UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 0564

September Term, 2014

ZESHAN MUSTAFA, et al.

v.

CARRIE M. WARD, et al.
SUBSTITUTE TRUSTEES

Eyler, Deborah S.,
Hotten,
Nazarian,

JJ.

Opinion by Hotten, J.

Filed: June 24, 2015

Appellees, Carrie M. Ward, Howard N. Bierman, and Jabob Geesing (collectively "substitute trustees"), filed their order to docket a foreclosure suit against appellants, Zeshan Mustafa, Fatima Mustafa, and Kamal Mustafa, pertaining to appellants' property located at 14406 Autumn Branch Terrace, Boyds, MD in the Circuit Court for Montgomery County. Appellants filed for a foreclosure mediation and following the sessions, no agreement was reached. Thereafter, appellants filed a motion to stay and dismiss the foreclosure, to which appellees filed an opposition. The circuit court denied appellants' motion for failure to comply with Md. Rule 14-211. Appellants appealed and present two questions for our consideration, which we have consolidated and rephrased for clarity[1]:

I. Whether the circuit court erred when it granted appellees' motion to dismiss?

For the foregoing reasons, we shall affirm the judgment of the circuit court.

FACTUAL AND PROCEDURAL HISTORY

On May 5, 2005, appellants entered into a consumer credit transaction with Washington Mutual Bank, FA ("WAMU") by obtaining a $680,000 mortgage loan secured by appellants' property located at 14406 Autumn Branch Terrace, Boyds, MD ("the subject

[1] Appellants' original questions presented for appeal stated:

I. Whether a Lender can [f]oreclos[e] on a property without a Final Loss Mitigation Affidavit which is requirement by Maryland Rule 14-207 (b)[(]6).

II. Whether a Lender can foreclose on a property without an "Affidavit of Indebtedness" which is required by . . . Maryland Rule Section 14-207 (b) (2).

property"). The deed of trust, or security instrument, secured repayment of the note up to a principal amount of $680,000 plus interest and was recorded on May 11, 2005 in the Land Record Office for Montgomery County, Maryland in Liber 25543 at Folio 351.

On March 20, 2009, appellees were appointed as substitute trustees by JPMorgan Chase Bank ("Chase Bank"), as purchaser of the loans and other assets of WAMU from the Federal Deposit Insurance Corporation ("FDIC"),[2] acting as receiver for WAMU. The Deed of appointment of substitute trustee indicated:

> WHEREAS, said Deed of Trust provides that the holder of the Note shall have the power and authority to appoint, by an instrument duly executed, acknowledged and recorded among the Land Records aforesaid, substitute trustee(s) in the place and stead of the trustee(s) named therein. . . .

On September 19, 2013, the Vice President of Chase Bank executed an Affidavit of Debt and Right to Foreclose. The affidavit stated, *inter alia*:

> There has been a default under the terms of the promissory note and deed of trust/mortgage/secured instrument. The nature of the default is the failure to make required payments, as the payment that was due April 01, 2008 has not been made. Under the Definitions set forth by the Commissioner of Financial Regulation, "Date of Default" means the first calendar day after the borrower has failed to meet the borrower's obligations under the terms of the debt instrument where the debt instrument characterizes that failure as a default. Accordingly, under the definition, Borrower's "Date of Default" is April 02, 1998.

[2] FDIC was acting pursuant to its authority under the Federal Deposit Insurance Act, 12 U.S.C. 1821(d). On September 25, 2008, by operation of law, the FDIC transferred WAMU's banking operations to Chase Bank because WAMU seized operations and was placed into receivership.

Appellants failed to make subsequent payments and the affidavit outlined the amount that appellants owed as of September 19, 2013.

On October, 3, 2013, appellees filed an order to docket a foreclosure suit against appellants, pursuant to Md. Rule 14-207(b)(2), with the Circuit Court for Montgomery County. Thereafter, on December 9, 2013, appellants requested foreclosure mediation.

On November 21, 2013, the Vice President of Chase Bank filed a Final Loss Mitigation Affidavit. The mediation was held on February 3, 2014, and the parties agreed to extend the time for mediation beyond 30 days. Ultimately, the parties did not reach an agreement.

On February 6, 2014, Chase Bank sent a letter to appellant, Zeshan Mustafa, in response to his correspondence regarding assistance with his mortgage loan. The servicing of the loan was transferred to Penny Mac Loan Services, LLC ("Penny Mac"). Within the letter, Chase Bank indicated:

> **Your loan is no longer in active foreclosure with Chase**
>
> As stated in the goodbye letter dated December 17, 2013, your loan is now being serviced by Penny Mac which means any collection and foreclosure activity you had on the loan is now being handled by your new servicer. In addition, we removed your loan from active foreclosure in our systems on January 3, 2014; therefore our foreclosure attorney is no longer pursuing foreclosure action in our name. You will need to contact Penny Mac to inquiry if your loan is in active foreclosure and who the new foreclosure attorney is on your account.

On April 7, 2014, appellants filed a motion to stay of the sale or dismiss the action pursuant to Md. Rule 14-211. Appellants contended that appellees were in violation of the Rules of Professional Conduct for continuing to pursue the foreclosure action after a

change in the loan servicer, that the affidavits presented by appellees did not support the transaction history, and that documents submitted by the trustees did not meet the requirements of Md. Rule 8-112 regarding the size and fonts. In response, appellees filed an opposition to appellant's motion because it failed to comply with the requirements of Md. Rule 14-211 and did not present a valid defense to the validity of the lien, lien instrument, or right of appellants' right to foreclose.

On June 6, 2014, the Circuit Court for Montgomery County denied appellants' motion "for failure to comply with [Md.] Rule 14-211." Appellants noted a timely appeal. Additional facts shall be provided, *infra*, to the extent they prove relevant in addressing the issues presented.

STANDARD OF REVIEW

This Court reviews the denial of a motion to stay or dismiss in a property foreclosure action for an abuse of discretion by the circuit court. *Burson v. Capps*, 440 Md. 328, 342 (2014) (citations omitted). We have found abuse of discretion where the trial court ruling was 'clearly against the logic and effect of facts and inferences before the court[ ] . . . or when the ruling is violative of fact and logic.'" *Fishman v. Murphy ex rel. Estate of Urban*, 433 Md. 534, 546 (2013) (quoting *Aventis Pasteur, Inc. v. Skevofilax,* 396 Md. 405, 419 (2007)).

The Court of Appeals indicated in *Bates v. Cohn*, 417 Md. 309 (2010) that, "[b]efore a foreclosure sale takes place, the defaulting borrower may file a motion to 'stay the sale of the property and dismiss the foreclosure action.'" *Id.* at 318 (quoting Md. Rule 14-

211(a)(1)). Therefore, the borrower "may petition the court for injunctive relief, challenging 'the validity of the lien or . . . the right of the [lender] to foreclose in the pending action.'" *Id.* at 318-19 (quoting Md. Rule 14-211(a)(3)(B)). "We will reverse under this standard if we determine that 'no reasonable person would take the view adopted by the [trial] court[ ].'" *Fishman*, 433 Md. at 546 (quoting *Aventis,* 396 Md. at 419 (2007)). We review the circuit court's legal conclusions *de novo*. *Svrcek v. Rosenberg*, 203 Md. App. 705, 720 (2012) (citing *Wincopia Farm, LP v. Goozman,* 188 Md. App. 519, 528 (2009)).

DISCUSSION

I.

Appellants contend that the circuit court improperly dismissed their motion because the Final Loss Mitigation Affidavit was filed by Chase Bank, a non-party, prior to mediation and that Penny Mac had not filed an Affidavit of Indebtedness and Right to Foreclose. Appellants' motion to stay or dismiss the action requested that "the Affidavits" be stricken without discussing which particular affidavits. Therefore, the issues presented in appellants' brief were not preserved for review. The scope of our review is governed by Md. Rule 8-131(a):

> (a) **Generally.** The issues of jurisdiction of the trial court over the subject matter and, unless waived under Rule 2-322, over a person may be raised in and decided by the appellate court whether or not raised in and decided by the trial court. Ordinarily, the appellate court will not decide any other issue unless it plainly appears by the record to have been raised in or decided by the trial court, but the Court may decide such an issue if necessary or desirable to guide the trial court or to avoid the expense and delay of another appeal.

"The rules for preservation of issues have a salutary purpose of preventing unfairness and requiring that all issues be raised in and decided by the trial court, and these rules must be followed in all cases . . . [t]he few cases where we have exercised our discretion to review unpreserved issues are cases where prejudicial error was found and the failure to preserve the issue was not a matter of trial tactics." *State v. Rich*, 415 Md. 567, 574 (2010) (quoting *Conyers v. State*, 354 Md. 132, 150 (1999)) (internal quotation marks omitted). The Court of Appeals has established a two-step analysis for determining whether exercising its discretion will "further or hinder the goals of Md. Rule 8-131(a):

> First, the appellate court should consider whether the exercise of its discretion will work unfair prejudice to either of the parties. . . . Second, the appellate court should consider whether the exercise of its discretion will promote the orderly administration of justice.

King v. State, 434 Md. 472, 480 (2013) (quoting *Jones v. State,* 379 Md. 704, 712 (2004) ("discussing the principles [the Court of Appeals] laid out 'to guide the courts when consideration of unpreserved issues might be proper'"). Even if appellants' arguments were preserved for appeal, they would not prevail.

A debtor who owns property subject to a lien instrument has three means of challenging a foreclosure: by "obtaining a pre-sale injunction pursuant to Maryland Rule 14-[211], filing post-sale exceptions to the ratification of the sale under Maryland Rule 14-305(d), and the filing of post-sale ratification exceptions to the auditor's statement of account pursuant to Maryland Rule 2-543(g),(h)." *Jones v. Rosenberg,* 178 Md. App. 54,

65 (2008). Maryland Rule 14-211 governs the stay of a sale or dismissal of the action and states, in part:

> **(a) Motion to stay and dismiss.**
>
> (1) Who may file. The borrower, a record owner, a party to the lien instrument, a person who claims under the borrower a right to or interest in the property that is subordinate to the lien being foreclosed, or a person who claims an equitable interest in the property may file in the action a motion to stay the sale of the property and dismiss the foreclosure action.
>
> * * *
>
> (3) Contents. A motion to stay and dismiss shall:
>
> (A) be under oath or supported by affidavit;
>
> (B) state 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. . . .
>
> * * *
>
> **(b) Initial determination by court.**
>
> (1) Denial of motion. The court shall deny the motion, with or without a hearing, if the court concludes from the record before it that the motion:
>
> (A) was not timely filed and does not show good cause for excusing non-compliance with subsection (a)(2) of this Rule;
>
> (B) does not substantially comply with the requirements of this Rule; or
>
> (C) does not on its face state a valid defense to the validity of the lien or the lien instrument or to the right of the plaintiff to foreclose in the pending action.

Appellants' allege that Penny Mac failed to file a Final Loss Mitigation Affidavit, as required by Md. Rule 14-207(b)(6)[3] and Affidavit of Indebtedness, as required by Md. Rule 14-207(b)(2).[4] Additionally, appellants contend that appellees did not inform the circuit court of the transfer of actual parties involved in the foreclosure and that the current lender "has failed to file any [a]ffidavits claiming the ownership of the note, Deed of Trust, Final Loss Mitigation or Amended Affidavit of Indebtedness." Appellees filed an affidavit of debt and right to foreclosure on October 3, 2013, with the order to docket. The accuracy of the affidavit was not challenged and instead appellants' contend that the new loan servicer did not file a new affidavit. Additionally, on November 21, 2013, appellees filed a Final Loss Mitigation Affidavit. Appellants did not challenge the accuracy of that affidavit. Appellants failed to provide authority for either of these contentions.

Appellees were appointed as substitute trustees by Chase Bank in 2009 and no subsequent appointments were made. A change in the loan servicer does not alter the effectiveness of a previous executed and recorded Deed of Appointment. The Court of

[3] Md. Rule 14-207(b)(6) states:

> [A] statement as to whether the property is residential property and, if so, statements in boldface type as to whether (A) the property is owner-occupied residential property, if known, and (B) a final loss mitigation affidavit is attached[.]

[4] Md. Rule 14-207(b)(2) states:

> [A]n affidavit by the secured party, the plaintiff, or the agent or attorney of either that the plaintiff has the right to foreclose and a statement of the debt remaining due and payable[.]

Appeals, explained the legal effect of an assignment of a deed of trust in *Le Brun v. Prosise,* 197 Md. 466 (1951):

> This deed of trust secures a negotiable note, whoever may be the holder. The deed of trust need not and properly speaking cannot be assigned like a mortgage, but the note can be transferred freely, and, when transferred, carries with it the security, if any, of the deed of trust, which was true of a mortgage note before the Act of 1892, ch. 392, amended by Acts of 1910, ch. 719, now section 26. The note and the mortgage are inseparable; the former as essential, the latter as an incident. An assignment of the note carries the mortgage with it, while an assignment of the latter alone is a nullity.

Id. at 474–75 (internal quotations and citations omitted).

We discussed the role of substitute trustees in *Svrcek v. Rosenberg*, 203 Md. App. 705 (2012), indicating:

> The deed of appointment of substitute trustees [does] not convey property, but merely the right to initiate a foreclosure of the equity of redemption or otherwise act to protect the secured party's interest. A deed of trust is a security device. It transfers legal title from a property owner to one or more trustees to be held for the benefit of a beneficiary. The conveyance transfers the estate of the debtor to the trustee, giving the trustee legal title to the property. The debtor retains an equity of redemption or the right to reassert complete ownership of the land, upon payment of the debt and any other charges rightly assessed under the terms of the lien instrument. A foreclosure sale serves only to eliminate the mortgagors' rights in the property, including the right of redemption.
>
> The deed of 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, subject to the mortgagor's equitable right to redeem the property prior to the sale.

Id. at 728-29 (internal quotations and citations omitted). The Deed of Trust, assigned to Penny Mac on February 21, 2014, stated in pertinent part:

> For Value Received, **JPMorgan Chase Bank, National Association**, the undersigned holder of a Deed of Trust (herein "Assignor") does hereby grant, sell, assign, transfer and convey, unto **PennyMac Corp.** (herein "Assignee") . . . all beneficial interest under a certain Deed of Trust dated **May 5, 2005** and recorded on **May 11, 2005**. . . .
>
> . . . such Deed of Trust having been given to secure payment of **Six Hundred Eighty Thousand and 00/100ths ($680,000.00**), which Deed of Trust is of record in Book, Volume, or Liber No. **29846**, at Page **609** (or as No. N/A), in the Office of the County Recorder of **MONTGOMERY** County, State of Maryland.

The substitute trustees have remained the same throughout the foreclosure process and instituted the foreclosure proceedings and the proceedings were not in Chase Bank's name. Chase Bank executed the deed of appointment of substitute trustee on March 20, 2009, as the authorized agent for the secured party and servicer of the mortgage loan. The appointment of appellees remains valid despite a change in loan servicers. Thus, the circuit court did not abuse its discretion.

Appellants also contend that the meaning of Md. Rule 14-211(a)(2)(C)[5] is at issue. However, the circuit court did not dismiss the motion for untimeliness and therefore, this is not at issue. Additionally, appellants present new arguments in its reply brief stating that Penny Mac is not licensed lender in the State of Maryland and therefore, it may not proceed with the foreclosure of the property. As stated above, the substitute trustees

[5] Md. Rule 14-211(a)(2)(C) states:

> Non-Compliance; Extension of Time. For good cause, the court may extend the time for filing the motion or excuse non-compliance.

initiated the order to docket foreclosure. Furthermore, appellants admit that this issue was not preserved. Accordingly, we shall affirm.

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