Circuit Court for Anne Arundel County
Case No. C-02-CV-17-241

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 907

September Term, 2019

GREGORY MCDONALD

v.

CHASITY BROWN, ET AL.

Fader, C.J.,
Beachley,
Woodward, Patrick L.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Woodward, J.

Filed: October 20, 2020

On May 5, 2006, appellant, Gregory McDonald, obtained a loan from USA Lending, LLC ("USA Lending"), secured by a Deed of Trust, to buy a home in Severn, Maryland. When he defaulted on the loan, appellees, the Substitute Trustees,[1] initiated foreclosure proceedings in the Circuit Court for Anne Arundel County.

On the day before the foreclosure sale, appellant filed an emergency motion to stay and dismiss. The circuit court did not consider the motion until after the foreclosure sale when the court held a hearing, denied the motion, and ratified the sale. On appeal, appellant raises three questions, which as set forth in his brief are:

> 1. Did the lower court err by not dismissing this foreclosure action because the Deed of Trust contained in the Order to Docket is fraudulent and deprived the lower court of jurisdiction?
>
> 2. Did the court err by not dismissing this foreclosure action because the note was not endorsed by the payee and there was a failure in the chain of title?
>
> 3. Did the court err by not dismissing this foreclosure action because Appellees have unclean hands?

For the reasons set forth herein, we shall affirm.

I. BACKGROUND

When appellant purchased his home, located on Old Bay Lane in Severn, Maryland, on May 5, 2006, he executed an Adjustable Rate Note and promised to repay USA Lending $365,000. The note was secured by a Deed of Trust. The name of the Trustee, however, was not included in the Deed of Trust, which was recorded on June 9, 2006.

[1] The Substitute Trustees to the underlying action are Chastity Brown, Laura H. G. O'Sullivan, Rachel Kiefer, and Jana M. Gantt.

Appellant defaulted on the Note several times, spurring multiple foreclosure attempts. The first order to docket was filed on September 28, 2009. The Substitute Trustees to the first foreclosure, separate from the ones in this action ("First Trustees"), filed a motion to reform the Deed of Trust, stating that they "discovered that the Deed of Trust [was] defective because no trustee [was] named in the instrument." Judge William C. Mulford, II issued a written order denying the First Trustees' motion on the ground that "[t]he parameters of a foreclosure proceeding are insufficient to address the merits of [the First Trustees'] Motion." The court explained that, if the First Trustees wanted to reform the Deed of Trust, they needed to "plead the appropriate cause of action."

As a result, the First Trustees dismissed the first foreclosure suit on November 6, 2009. The Deed of Trust, however, was re-recorded on the same day, with "ACE Title & Escrow" ("ACE Title") handwritten in the space after the words "'Trustee' is." Additional handwriting at the top of the document stated that the Deed of Trust was "[b]eing re-recorded to add Trustee." On May 23, 2012, appellees filed a second order to docket based on the Deed of Trust with Ace Title listed as Trustee. The second foreclosure action was dismissed voluntarily without any explanation in the record.

On January 24, 2017, appellees filed the third order to docket, which led to the instant appeal. Appellant received notice of the foreclosure action on March 7, 2017, and the final loss mitigation affidavit was filed a little over a month later on April 12, 2017.

On September 18, 2018, one day before the foreclosure sale, appellant filed an

Emergency Motion to Stay and/or Dismiss Foreclosure ("motion to dismiss").[2] In the motion to dismiss, appellant argued that appellees improperly "'reform[ed]'" the Deed of Trust by adding the name of the Trustee, failed to file an endorsed Note, and acted with "unclean hands." The trial court did not rule on the motion to dismiss prior to the foreclosure sale, which took place as scheduled on September 19, 2018. Appellees filed the report of sale on October 12, 2018, to which appellant did not file any exceptions.

On May 17, 2019, the parties appeared for a hearing before Judge Paul F. Harris, Jr. on the motion to dismiss. At the conclusion of the hearing, Judge Harris denied appellant's motion and ratified the sale. Appellant filed a Motion to Revise and Vacate Judgment and to Dismiss Action on May 21, 2019, less than ten days after Judge Harris's order. Judge Harris denied appellant's motion to revise on July 9, 2019.

Appellant filed this timely appeal. We shall supply additional facts as necessary below.

II. STANDARD OF REVIEW

We review the denial of a motion to stay a foreclosure sale and dismiss the action for abuse of discretion. *Mitchell v. Yacko*, 232 Md. App. 624, 640–41 (2017) (stating that the denial "lies generally within the sound discretion of the trial court"). Finally, we review the court's legal conclusions *de novo*. *Id.* at 641.

[2] We note that, although appellant's motion to dismiss was filed on September 18, 2018, the filing was deficient for failure to include a certificate of service. On September 28, 2018, the circuit court struck the motion to dismiss; however, appellant corrected the deficiency on October 11, 2018. For purposes of this opinion, we will treat the motion to dismiss as filed on September 18, 2018.

III. DISCUSSION

Appellant argues that he did not sign the Deed of Trust filed in this case because the Trustee was added to the document later, and that as a result the order to docket was fraudulent. He argues further that the Note was not properly endorsed and that appellees, in filing what he contends is a fraudulent action, acted with unclean hands.

Appellees respond that we need not address any of the issues raised by appellant in the instant appeal because the motion to dismiss was untimely and, under Maryland Rule 14-211, the trial court was required to deny the motion to dismiss. We agree with appellees.

Regarding an owner-occupied residential property, the borrower may file a motion to stay the sale of the property and dismiss the foreclosure action before a foreclosure sale takes place. *Blackstone v. Sharma*, 461 Md. 87, 110 (2018) (citing Md. Rule 14-211(a)). Rule 14-211 outlines the borrower's right to file such motion. Specifically, Rule 14-211(a)(2) describes *when* the borrower must file a motion to stay and dismiss:

> (2) Time for filing. (A) Owner-occupied residential property. In an action to foreclose a lien on owner-occupied residential property, **a motion by a borrower to stay the sale and dismiss the action shall be filed no later than 15 days after the last to occur of**:
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> (i) **the date the final loss mitigation affidavit is filed**;
>
> (ii) the date a motion to strike postfile mediation is granted; or
>
> (iii) if postfile mediation was requested and the request was not stricken, the first to occur of:
>
> (a) the date the postfile mediation was held;
>
> (b) the date the Office of Administrative Hearings files with the court a report stating that no postfile mediation was held; or

> (c) the expiration of 60 days after transmittal of the borrower's request for postfile mediation or, if the Office of Administrative Hearings extended the time to complete the postfile mediation, the expiration of the period of the extension.
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> ***
>
> (C) Non-compliance; extension of time. **For good cause, the court may extend the time for filing the motion or excuse non-compliance.**

(emphasis added).

Here, the final loss mitigation affidavit was filed on April 12, 2017. The record contains no indication that a motion for postfile mediation was requested or that such mediation was held. Therefore, appellant had fifteen days from the filing of the affidavit, or until April 27, 2017, to file his motion to stay and dismiss the foreclosure action. Appellant, however, filed his motion on September 18, 2018[3]—over one year and five months after the final loss mitigation affidavit was filed, well beyond the fifteen-day filing deadline.

Further, in the motion to dismiss, appellant provided no explanation for why he was late in filing the motion. Rule 14-211(a)(3)(F) states that, "if the motion was not filed within the time set forth in subsection (a)(2)[,]" it shall "*state with particularity the reasons why the motion was not filed timely*." (emphasis added). Not only did appellant fail to provide any explanation for the late filing of the motion to dismiss, he asserted incorrectly that the motion was on time: "Defendant *timely files this motion* as the filing of the subject

[3] *See* footnote 2, *supra*.

foreclosure action was done in violation of this Court's October 22, 2009, Order." (emphasis added). Appellant repeated this assertion in his accompanying memorandum: "[Appellant] must show that he occupies the property at issue . . . and that his motion was timely filed, *both of which he has*." (emphasis added).

At the hearing on the motion to dismiss, held on May 17, 2019, appellees argued that the motion was filed "well over a year and a half late," that no good cause had "attempted to be shown," and that "as such[,] the motion on its face should be denied by the Court under 14-211(b)(1)[.]" During appellant's response, the following colloquy took place between the circuit court and appellant's counsel:

> THE COURT: Well address the fact that the motion was not even timely filed.
>
> [APPELLANT'S COUNSEL]: **That is what it is**. When we—when I got involved or my paralegal got involved it was [] short days before the trial. There's nothing I can do about that.
>
> THE COURT: No, I understand.
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> [APPELLANT'S COUNSEL]: But—
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> THE COURT: **But I can't ignore that.**
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> [APPELLANT'S COUNSEL]: [W]ell Your Honor, this is a court of equity, and if there's fraud in the making, and we did file before the lawsuit—you know, before the sale, it was put in there, **but the problem is I agree there's a timing problem under 14-211.** But when counsel says there's no defense as was set forth there that is wrong, that is equitably wrong, and the problem is that Your Honor has the ability to say in these circumstances I'm not going to ratify a sale where the Plaintiffs want it ratified and [] they really pulled a fast run around this court [] between 2009 and 2012.

(emphasis added). As shown above, appellant's counsel admitted that there was a "timing problem" under Rule 14-211. Also, appellant's counsel did not proffer any reason for the

delay; instead, he stated that he wasn't involved in the case when the motion was due.

Under Rule 14-211, if a motion to stay and dismiss is not timely filed and does not show good cause for excusing such delay, the trial court is required to deny the motion. Rule 14-211(b)(1) provides:

> (b) Initial Determination by Court. (1) **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.

(emphasis added). Accordingly, the trial court correctly denied appellant's motion to dismiss. Indeed, the court lacked discretion to do otherwise.

Finally, appellant has waived any opportunity to challenge in this appeal the denial of the motion to dismiss for late filing under Rule 14-211. Not only did appellant fail to cite Rule 14-211 in his brief, he neglected to mention that there was a timeliness problem at all. We have "consistently held that a question not presented or argued in an appellant's brief is waived or abandoned and is, therefore, not properly preserved for review." *Health Servs. Cost Review Comm'n v. Lutheran Hosp. of Md.*, 298 Md. 651, 664 (1984); *see* Md.

Rule 8-504(a)(6) ("A brief shall . . . include . . . [a]rgument in support of the party's position on each issue.").

JUDGMENT OF THE CIRCUIT COURT FOR ANNE ARUNDEL COUNTY AFFIRMED. APPELLANT TO PAY COSTS.