

UNREPORTED
IN THE COURT OF SPECIAL APPEALS
OF MARYLAND

No. 0744

September Term, 2014

PAUL S. CARVER

v.

JEFFREY B. FISHER, et al.
SUBSTITUTE TRUSTEES

Hotten,
Berger,
Arthur,

JJ.

Opinion by Hotten, J.

Filed: June 4, 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.

Appellees, Jeffrey B. Fisher, Doreen A. Strothman, Virginia S. Inzer, William K. Smart, and Carlette M. Grier (collectively “substitute trustees”), filed their order to docket a foreclosure suit against appellant, Paul S. Carver, pertaining to appellant’s property located at 1600 E. Oliver Street, Baltimore, MD in the Circuit Court for Baltimore City. The court entered an order for the foreclosure to proceed and appellant filed for a foreclosure mediation. The parties executed an agreement in which appellant had 30 days to consult with a housing counselor and submit a financial analysis form and proof of income. Thereafter, appellant filed a motion to stay and dismiss the foreclosure, to which appellees filed an opposition. The circuit court denied appellant’s motion because, *inter alia*, appellant did not present a valid defense regarding the validity of the lien. Appellant appealed and presents one question for our review:

- I. Did the [c]ircuit [c]ourt [e]rr in denying [appellant’s] [m]otion to [s]tay and [d]ismiss and [r]equest for [h]earing?

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

FACTUAL AND PROCEDURAL HISTORY

Appellant has owned 1600 E. Oliver Street, Baltimore, MD (“the Property”) since his mother and her husband deeded it to him in 1987. In 2009, appellant applied for a Home Equity Conversion Mortgage (“HECM”), also known as a reverse mortgage, from Generation Mortgage Company (“Generation Mortgage”), which was insured by the United States Department of Housing and Urban Development (“HUD”), Federal Housing Administration (“FHA”). Thereafter, appellant completed a HUD required counseling program on reverse mortgages. On November 23, 2009, he signed a Certificate of HECM

Counseling as part of the loan application process.¹ Subsequently, the loan was approved and appellant proceeded to settlement, at his residence, on December 23, 2009.²

At settlement, appellant signed a Closed-End Fixed Rate Note (“Note”) payable to Generation Mortgage and promised:

[T]o pay to the order of [Generation Mortgage] a principal amount equal to the sum of all Loan Advances made under the Loan Agreement with interest. Interest will be charged on unpaid principal at the rate of FIVE AND 56/100 percent (5.560%) per year until the full amount of principal has been paid. Accrued interest shall be added to the principal balance as a Loan Advance at the end of each month.

The deed of trust, or security instrument, secured repayment of the note to Generation Mortgage up to a maximum principal amount of \$213,000. Additionally, repayment was secured by the Property.³ Appellant also signed a refinance affidavit, which indicated that the amount of unpaid principal from the original deed of trust was \$41,0880.07. On January 13, 2010, the HECM was recorded in the Land Record Office for Baltimore City, Maryland in Liber 12338 at Folio 215.

On August 1, 2010, appellant defaulted on his mortgage loan when he failed to pay real property taxes owed to Baltimore City. This was a breach of the terms of the HECM, which indicated:

2. Payment of Property Charges. Borrower [appellant] shall pay all property charges consisting of taxes, ground rents, flood and hazard

¹ The certification interview occurred by telephone on October 29, 2009.

² Appellant had no personal liability for payment of the debt and Generation Mortgage was to enforce the debt only through sale of the Property as covered by the deed of trust.

³ Additionally, appellant re-signed the Certificate of HECM Counseling.

insurance premiums, and special assessments in a timely manner, and shall provide evidence of payment to Lender, unless Lender pays property charges by withholding funds from monthly payments due to the Borrower or by charging such payments to a line of credit as provided for in the Loan Agreement.

* * *

5. Charges to Borrower and Protection of Lender's Rights in the Property. Borrower shall pay all governmental or municipal charges, fines and impositions that are not included in Paragraph 2. Borrower shall pay these obligations on time directly to the entity which is owed the payment. If failure to pay would adversely affect Lender's interest in the Property, upon Lender's request Borrower shall promptly furnish to Lender receipts evidencing these payments. . . .

If Borrower fails to make these payments or the property charges required by Paragraph 2, or fails to perform any other covenants and agreements contained in this Security Instrument, or there is a legal proceeding that may significantly affect Lender's rights in the Property (such as a proceeding in bankruptcy, for condemnation or to enforce laws or regulations), then Lender may do or pay whatever is necessary to protect the value of the Property and Lender's rights in the Property, including payment of taxes, hazard insurance and other items mentioned in Paragraph 2. . . .

Generation Mortgage appointed the substitute trustees and filed an order to docket suit regarding the Property in the Circuit Court for Baltimore City on May 17, 2013. The order requested that the action be docketed as "an action to foreclose a Deed of Trust of a residential property." Additionally, appellees filed a combined affidavit, which included, *inter alia*, the statement of indebtedness, the ownership and accuracy of the security instrument, and that the "mortgage loan is in default because of tax and insurance delinquency of the borrower. The default occurred on August 1, 2010." Further, appellees

filed a final loss mitigation affidavit (“FMLA”) signed by a representative.⁴ The FMLA stated, in part:

This is a reverse mortgage with no monthly payments due. However, the loan is in default for the taxes paid by Generation Mortgage Company on behalf of the borrower to protect our interest in the property. A repayment plan was offered; however, [t]he borrower failed to comply with the repayment plan.

On June 26, 2013, the circuit court entered an order finding that the case may proceed for an action in foreclosure. Thereafter, appellant applied for foreclosure mediation. Mediation sessions were conducted in November 2013 and again in February, 2014. On February 28, 2014, the parties reached an agreement, the terms and conditions of which included:

- 1) Lender agrees that Borrower has 30 days from the date of this Agreement to consult a housing counselor and to submit a financial analysis form and proof of income to Lender[.]
- 2) Lender will make a determination of Borrower’s eligibility for a repayment plan or other resolution options within 5 days of timely receipt of the above[.]
- 3) Lender agrees that it will not proceed with foreclosure proceedings pending the above determination and that . . . any time frames by which Borrower must file any motions are stayed pending the above determination[.]

On April 14, 2014, appellant filed a motion to stay and dismiss the foreclosure action and also a request for a hearing pursuant to Md. Rule 14-211. Appellant asserted that appellees violated the Americans with Disabilities Act (“ADA”), committed mortgage

⁴ Appellees also filed a request for foreclosure mediation and a notice of foreclosure action.

fraud, and violated the Federal Reverse Mortgage law. On April 30, 2014, appellees filed an opposition asserting that appellant did not present a valid ground of exception to the foreclosure sale and therefore, a hearing on the matter was not necessary.

On May 21, 2014, the circuit court denied appellant's motion and request for a hearing. Appellant noted a timely appeal. Additional facts shall be provided, *infra*, to the extent they prove relevant in addressing the issues presented.

STANDARD OF REVIEW

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)). 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 will reverse under this standard if we determine that ‘no reasonable person would take the view adopted by the [trial] court[].’ We have found abuses 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)). 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.

Appellant avers that the circuit court erred when it denied his motion to stay or dismiss the foreclosure action and his request for a hearing. In response, appellees contend that appellant failed to provide a defense regarding the validity of the lien or lien instrument, and failed to provide a defense to appellees' right to foreclose.

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.

* * *

(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.

The Americans With Disabilities Act

Appellant's first contention is that appellees violated the ADA because they were aware that appellant was legally blind and failed to provide him with auxiliary aids at settlement. Appellant stated that one of Generation Mortgage's representatives read the documents to him and failed to read any statement that appellant would be responsible for the taxes and insurance of the Property. Appellant alleges that he was not given the opportunity to read or understand the documents.

The ADA was created:

- (1) to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities;
- (2) to provide clear, strong, consistent, enforceable standards addressing discrimination against individuals with disabilities;
- (3) to ensure that the Federal Government plays a central role in enforcing the standards established in this chapter on behalf of individuals with disabilities; and
- (4) to invoke the sweep of congressional authority, including the power to enforce the fourteenth amendment and to regulate commerce, in order to

address the major areas of discrimination faced day-to-day by people with disabilities.

42 U.S.C. § 12101(b). The prohibition of discrimination by public accommodations is governed by 42 U.S.C. § 12182(a), which states as a general rule that:

No individual shall be discriminated against on the basis of disability in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation by any person who owns, leases (or leases to), or operates a place of public accommodation.

A public accommodation is defined by 42 U.S.C. § 12181(7), which states:

The following private entities are considered public accommodations for purposes of this subchapter, if the operations of such entities affect commerce⁵—

- (A) an inn, hotel, motel, or other place of lodging, except for an establishment located within a building that contains not more than five rooms for rent or hire and that is actually occupied by the proprietor of such establishment as the residence of such proprietor;
- (B) a restaurant, bar, or other establishment serving food or drink;
- (C) a motion picture house, theater, concert hall, stadium, or other place of exhibition or entertainment;
- (D) an auditorium, convention center, lecture hall, or other place of public gathering;

⁵ “The term ‘commerce’ means travel, trade, traffic, commerce, transportation, or communication—

- (A) among the several States;
- (B) between any foreign country or any territory or possession and any State; or
- (C) between points in the same State but through another State or foreign country.”

42 U.S.C. § 12181(1).

- (E) a bakery, grocery store, clothing store, hardware store, shopping center, or other sales or rental establishment;
- (F) a laundromat, dry-cleaner, bank, barber shop, beauty shop, travel service, shoe repair service, funeral parlor, gas station, office of an accountant or lawyer, pharmacy, insurance office, professional office of a health care provider, hospital, or other service establishment;
- (G) a terminal, depot, or other station used for specified public transportation;
- (H) a museum, library, gallery, or other place of public display or collection;
- (I) a park, zoo, amusement park, or other place of recreation;
- (J) a nursery, elementary, secondary, undergraduate, or postgraduate private school, or other place of education;
- (K) a day care center, senior citizen center, homeless shelter, food bank, adoption agency, or other social service center establishment; and
- (L) a gymnasium, health spa, bowling alley, golf course, or other place of exercise or recreation.

Appellant relies on non-binding authority to emphasize that “mortgage loan servicing and enforcement is a ‘service’ provided by a ‘place of accommodation’ triggering ADA.” However, in *Webster Bank v. Oakley*, 265 Conn. 539, 570 (2003), the Supreme Court of Connecticut, in affirming the trial court, determined that the ADA was not a valid defense to the foreclosure action, indicating:

[W]e conclude that Title III of the ADA regulates a lender’s provision of access to its mortgage loans, which are the goods and services that it offers, but does not regulate the content of those loan agreements. Thus, although a lender like the plaintiff may not refuse to provide equal access to its mortgage policies on the basis of the disabilities of potential mortgagors, it was not required to alter the otherwise universally applicable terms or conditions of its mortgage policies to accommodate the disabilities of borrowers such as the

defendant. Thus, the reasonable modifications provision of the ADA does not afford the defendant any relief in the present case.

Id. at 577-78.

We appreciate appellant's concern that Generation Mortgage should have treated his case with more care. However, the circuit court determined that the ADA was not applicable to the lender, and that appellant was aware of his obligation to pay taxes and insurance as far back as 2011. In denying appellant's motion the court indicated:

The motion does not on its face state a valid defense to the validity of the lien or the lien instrument or the right of the [appellee] to foreclose in the pending action. Maryland Rule 14-211(b)(1). [Appellant] claims that the lender failed to provide accommodations for him pursuant to the Americans with Disabilities Act. However, the Act is not applicable to the lender. [Appellant] further claims that he was not aware that he was required to pay taxes and insurance. It is clear, however, that [appellant] acknowledged these obligations in June, 2011, and that he made payments for both taxes and insurance in 2012.

We agree. As outlined in the statute, Generation Mortgage does not fall into one of the categories as a place of public accommodation. Furthermore, the settlement of the mortgage loan was conducted at appellant's residence. He did not provide evidence that he requested accommodations prior to the representative's arrival, or that he previously informed Generation Mortgage he was legally blind. It is undisputed that the representative conducting the settlement offered to read the documents to appellant and appellant signed the documents. Thus, we perceive no error.

Mortgage Fraud

Appellant also alleges that appellees committed mortgage fraud because they represented that he would never have to pay sums regarding the Property upon entering

into the reverse mortgage. He contended that he was unaware of his obligation to pay taxes and insurance for the Property. We agree with the circuit court that this claim must fail. The appellant's letter, dated June 15, 2011, referenced his inability to pay the tax and water bill. His payment of the taxes and insurance for the Property in 2012, demonstrates that he was aware of his obligations to the Property.

Mortgage fraud is defined by Md. Code (1974, 2010 Repl. Vol.) § 7-401(d) of the Real Property Article [hereinafter "Real Prop."]:

Mortgage Fraud.— "Mortgage fraud" means any action by a person made with the intent to defraud that involves:

- (1) Knowingly making any deliberate misstatement, misrepresentation, or omission during the mortgage lending process with the intent that the misstatement, misrepresentation, or omission be relied on by a mortgage lender, borrower, or any other party to the mortgage lending process;
- (2) Knowingly creating or producing a document for use during the mortgage lending process that contains a deliberate misstatement, misrepresentation, or omission with the intent that the document containing the misstatement, misrepresentation, or omission be relied on by a mortgage lender, borrower, or any other party to the mortgage lending process;
- (3) Knowingly using or facilitating the use of any deliberate misstatement, misrepresentation, or omission during the mortgage lending process with the intent that the misstatement, misrepresentation, or omission be relied on by a mortgage lender, borrower, or any other party to the mortgage lending process;
- (4) Receiving any proceeds or any other funds in connection with a mortgage closing that the person knows resulted from a violation of item (1), (2), or (3) of this subsection;
- (5) Conspiring to violate any of the provisions of item (1), (2), (3), or (4) of this subsection; or

(6) Filing or causing to be filed in the land records in the county where a residential real property is located, any document relating to a mortgage loan that the person knows to contain a deliberate misstatement, misrepresentation, or omission.

Appellant would not be afforded injunctive relief from this statute. Real Prop. § 7-404(a) states:

Injunction.— The Attorney General may seek an injunction to prohibit a person who has engaged or is engaging in a violation of this subtitle from engaging or continuing to engage in the violation.

Thus, the Attorney General may seek an injunction, but appellant would not be able to seek an injunction and instead could only pursue a private cause of action for legal damages or criminal penalty for violation the statute. *See* Real. Prop. §§7-405-408. Therefore, this claim must fail.

The Federal Reverse Mortgage Act

Appellant alleges that appellees failed to provide him with information regarding the loan and credit counseling in a manner that he could understand. He avers that appellees violated 12 U.S.C. § 1715z-20. The purpose of 12 U.S.C. § 1715z-20(a) is:

[T]o authorize the Secretary to carry out a program of mortgage insurance designed—

(1) to meet the special needs of elderly homeowners by reducing the effect of the economic hardship caused by the increasing costs of meeting health, housing, and subsistence needs at a time of reduced income, through the insurance of home equity conversion mortgages to permit the conversion of a portion of accumulated home equity into liquid assets; and

(2) to encourage and increase the involvement of mortgagees and participants in the mortgage markets in the making and servicing of home equity conversion mortgages for elderly homeowners.

Specifically, 12 U.S.C § 1715z-20(f) states:

Counseling services and information for mortgagors

The Secretary shall provide or cause to be provided adequate counseling for the mortgagor, as described in subsection (d)(2)(B). Such counseling shall be provided by counselors that meet qualification standards and follow uniform counseling protocols. The qualification standards and counseling protocols shall be established by the Secretary within 12 months of July 30, 2008. The protocols shall require a qualified counselor to discuss with each mortgagor information which shall include—

- (1) options other than a home equity conversion mortgage that are available to the homeowner, including other housing, social service, health, and financial options;
- (2) other home equity conversion options that are or may become available to the homeowner, such as sale-leaseback financing, deferred payment loans, and property tax deferral;
- (3) the financial implications of entering into a home equity conversion mortgage;
- (4) a disclosure that a home equity conversion mortgage may have tax consequences, affect eligibility for assistance under Federal and State programs, and have an impact on the estate and heirs of the homeowner; and
- (5) any other information that the Secretary may require.

Appellant has failed to establish a section in the Act that would provide him a private cause of action. Furthermore, there is a Certificate of HECM Counseling that was signed by appellant on November 23, 2009 and December 23, 2009. The signatures were an acknowledgement that appellant “discussed the financial implications of and alternatives to a HECM with the . . . Counselor.” Therefore, the circuit court properly denied appellant’s motion.

Combined Affidavit

Appellant lastly argues that appellees' combined affidavit demonstrates that their foreclosure case is defective because "there is no asserted default based on failure to pay taxes and insurance[.]" Appellant is specifically focusing on the language in the affidavit, which states, "Funds have been advanced for payment of taxes and insurance in the amount of \$0.00." Appellant has not demonstrated how this language would result in the foreclosure being dismissed. The affidavit reflected that the "mortgage loan is in default because of tax and insurance delinquency of the borrower. The default occurred on August 1, 2010." It was appellant's obligation to maintain the taxes and insurance on the Property. As mentioned above, appellees were not obligated to advance any payments and as an option, could make payments in the event of default. Thus, this argument must fail.

The circuit court may dismiss an action which does not present a valid defense to the validity of the lien or lien instrument on its face. *See* Md. Rule 14-211(b)(1)(C). Additionally, the court may deny the motion with or without a hearing. The record establishes that the circuit court did not abuse its discretion.

**JUDGMENT OF THE CIRCUIT
COURT FOR BALTIMORE CITY IS
AFFIRMED. COSTS TO BE PAID
BY APPELLANT.**