party who has filed a complaint, counterclaim, cross-claim, or third-party claim may dismiss all or part of the claim without leave of court by filing (1) a notice of dismissal at any time before the adverse party files an answer. . .

Md. Rule 2-506(a). Thus, “[t]he Maryland Rules allow a plaintiff to voluntarily dismiss a complaint by filing a simple notice of dismissal before the defendant has answered the complaint.” *Wilcox*, 443 Md. at 181. The Appellant filed the notice of dismissal in

accordance with Maryland Rule 2-506(a), before the Appellees filed answers to the complaint. The Appellees’ two motions to dismiss raised jurisdictional issues that must be raised in preliminary motions before filing an answer, and thus were preliminary motions under Maryland Rule 2-322.² Thus, we hold that the instrument effectuating the dismissal was the Appellant’s notice of dismissal under Maryland Rule 2-506(a) and the dismissal was not by order of the court under Maryland Rule 2-506(c).

Since the Appellant’s notice of the dismissal was the instrument that brought forth the dismissal under Maryland Rule 2-506(a), and this is the first voluntary dismissal filed by the Appellant, the Appellant’s dismissal should have been recognized as “without prejudice”. The Court of Appeals stated, “Rule 2-506 indicates, on the first occasion that a

² Maryland Rule 2-322 for preliminary motions enumerates preliminary motions before the answer, with the pertinent text excerpted below:

(a) Mandatory. The following defenses shall be made by motion to dismiss filed before the answer, if an answer is required: (1) lack of jurisdiction over the person, (2) improper venue, (3) insufficiency of process, and (4) insufficiency of service of process. If not so made and the answer is filed, these defenses are waived.

(b) Permissive. The following defenses may be made by motion to dismiss filed before the answer, if an answer is required: (1) lack of jurisdiction over the subject matter, (2) failure to state a claim upon which relief can be granted, (3) failure to join a party under Rule 2-211, (4) discharge in bankruptcy, and (5) governmental immunity. If not so made, these defenses and objections may be made in the answer, or in any other appropriate manner after answer is filed.

...

Md. Rule 2-322.

claim is voluntarily dismissed, the dismissal is ‘without prejudice’ . . .” *Wilcox*, 443 Md. at 182. Moreover, “a dismissal is deemed to be without prejudice unless a contrary intention is shown in the instrument effecting the dismissal.” *State ex rel. Lennon*, 331 Md. at 275. While Appellant confused matters by submitting a proposed Order because no court Order was necessary under the Rule, the language of the Rule is unambiguous. Since the Appellant’s notice of dismissal clearly states the dismissal is “without prejudice,” we hold that the circuit court erred in entering the “Plaintiff’s Notice of Dismissal Under 2-506(a)” with prejudice.

Finally, the Mortgagee Appellees assert that they take no affirmative action or position to the circuit court’s order and thus, they should not have to bear the cost of the action should the Appellant prevail in this appeal. However, in the same breath, the Mortgagee Appellees reassert their argument in their preliminary motion stating that under *One Thousand Fleet*, the circuit court can dismiss an abuse of process count if the plaintiff fails to allege facts sufficient to satisfy any one element of a Malicious Use of Process case. Ultimately, the Mortgagee Appellees asks our Court to either affirm one of the Motions to Dismiss under *One Thousand Fleet* or use our discretion to not allocate any costs to them.

Indeed, as the Mortgagee Appellees correctly cite, under Maryland Rule 8-607(a) that the Court has the discretion to allocate costs among the parties.³ However, in cases

³ Maryland Rule 8-607 Assessment of Costs states:

- (a) Allowance and Allocation.** Unless the Court orders otherwise, the prevailing party is entitled to costs. The Court, by order, may allocate costs among the parties.

involving Voluntary Dismissals under Maryland Rule 2-506, the Court has equally divided costs amongst non-prevailing parties consistent with Maryland Rule 8-607(a). *See Wilcox*, 443 Md. at 198; *Aventis Pasteur, Inc.*, 396 Md. at 443; *Owens-Corning Fiberglas Corp.*, 95 Md. App. at 364; *State ex rel. Lennon*, 331 Md. at 275-76. Thus, not allocating costs to the Mortgagee Appellee would not align with Maryland case law involving Voluntary Dismissals under Maryland Rule 2-506.

CONCLUSION

Accordingly, we hold that the circuit court erred in ordering the case, under Maryland Rule 2-506(a), to be dismissed with prejudice and reverse the judgment.

**JUDGMENT OF THE CIRCUIT COURT
FOR PRINCE GEORGE’S COUNTY
REVERSED; COSTS TO BE EQUALLY
DIVIDED BETWEEN APPELLEES.**

...

Md. Rule 8-607(a).