

Circuit Court for Prince George's County  
Case No. CAEF17-29187

UNREPORTED  
IN THE COURT OF SPECIAL APPEALS  
OF MARYLAND

No. 631

September Term, 2018

---

CLAUDETTE BROOKS

v.

LAURA O'SULLIVAN, ET AL.

---

Wright,  
Arthur,  
Beachley,

JJ.

---

Opinion by Arthur, J.

---

Filed: June 17, 2019

\*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 generally concerns whether a homeowner may bring a counterclaim for damages and demand a jury trial in an in rem action to foreclose a lien pursuant to a power of sale. Here, the homeowner asserted a putative counterclaim, but the circuit court struck the pleading after it permitted the substitute trustees to dismiss the foreclosure action. The homeowner appealed.

We conclude that the homeowner's appeal is moot, because there is no longer a pending action into which the "counterclaim" could be reinstated as a counterclaim.

### **BACKGROUND FACTS**

On October 12, 2007, Laura O'Sullivan and others, as substitute trustees under a deed of trust, commenced an action to foreclose a lien pursuant to a power of sale by filing an order to docket in the Circuit Court for Prince George's County. The foreclosure action concerned the residence of appellant Claudette Brooks.

On October 25, 2017, Ms. Brooks filed what she characterized as a "counterclaim." Ms. Brooks's "counterclaim," however, did not assert claims against Ms. O'Sullivan or any of the other substitute trustees who were the opposing parties. Instead, Ms. Brooks asserted claims against Freedom Mortgage Corp., the lender and servicer of the loan that was secured by her property; and McCabe, Weisberg & Conway LLC, the law firm that represented the substitute trustees.

Ms. Brooks's 55-page, 133-paragraph "counterclaim" purported to set forth claims for violations of the Real Estate Settlement Procedures Act, 12 U.S.C. § 2605; the Fair Debt Collection Practices Act, 15 U.S.C. §§ 1692 to 1692p; the Fair Credit Reporting Act, 15 U.S.C. § 1681; and the Maryland Consumer Protection Act, Md. Code (1975,

2013 Repl. Vol.), §§ 13-101 to -501 of the Commercial Law Article. In addition, the “counterclaim” contained two requests for declaratory relief, including a request for a declaration that federal law preempted certain portions of the Maryland Rules and the Real Property Article of the Maryland Code.

Although Ms. Brooks asserted her “counterclaim” in a foreclosure action, which is “a summary, in rem proceeding” that is designed to carry out the policy of “expedit[ing] mortgage foreclosures” (*Wells Fargo Home Mortg., Inc. v. Neal*, 398 Md. 705, 726 (2007) (quoting *G.E. Capital Mortg. Servs., Inc. v. Levenson*, 338 Md. 227, 245 (1995))), she asserted that the pleading entitled her to a trial by jury on all issues of fact, including issues of fact pertaining to the foreclosure action.

On November 6, 2017, McCabe, Weisberg & Conway moved to strike the “counterclaim.” Among other things, the firm cited *Wells Fargo Home Mortg., Inc. v. Neal*, 398 Md. at 726, for the proposition that, in filing an order to docket, the substitute trustees did not assert a “claim,” to which Ms. Brooks could assert a “counterclaim.” The firm also argued that the foreclosure procedures do not contemplate the filing of a counterclaim, because Rule 2-331(d) requires that a counterclaim be filed within 30 days of the answer, but no answer is ever filed in an action to foreclose a lien pursuant to a power of sale. Finally, the firm questioned how Ms. Brooks could assert a “counterclaim” against someone other than her opposing parties when she had asserted no claims against the opposing parties themselves. Freedom Mortgage joined the firm’s motion.

Meanwhile, on approximately December 18, 2017, the substitute trustees requested the voluntary dismissal of their foreclosure action. Two days later, Ms. Brooks opposed the dismissal of the foreclosure action, arguing that under Md. Rule 2-506(c) the court cannot dismiss a “complaint” over the objection of a party who has filed a counterclaim unless the counterclaim remains pending for adjudication.

Although the three different sets of docket entries in the record extract are not entirely consistent with each other, it appears from two of them that the foreclosure action was dismissed on (or perhaps as of) December 18, 2017, before Ms. Brooks filed her opposition. Two days later, on December 20, 2017, the circuit court signed an order striking the “counterclaim” on the ground that it asserted no claims against the substitute trustees and, hence, was, in the court’s view, actually a third-party complaint.<sup>1</sup>

Although the order striking the “counterclaim” appears to have been mailed to counsel for the substitute trustees and for Ms. Brooks, it was, for some unknown reason, not entered on the docket until April 5, 2018. In the intervening three months, Ms. Brooks propounded discovery; filed what she described as a “combined counterclaim and third-party complaint” and demand for a jury trial against Freedom Mortgage and McCabe, Weisberg & Conway; and renewed her objection to the dismissal of the

---

<sup>1</sup> *But see* Md. Rule 2-332(a) (authorizing a defendant to serve a third-party complaint “upon a person not a party to the action who is or may be liable to the defendant for all or part of a plaintiff’s claim against the defendant”). Ms. Brooks did not allege that Freedom Mortgage or McCabe, Weisberg & Conway were or might have been liable to her for all or part of some claim against her. In fact, there was no claim, as such, against Ms. Brooks in the in rem foreclosure action in which she purported to assert the “counterclaim.” *See Wells Fargo Home Mortg., Inc. v. Neal*, 398 Md. at 726.

foreclosure action. In response, Freedom Mortgage and McCabe, Weisberg & Conway moved for a protective order; and Freedom Mortgage and the substitute trustees moved to strike the 55-page, 134-paragraph “combined counterclaim and third-party complaint.”

On April 5, 2018, the clerk finally docketed the three-month-old orders by which the circuit court had stricken the “counterclaim” and allowed the substitute trustees to dismiss the foreclosure action. On that same date, the clerk docketed two additional orders, dated April 2, 2018. In the first of those two orders, the circuit court denied Ms. Brooks’s motion to stay or, alternatively, to dismiss the foreclosure proceeding. In the second order, the court denied Freedom Mortgage’s motion to strike the “combined counterclaim and third-party complaint,” calling it “moot.”<sup>2</sup>

On April 16, 2018, Ms. Brooks filed a timely motion to alter or amend the decision to permit the substitute trustees to dismiss the foreclosure action and close the case; to deny her motion to stay or, alternatively, to dismiss the foreclosure proceeding; and to strike her “counterclaim.” At a hearing on May 10, 2018, the court rejected Ms. Brooks’s contentions and disposed of all other pending motions. The court embodied its rulings in an order dated May 10, 2018, and docketed on May 18, 2018. Ms. Brooks took a timely appeal.

---

<sup>2</sup> More precisely, the court wrote that it denied Freedom Mortgage’s “motion to join” the substitute trustees’ motion to strike the “combined counterclaim and third-party complaint.” Freedom Mortgage did not, however, move “to join” the substitute trustees’ motion; it filed a motion of its own. The court did not expressly address the substitute trustees’ motion.

While the appeal was pending, Ms. Brooks filed a new complaint and demand for jury trial against Freedom Mortgage and two of its alleged agents, including one of the substitute trustees in this action. The new complaint includes claims alleging violations of the Maryland Consumer Protection Act; violations of the statutory prohibition on usury under § 12-114 of the Commercial Law Article; violations of the Maryland Consumer Debt Collection Act, §§ 14-201 to -204 of the Commercial Law Article; violations of the Maryland Mortgage Fraud Protection Act, §§ 7-401 to -409 of the Real Property Article; and defamation. The new complaint, which repeats verbatim many of the allegations in the “counterclaim” in this case, has been stayed pending the disposition of this appeal.

#### QUESTIONS PRESENTED

Ms. Brooks presents two questions, which, in the interest of concision, we have rephrased and combined into one: Did the circuit court err in dismissing the “counterclaim”?<sup>3</sup>

---

<sup>3</sup> Ms. Brooks formulated her questions as follows:

1. Did the Circuit Court err when it disregarded the binding precedent of *Fairfax Sav., F.S.B. v. Kris Jen Ltd. P’ship*, 338 Md. 1.21 (1995) and *Higgins v. Barnes*, 310 Md. 532 (1987) and statutory protection REAL PROP. § 7-105.1(m)(3), which permit a homeowner to voluntarily appear in an equitable foreclosure proceeding and assert ancillary legal claims with a jury demand?
2. Did the Circuit Court err by dismissing and striking Appellant’s timely counterclaims over her objection pursuant to MD. RULE 2-506(c)?

We decline to consider this question, because it is moot in light of the unchallenged dismissal of the foreclosure action: it makes no difference whether the court did or did not err in concluding that Ms. Brooks could not assert a “counterclaim” and demand for jury trial in an in rem foreclosure action now that there is no longer a pending foreclosure action into which her claims could be reinserted as “counterclaims.”

### ANALYSIS

Ms. Brooks’s appeal poses a number of subtle and unsettled questions of law. Can a person assert a counterclaim in an action, like an in rem foreclosure action, which does not involve a claim? Given that a counterclaim is a type of pleading (Md. Rule 2-302), is a person permitted to file a counterclaim in a foreclosure action under a power of sale, where the only “[p]leading[] [a]llowed” is an order to docket? Md. Rule 14-207(a)(1).<sup>4</sup> How can one gauge the timeliness of a counterclaim in a foreclosure proceeding, given that a counterclaim must be filed within 30 days of the answer (Md. Rule 2-331(d)), but there is no answer in a foreclosure proceeding? Can one assert a counterclaim against “[a]dditional [p]arties” under Md. Rule 2-331(c) without also asserting a counterclaim against the “opposing party” under Md. Rule 2-331(a)? If a party asserts what purports to

---

<sup>4</sup> At oral argument, Ms. Brooks argued that the phrase “Pleadings Allowed” in Rule 14-207 is in the heading, which, she said, is not part of the rule. Ms. Brooks was evidently thinking of the cases that hold that headings, catchlines, or taglines *in statutes* have no role in the interpretation of Maryland law. *See, e.g., Carter v. State*, 236 Md. App. 456, 481-82 (citing Md. Code (2014), § 1-208 of the General Provisions Article), *cert. denied*, 460 Md. 9 (2018). In statutes, headings, catchlines, or taglines are often created by the publisher of the code. By contrast, the Rules Committee drafts the headings in the Maryland Rules, and they are submitted for approval (and approved) by the Court of Appeals.

be a “counterclaim” against “[a]dditional [p]arties” without also asserting a counterclaim against the “opposing party,” is she really attempting to effectuate a de facto consolidation of separate trials without requesting and obtaining the court order that is required under Md. Rule 2-503(a)? If a borrower does not assert a counterclaim in a foreclosure proceeding, might the claims be barred by res judicata, or might the factual issues be conclusively resolved against her under the doctrine of collateral estoppel?

Ms. Brooks asserts that the Court of Appeals answered these questions in *Fairfax Savings, F.S.B. v. Kris Jen Ltd. P’ship*, 338 Md. 1, 22 (1995), which held that the borrowers could assert a counterclaim against their lender in a mortgage foreclosure proceeding. We disagree with her assessment.

*Kris Jen* is a commercial foreclosure case that was decided under the rules that were in effect in circa 1995. *See id.* at 21 (stating that, “[t]oday,” i.e., in 1995, “nothing in the Maryland Rules of Procedure prohibits a mortgagor who voluntarily appears in a mortgage foreclosure proceeding from filing a counterclaim”).<sup>5</sup> In *Kris Jen* the lender itself had instituted the proceeding. Consequently, the borrowers in *Kris Jen* asserted the counterclaim against the opposing party. In this case, by contrast, Ms. Brooks asserted no claims against the opposing parties (the substitute trustees). Instead, she asserted

---

<sup>5</sup> On page 19 of her brief, Ms. Brooks quotes *Kris Jen*’s statement that “nothing in the Maryland Rules of Procedure prohibits a mortgagor who voluntarily appears in a mortgage foreclosure proceeding from filing a counterclaim,” but leaves out the temporal qualification, “[t]oday.”

claims only against Freedom Mortgage and the lawyers who represented her opposing parties. *Kris Jen* does not authorize Ms. Brooks’s “counterclaim.”

In view of the procedural posture of this case, we are inclined to ask what benefit would be served by addressing the unresolved issues that Ms. Brooks has raised. Even if we agreed with Ms. Brooks and concluded that the circuit court erred in dismissing the “counterclaim,” we could not reinstate it as a “counterclaim” in a foreclosure proceeding: the foreclosure proceeding has been dismissed, Ms. Brooks says that she did not object to the dismissal of the foreclosure proceeding (Brief at 23), and she does not argue that the foreclosure proceeding should be reinstated on remand so that it can serve as a receptacle for the “counterclaim.” Hence, if we were to reverse the dismissal of the “counterclaim” and remand the case for further proceedings, the “counterclaim” would no longer be a counterclaim in an in rem foreclosure action: it would be a stand-alone complaint in an action for damages at law, much like Ms. Brooks’s separate complaint that is currently pending in the circuit court.

Ms. Brooks’s adversaries do not contend that her new complaint is somehow untimely, and Ms. Brooks does not argue that her rights will be impaired unless her “counterclaim” is reinstated. For example, there is no reason to believe that Ms. Brooks could not amend the new complaint, if she chose, to add any theories or allegations that she included in the “counterclaim,” but omitted from the complaint. Hence, it appears that the new complaint can serve exactly the same function as the “counterclaim” would serve if we were to reverse the circuit court’s decision in this case. In fact, Ms. Brooks

says that if we reversed the dismissal of the “counterclaim,” she would simply ask the court to consolidate it with her new complaint.

In these circumstances, it is difficult to see how a decision on the merits would amount to anything more than an advisory opinion about whether a homeowner in some future foreclosure case could or could not bring a “counterclaim” like the one that Ms. Brooks has attempted to bring here. This Court, however, does not give advisory opinions. *See, e.g., Green v. Nassif*, 401 Md. 649, 655 (2007). For that reason, we shall dismiss the appeal on the ground that it is moot. *See* Md. Rule 8-602(c)(8).

At oral argument, Ms. Brooks pointed out that if a homeowner’s “counterclaim” were dismissed and the foreclosure proceeding were then litigated to its conclusion, the substitute trustees might obtain the right to sell the property. It would be impossible to reinstate the “counterclaim” in a foreclosure proceeding, she argued, once the property has been sold and the sale ratified pursuant to a final judgment of foreclosure. She expressed concern that a homeowner could never obtain appellate review of a ruling that dismissed a putative counterclaim.

Ms. Brooks omits to note that a court may stay the final judgment in a foreclosure proceeding upon the posting of a supersedeas bond or other security. *See, e.g., Mirjafari v. Cohn*, 412 Md. 475, 484 (2010). Moreover, a court may stay the judgment in a foreclosure proceeding without the posting of a bond or other security in case of unfairness or collusion between the purchaser and the trustee, or when a mortgagee or its affiliate purchases the property at the foreclosure sale. *Id.* at 485. If a homeowner obtains a stay of a final judgment of foreclosure and notes a timely appeal, the challenge

to the disposition of a putative counterclaim would be properly before us. It is not before us in this case.

**APPEAL DISMISSED. COSTS TO BE  
PAID BY APPELLANT.**