

**UNREPORTED**  
**IN THE COURT OF SPECIAL APPEALS**  
**OF MARYLAND**

No. 0110

September Term, 2014

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ICYLYN J. CARTER-FORD

v.

LAURA H.G. O’SULLIVAN, ET AL.,  
TRUSTEES

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Meredith,  
Hotten,  
Reed,

JJ.

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Opinion by Meredith, J.

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Filed: August 20, 2015

\* 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.

In April 2008, Icylyn Carter-Ford, appellant, financed the purchase of a home located in Fairmount Heights, Maryland, by a mortgage loan from Universal Mortgage & Finance, Inc. (“Universal”). Universal subsequently transferred its interest in the mortgage to Flagstar Bank (“Flagstar”). By late 2012, appellant was in default on the loan. In February 2013, Flagstar appointed Laura H.G. O’Sullivan, Erin Brady, Diana Theologou, Laura Latta, Jonathan Elefant, Laura Curry, Chastity Brown — collectively, the appellees in this case — to serve as substitute trustees. Appellees subsequently initiated foreclosure proceedings in the Circuit Court for Prince George’s County. On June 11, 2013, appellees foreclosed on appellant’s property and sold it at auction. Pursuant to Maryland Rule 14-305(d), appellant filed exceptions to the sale, and asserted that appellees failed to complete the required loss mitigation analysis prior to selling the property. The circuit court denied appellant’s exceptions without a hearing. Appellant filed this appeal.

### **QUESTIONS PRESENTED**

Appellant submitted three questions for our review, which we have rephrased and consolidated into one question:<sup>1</sup>

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<sup>1</sup> Appellant submitted the following questions for our review:

1. Did the Circuit Court abuse its discretion when it failed to hold an evidentiary hearing on Appellants [sic] exception even after Appellant had requested a hearing and presented a showing of extrinsic fraud on the part of Appellees?
2. Did the Circuit Court err in finding that the Appellant had failed to identify any procedural irregularity under Md. Rule 14-305 when the Appellant presented a showing that Appellees actively encouraged her to sit on her rights and await the outcome of loss mitigation efforts such that the sale of her property was the product of silent fraud?

(continued...)

Did the circuit court err by denying appellant’s post-sale exceptions and ratifying the foreclosure sale without conducting an evidentiary hearing regarding the allegations contained in appellant’s post-sale exceptions?

Because we answer the question in the negative, we affirm the judgment of the Circuit Court for Prince George’s County.

### **FACTS & PROCEDURAL HISTORY**

On April 25, 2008, appellant borrowed approximately \$355,000 from Universal to finance the purchase of a house located at 612 60th Avenue in Fairmount Heights, Maryland. The loan was secured by a mortgage on the property. At some point after Universal made the loan, it transferred its interest in the mortgage to Flagstar.

On August 2, 2012, appellant failed to make the required monthly mortgage payment, and was therefore in default on the loan. On February 5, 2013, Flagstar appointed appellees as substitute trustees. The following day, appellees initiated foreclosure proceedings by filing an order to docket in the circuit court. Attached to the order to docket was a preliminary loss mitigation affidavit from Flagstar that indicated: “The loan currently is under loss mitigation analysis, but the analysis has not yet been completed.”

While the foreclosure action was pending, appellant filed an application with Flagstar for loss mitigation. On March 19, 2013, Flagstar filed a final loss mitigation affidavit in the

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(...continued)

3. Is extrinsic fraud a recognized exception to a foreclosure sale under Md. Rule 14-305 when this fraud prevented an actual dispute from being submitted to the factfinder?

circuit court, indicating that it had not conducted a loss mitigation analysis on appellant's loan because "[t]he borrower has not provided the required financial package needed in order to review for loss mitigation options. Did not fulfill investor requirements/guidelines."

On May 6, 2013, appellant and Flagstar participated in court-sponsored foreclosure mediation, but the parties were unable to reach an agreement on the terms of a loan modification. As a result, on May 15, the circuit court issued an order authorizing appellees to proceed with the foreclosure sale. On May 24, appellees sent appellant a letter stating that the foreclosure sale was scheduled for June 11. On June 11, 2013, the foreclosure sale proceeded as scheduled and the property was sold at auction. Prior to the sale, appellant did not file a motion pursuant to Maryland Rule 14-211 to stay the sale, or any other motion objecting to the foreclosure.

On June 11, the same day that the foreclosure sale took place, Flagstar sent appellant a letter stating that her application for loss mitigation had been denied because her application was incomplete.

Nevertheless, on June 13, Flagstar sent appellant an additional letter indicating that her loss mitigation application was still under consideration and had been assigned to the "Escalation Resolution team." Finally, on June 19, appellant received a final letter from Flagstar, which stated in part:

As the servicer of your mortgage loan, we have reviewed the information you provided in consideration of a loss mitigation Home Affordable Modification Program (HAMP) option for your mortgage loan. Unfortunately, you are not eligible at this time for the option for which you applied. The reasons for our decision are listed below:

Excessive obligations in relation to income.

On July 25, 2013, appellant filed exceptions to the sale pursuant to Maryland Rule 14-305(d), alleging, *inter alia*, that appellees failed to undertake the required loss mitigation analysis before conducting the foreclosure sale. In the exceptions, appellant acknowledged that “noncompliance with HUD regulations should be raised in a pre-sale motion,” but asserted that “this challenge remains proper because [appellees] actively encouraged Ms. Carter-Ford to sit on her rights and await the outcome of loss mitigation or loan modification efforts that would never come to pass.” In support of this contention, appellant filed an affidavit that stated in part:

5. I continued to make monthly payments of \$2,684.45 up until August 2012. In August 2012 my mortgage was increased to \$2,784 a month. I called [Flagstar] again and asked why my mortgage had been increased. I was told because the tax on my property went up. I called the tax department for Prince George’s County, and was informed my property tax had been reduced not increased.
6. I then called Flagstar and requested a modification of my loan. I was asked to provide several financial documents including bank account statements, pay stubs, and federal and state tax returns, including a hardship affidavit. I provided all the documents as requested. However, each time I called to check up on the status of my application, I was informed that some document was missing and had to produce additional financial documents.

\* \* \*

8. Every three months Flagstar asked for W2 form, size of budget letter, hardship letter all the way till June 7, 2013[.]
9. On June 7, 2013, I called Flagstar to check on the status of my application. At this time my property had been placed in foreclosure and sale had been scheduled for June 11, 2013. **I spoke to Ms. Johnson and asked her about the sale scheduled on June 11, 2013.**

**She assured me not to worry that the sale will not go through until a decision is made on my application.**

10. **On June 10, 2013, I called Ms. Johnson to ask if the sale of my property had been stopped, and she said yes.** My counselor Megan Wessel was also told the sale of my property had been stopped and called off.
11. On June 11, 2013, Flagstar went ahead and sold my property without completing review of my loan modification application. My counselor Megan Wessel was contacted on the afternoon and told of the sale. She then contacted me and notified me of the news. I called back Flagstar and spoke with Ms. Johnson. I asked how is it they called off the sale on June 10, 2013, and yet sold my property house June 11, 2013. **She was apologetic and informed me that the under-writer and lawyer sold the house while I was still in the loan modification review process.**
12. On June 14, 2013, Flagstar sent me a letter indicating that the documents submitted were incomplete. On June 17, 2013, Flagstar sent me another letter indicating that my loan modification application was still in process. Finally, On June 19, 2013, Flagstar informed me via first class mail that my application had been denied.

(Emphasis added).

At the time appellant filed her exceptions to the sale, she requested a hearing, stating that she would “rely on the grounds and authorities stated in her Memorandum filed coincidentally with the Motion.”

On November 12, 2013, appellees filed a response to appellant’s post-sale exceptions, arguing that appellant’s allegations of misconduct and fraud by Flagstar were unsubstantiated, “self-serving hearsay.” Appellees also argued that, even if the allegations contained in the affidavit were true, appellant was required to raise Flagstar’s failure to conduct loss mitigation analysis *prior* to the foreclosure sale, not after.

On March 4, 2014, without holding a hearing, the circuit court issued a written order denying appellant’s post-sale exceptions, and stated: “Upon review of the file, [appellant] has failed to comply with Md. Rule 14-305(d) by failing to identify any legitimate procedural irregularity regarding the April 25, 2008 sale.” The following day, the circuit court issued an order ratifying the foreclosure sale. Appellant filed a timely notice of appeal on March 24, 2014.

### STANDARD OF REVIEW

When ruling on post-sale exceptions to a foreclosure sale and determining whether to ratify the sale, “trial courts may consider both questions of fact and law.” *Jones v. Rosenberg*, 178 Md. App. 54, 68 (2008). When reviewing the circuit court’s findings of fact, “we do ‘not substitute our judgment for that of the lower court unless it was clearly erroneous’ and [we] give due consideration to the trial court’s ‘opportunity to observe the demeanor of the witnesses, to judge their credibility and to pass upon the weight to be given their testimony.’” *Id.* (quoting *Young v. Young*, 37 Md. App. 211, 220 (1977)). In contrast, “[q]uestions of law decided by the trial court are subject to a *de novo* standard of review.” *Id.*

### DISCUSSION

Appellant asserts the circuit court erred by ratifying the sale and denying her post-sale exceptions even though Flagstar failed to complete its loss mitigation analysis prior to the sale. Appellant concedes that a borrower must normally raise the lender’s failure to conduct loss mitigation analysis *before* the foreclosure sale takes place, but she asserts that Flagstar

fraudulently induced her to delay filing a timely pretrial motion by repeatedly telling her that it was still reviewing her application for a loan modification. Appellant argues that Flagstar’s actions amount to “extrinsic fraud,” which excuses her failure to raise the issue before the sale took place. Appellees respond that appellant’s allegations of fraud are merely unsubstantiated and self-serving hearsay. Alternatively, appellees argue that, even if Flagstar failed to properly consider appellant’s application for loss mitigation, appellant waived the issue by failing to raise that claim *before* the property was sold.

Once a foreclosure sale has taken place, Maryland Rule 14-305(d) allows a homeowner to “file exceptions to the sale.” As appellees note, the Court of Appeals has stated: “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.” *Bates v. Cohn*, 417 Md. 309, 327 (2010). The Court of Appeals has held that, once the property is sold, the borrower “may challenge only **procedural irregularities at the sale** or . . . the statement of indebtedness.” *Id.* (emphasis added) (quoting *Greenbriar Condo., Phase I Council of Unit Owners, Inc. v. Brooks*, 387 Md. 683, 688 (2005)). A borrower who wishes to challenge the lender’s right to foreclose must raise that claim in a Rule 14-211 motion filed *before* the sale is conducted. *See Thomas v. Nadel*, 427 Md. 411, 442 (2012) (“[A] borrower challenging a foreclosure action must ordinarily assert known and ripe defenses to the conduct of the foreclosure sale in advance of the sale. After the sale, the borrower is ordinarily limited to raising procedural irregularities in the conduct of the sale . . .”).



In *Bates*, the Court of Appeals concluded that claims arising from the lender’s failure to conduct loss mitigation analysis relate to the lender’s right to foreclose, and therefore must be raised in a Rule 14-211 pre-sale motion, rather than in Rule 14-305(d) post-sale exceptions. *Bates*, 417 Md. at 329 (“[A] homeowner, who wishes to use the lender's failure [to comply with loss mitigation requirements] as the basis of his or her claim, must do so through Rule 14–211's pre-sale injunctive relief apparatus.”). However, as appellant notes, the *Bates* Court left open the possibility that a borrower might successfully assert a Rule 14-305 post-sale exception that the lender fraudulently failed to consider the borrower for loss mitigation and dissuaded her from filing a timely pre-sale motion. The Court stated:

[We do not] determine whether a homeowner/borrower may assert under 14–305, as a post-sale exception, claims that a foreclosure sale was the product of the lender **affirmatively and purposefully misleading the borrower** in default **that** ultimately unsuccessful pre-sale **loss mitigation or loan modification efforts would likely be successful** (or protracting strategically the denial of those efforts) **and therefore dissuading the borrower from seeking to assert pre-sale defenses** in a timely manner.

*Id.* at 328 (emphasis added). Since *Bates* was decided in 2010, our appellate courts have yet to resolve whether this type of claim is cognizable in Rule 14-305 post-sale exceptions.

However, we need not resolve that issue here because, even if appellant’s claim that Flagstar failed to properly consider her for loss mitigation was not waived, appellant failed to demonstrate that Flagstar’s alleged misrepresentations actually misled her to believe that loan modification efforts would *likely* be successful, and she has not shown that she could have successfully asserted pre-sale defenses in a timely manner had she not relied on the appellees.

In order to set aside the foreclosure sale, appellant must do more than simply allege that an irregularity occurred during the foreclosure process; she must demonstrate that her substantial rights were prejudiced. *Bachrach v. Washington United Coop., Inc.*, 181 Md. 315, 320 (1943) (“It is essential to the prompt administration of justice that the rule be inviolably observed that no court shall set aside a foreclosure sale merely because of harmless errors or irregularities 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.”). The Court of Appeals has stated: “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.**” *Fagnani v. Fisher*, 418 Md. 371, 384 (2011) (emphasis added).

Even if we assume that the allegations contained in the affidavit submitted by appellant are true, the affidavit fails to show that appellant’s rights were negatively affected. Appellant does not assert that the alleged misrepresentations prevented her from receiving a loan modification that she was entitled to, or that she would have otherwise been able to redeem the mortgage and remain in her home, or that the bidding at the sale was in any manner affected. Appellant does not even assert in her affidavit that she would have timely filed a pre-sale objection to the foreclosure sale if Flagstar had not made the alleged misrepresentations. In the absence of offered facts that could persuade the court that the outcome of the foreclosure proceeding would have been different if Flagstar had not made the allegedly misleading statements about appellant’s loss mitigation application, the circuit court did not err by denying appellant’s Rule 14-305 exceptions to the foreclosure sale. *Cf.*

*Thomas, supra*, 427 Md. at 450 (“Unfortunately for the Thomases, 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.”).

Appellant contends, in the alternative, that the circuit court erred by ratifying the foreclosure sale because appellees have “unclean hands.” For the reasons just noted, however, even if we were to assume *arguendo* that Flagstar knowingly misrepresented the status of its efforts to conduct loss mitigation analysis on appellant’s loan, there were no facts proffered to establish that appellant was prejudiced as a result. Because appellant did not provide facts to the circuit court that showed that the outcome of the foreclosure process would have been different if Flagstar had not made the alleged misrepresentations, the circuit court did not err by denying appellant’s Rule 14-305(d) post-sale exceptions.

Appellant also argues that the circuit court erred by denying her post-sale exceptions without conducting an evidentiary hearing on the allegations contained in her affidavit. Rule 14-305(d)(2) provides: “The court shall determine whether to hold a hearing on the exceptions but it may not set aside a sale without a hearing. The court shall hold a hearing if a hearing is requested and the exceptions or any response **clearly show a need to take evidence.**” (Emphasis added.) Appellant argues that her allegations gave rise to a reasonable inference that Flagstar fraudulently denied her application for loss mitigation, and therefore, she was entitled to a hearing to prove that her failure to file a timely pre-sale objection was the result of Flagstar’s fraud. For the reasons discussed above, however, even if the allegations in appellant’s affidavit are assumed to be true, appellant failed to allege any facts

that could demonstrate that she was prejudiced by the alleged misrepresentations. *Cf. Thomas, supra*, 427 Md. at 454 (“a general allegation of ‘fraud’ does not suffice”). Without some reason to believe that the outcome of the foreclosure process would have been different but for Flagstar’s alleged misconduct, appellant was not entitled to have the sale set aside, and the circuit court did not err by ruling on the motion without conducting an evidentiary hearing.

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