UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 0959

September Term, 2013

DAWUD BEST

v.

JOHN DRISCOLL, III, ET AL.

Zarnoch,
Reed,
Kenney, James A., III
(Retired, Specially Assigned),

JJ.

Opinion by Kenney, J.

Filed: June 18, 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.

Appellant, Dawud Best, appeals the denial by the Circuit Court for Prince George's County of his Motion for Reconsideration of its order denying his motion to stay and dismiss a foreclosure proceeding and dismissing his counterclaim against the Substitute Trustees[1] ("trustees") and Capital One, N.A. ("Capital One") (collectively the appellees). He presents two questions[2] for our review, which we have rephrased as follows:

1. Did the circuit court err in denying the motion to stay and dismiss?

2. Did the circuit court err in dismissing the counterclaim?

For the reasons that follow, we shall affirm the judgments of the circuit court.

FACTUAL AND PROCEDURAL BACKGROUND

On October 31, 2007, Mr. Best executed a note ("the Note") to Chevy Chase Bank along with a purchase money deed of trust on residential property located at 5800 Carlyle Street, Cheverly, Maryland. The deed of trust provides as follows:

> The beneficiary of this Security Instrument is MERS (solely as nominee for Lender and Lender's successors and assigns) and the successors and assigns of MERS. This Security Instrument secures to Lender: (I) the repayment of the

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[1]Six substitute trustees were appointed by Capital One, of whom John Driscoll was the first named trustee.

[2]Mr. Best presented the questions as follows:

> 1. Whether an affidavit is suitable evidence to support a claim to have tendered payment.
> 2. Whether a defendant in a foreclosure action is required to file a counterclaim within 30 days of the Defendant's due date to respond to the foreclosure action.

> Loan, and all renewals, extensions and modifications of the Note; and (ii) the performance of Borrower's covenants and agreements under this Security Instrument and the Note.

On September 20, 2012, Capital One merged with and was successor to Chevy Chase Bank.

The Note provides that if the full amount of each monthly payment is not received by the date due, the borrower would be in default, and, if not received by 15 days past the date due, a 5% charge would be applied to each late payment.

Based on Mr. Best's default, the trustees, on October 23, 2012, initiated a foreclosure proceeding by filing an Order to Docket. Mr. Best filed a Notice of Lack of Service and an Application Request for Mediation on November 16, 2012. Mediation was held on January 10, 2013, and when no agreement was reached, a final loss mitigation affidavit was filed on January 16, 2013.[3]

On February 6, 2013, Mr. Best filed a counterclaim alleging violations of the Maryland Consumer Debt Collection Act (MCDCA), Maryland Consumer Protection Act (MCPA), and breach of contract.[4] The asserted facts underlying his counterclaim were that

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[3]The Final Loss Mitigation Affidavit stated that a loss mitigation analysis had not been conducted because "the secured party has been unable to contact the borrower." Programs available included: "Loan Modification, Short Sale, Deed in Lieu, Repayment/Forbearance plan, and Reinstatement."

[4]In the counterclaim, Mr. Best referred to the violation of the MCDCA as "Count One," the violation of the MCPA as "Count Three," and the third count (breach of contract) as "Count One." For clarity, we shall refer herein refer to the counts as "Count I (MCDCA),"
(continued...)

after "Capital One claimed to have acquired the servicing of the loan[,]" he had "requested documentation establishing that Capital One was either the 'holder' or current owner of the Note," along with a certified copy of the original Note and the opportunity to inspect it. The copy that Capital One sent him "was not certified and provided no indication that Capital One was in possession of the original Note." Therefore, "[b]ecause Capital One could not establish that it was a 'holder' of the Note[,] it was not entitled to enforce the Note," and, he "ceased sending mortgage payments[.]"

On June 28, 2010, Mr. Best received a letter claiming that the loan would go into foreclosure if Capital One did not receive $14,381.14 by July 28, 2010. Contending that he had withheld payments for only May and June, and each payment was $3,407.54, he claimed that he could not have owed $14,381.14. According to Mr. Best, he called Capital One to make a payment, but it would not accept any payment less than $14,381.14. He continued to send requests for a certified copy and to verify personally that Capital One was in possession of the Note. On January 14, 2013, Capital One responded that the original Note would be mailed to him when the account was paid in full.

On September 12, 2011, Mr. Best received a Notice of Intent to Foreclose from Capital One indicating that if he did not pay $63,853.93 within 45 days, the foreclosure

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"Count II (MCPA)," and "Count III (Breach of Contract)." All three counts are asserted against Capital One, only Count I is asserted against the trustees.

action would be filed. But, because he had "originally tendered the proper amount due to cure the default in July of 2010," he asserted that he "had no[] obligation to make payments after Capital One made it clear it would not accept the payment." In his view, Capital One was not the "holder," and, even if it was, the most he would have owed was $34,029.00.

Mr. Best also claimed that even if Capital One was the "holder," it did not have authority to appoint the substitute trustees because the deed of trust states that only the "Lender" is entitled to do that. He noted that in the Notice of Intent to Foreclose,[5] Capital One had indicated that the Federal National Mortgage Association was the "lender."

Mr. Best alleged that the trustees and Capital One violated the MCDCA, Maryland Code (1975, 2013 Repl. Vol.) §14-202(8) of the Commercial Law Article ("Comm."),[6] by threatening to foreclose immediately after July 28, 2010 "when [Capital One] knew Maryland foreclosure law did not give it a right to foreclose until forty-five days after the letter was sent on or after June 28, 2010." In addition, the trustees violated MCDCA §14-202(8) "by

[5]The Notice of Intent to Foreclose indicated the Federal National Mortgage Association as the "Secured Party" and Capital One as the "Loan Servicer." The Affidavit certifies ownership of the Note and identifies Federal National Mortgage Association as the "owner" of the Note and that "Capital One, NA" is the "holder." A Corporate Assignment of Deed of Trust indicates MERS is the nominee for Chevy Chase Bank, F.S.B., and assigned and transferred its "right, title, and interest" in the deed of trust to Capital One on September 20, 2012.

[6]Comm. §14-202(8) provides: "In collecting or attempting to collect an alleged debt a collector may not: (8) Claim, attempt, or threaten to enforce a right with knowledge that the right does not exist[.]"

attempting to foreclose with knowledge that they were not legally authorized to foreclose because they were not appointed substitute trustee[s] by the Lender or even the 'holder[.]'"

Mr. Best alleged that Capital One violated the MCPA, Comm.§§ 13-301(1)[7] and 13-303(5),[8] because of "deceptive and misleading" statements that "(1) overstated the amount required to cure the default and (2) understated the amount of time required to elapse before it could start the foreclosure process." In his view, "Capital One had no intention of foreclosing but was only threatening [him] in a deceptive ploy to extort payments from him" in violation of Comm. §§13-301(14)(iii)[9] and 14-202(8).

Because the deed of trust provides that the Lender must give him the "opportunity to cure a default prior to foreclosing," Mr. Best claimed, in the alternative, that Capital One breached their contract by not accepting his "tender to cure the alleged default" as of June 28, 2010.

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[7]Comm. §13-301(1) states: "Unfair or deceptive trade practices include any: (1) False, falsely disparaging, or misleading oral or written statement, visual description, or other representation of any kind which has the capacity, tendency, or effect of deceiving or misleading consumers;"

[8]Comm. §13-303(5) states: "A person may not engage in any unfair or deceptive trade practice, as defined in this subtitle or as further defined by the Division, in: (5) The collection of consumer debts[.]"

[9]Comm. §13-301(14)(iii) states: "Unfair or deceptive trade practices include any: (14) Violation of a provision of: (iii) Title 14, Subtitle 2 of this article, the Maryland Consumer Debt Collection Act[.]"

On February 14, 2013, following the unsuccessful mediation, the circuit court ordered that the foreclosure sale could be scheduled, but that Mr. Best could file a motion under Rule 14-211 to stay the sale and dismiss the action. Mr. Best filed a motion to stay and dismiss on February 21, 2013 and requested discovery. As he asserted in his counterclaim, he asserted that appellees lacked standing to foreclose because the trustees had been appointed by Capital One, and not the "Lender" that was identified in the deed of trust. Additionally, Capital One had "no interest" in the deed of trust because "Capital One [was] not in possession of the note" and, therefore, was not a holder. He noted that Capital One did not claim that it had lost the note, which was "the only exception to having possession of the note[.]"

He also contended that Capital One had "unclean hands" because it "was contractually obligated to accept [his] tender to pay the current amount due under the note on July 1, 2010[,]" and its "refusal to accept [his] tender to cure the debt is the cause of the purported uncured default." He argued that the clean hands doctrine "prohibits [Capital One] from receiving [a] remedy for a harm that it caused upon itself," and its refusal "to accept the proper amount to cure the default [he] was excused from making further payments." In his motion, he again requested production of the original note as part of the requested discovery.

The trustees filed an opposition to Mr. Best's Motion to Stay and Dismiss Foreclosure Sale on March 15, 2013, along with a motion to strike the counterclaim.[10] In regard to the

[10]The trustees did not explain why the motion to strike the counterclaim should have been granted.

motion to stay and dismiss the foreclosure sale, they argued that Mr. Best had "failed to state a legitimate defense to the validity of the lien or the lien instrument and right of the appellees to foreclose," and that the motion did not comply "with the provisions under Rule 14-211(a)(3) et seq. and failed to provide any of the mandatory motions 'contents[,]'"[11] such as "the required affidavits."

In response to Mr. Best's assertion that the trustees did not have standing to enforce the note, the trustees argued that under Comm. §3-301, "a person entitled to enforce a negotiable instrument may be either of three varieties: '(1) the **holder** of the instrument, (ii) a non-holder in possession of the instrument who has the rights of the holder . . . or (iii) a

[11]Rule 14-211(a)(3) provides:

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;
(C) be accompanied by any supporting documents or other material in the possession or control of the moving party and any request for the discovery of any specific supporting documents in the possession or control of the plaintiff or the secured party;
(D) state whether there are any collateral actions involving the property and, to the extent known, the nature of each action, the name of the court in which it is pending, and the caption and docket number of the case;
(E) state the date the moving party was served or, if not served, when and how the moving party first became aware of the action; and
(F) if the motion was not filed within the time set forth in subsection (a)(2) of this Rule, state with particularity the reasons why the motion was not filed timely.

person not in possession of the instrument who is entitled to enforce pursuant to §3-309 . . . .' (Emphasis added)." According to the trustees, the "term 'holder'" under Article 3 of the UCC means the "person in possession if the instrument is payable to 'bear [sic].'" Comm. §1-201(20). Because endorsement of the Note is "in blank," "the note [is] payable to 'bearer.'" Therefore, as the "holder," Capital One "is also the beneficiary under the Deed of Trust with authority to enforce same," which gives it authority to proceed, "including the appointment of the Substitute Trustees."

In response to Mr. Best's asserted attempt to pay Capital One, and its refusal to accept payment, the trustees argued that Mr. Best had "failed to establish any facts to support his contention[,]" and "without any evidence . . . the [doctrine of unclean hands] must [not] be applied[.]" As to Mr. Best's request for discovery, the trustees argued that "'Discovery' implied that a complaint . . . ha[d] been filed," but, complaints are not filed in in rem proceedings such as foreclosure proceedings, and therefore discovery is to be denied. Furthermore, the trustees argued, without explanation, that Mr. Best's request for discovery was not compliant with Maryland Rule 2-422[12] and that a true and accurate copy of the note

[12]Maryland Rule 2-422 provides:

(a) Scope. Any party may serve one or more requests to any other party (1) as to items that are in the possession, custody, or control of the party upon whom the request is served, to produce and permit the party making the request, or someone acting on the party's behalf, to inspect, copy, test, or sample

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designated documents or electronically stored information (including writings, drawings, graphs, charts, photographs, sound recordings, images, and other data or data compilations stored in any medium from which information can be obtained, translated, if necessary, by the respondent through detection devices into reasonably usable form) or to inspect and copy, test, or sample any designated tangible things which constitute or contain matters within the scope of Rule 2-402 (a); or (2) to permit entry upon designated land or other property in the possession or control of the party upon whom the request is served for the purpose of inspection, measuring, surveying, photographing, testing, or sampling the property or any designated object or operation on the property, within the scope of Rule 2-402 (a).

(b) Request. A request shall set forth the items to be inspected, either by individual item or by category; describe each item and category with reasonable particularity; and specify a reasonable time, place, and manner of making the inspection and performing the related acts. The request may specify the form in which electronically stored information is to be produced.

(c) Response. The party to whom a request is directed shall serve a written response within 30 days after service of the request or within 15 days after the date on which that party's initial pleading or motion is required, whichever is later. The response shall state, with respect to each item or category, that (1) inspection and related activities will be permitted as requested, (2) the request is refused, or (3) the request for production in a particular form is refused. The grounds for each refusal shall be fully stated. If the refusal relates to part of an item or category, the part shall be specified. If a refusal relates to the form in which electronically stored information is requested to be produced (or if no form was specified in the request) the responding party shall state the form in which it would produce the information.

(d) Production.

(1) A party who produces documents or electronically stored information for inspection shall (A) produce the documents or information as they are kept in the usual course of business or organize and label them to correspond with the categories in the request, and (B) produce electronically stored information in the form specified in the request or, if the request does not specify a form, in the form in which it is ordinarily maintained or in a form that is reasonably

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had been included in the order to docket, which was served on appellant.

Capital One, on March 28, 2013, filed its own Motion to Strike, or in the alternative, Dismiss Counterclaim. In its supporting memorandum, it argued that it had not been properly served with the counterclaim because no summons had been issued and "a copy of 'all pleadings, scheduling notices, court orders, and other papers previously filed in the action'" had not been served. Without waiving the service issue, Capital One alleged that a counterclaim was procedurally improper under Maryland's foreclosure regime, and that "all of Mr. Best's claims fail[ed] as a matter of law because they find no support in the foreclosure statutes, rules, or the loan documents." According to Capital One, Maryland Rule 14-211

> prescribes explicit requirements with respect to the manner in which a complaint to foreclose a lien on residential property can be challenged by the borrower. That challenge must be in the form described in the Rules- a motion to stay the sale and dismiss the foreclosure action. If a motion to stay the sale and dismiss the action is not compliant with Rule 14-211, the Court is required to dismiss the motion.

(Citations omitted). Pointing out that the mediation was held on January 10, 2013 and the final loss mitigation affidavit was filed by the trustees on January 16, 2013, Capital One argued that Mr. Best was required to file his motion to stay the sale and dismiss within 15

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usable.

(2) A party need not produce the same electronically stored information in more than one form.

days of that date, but instead he filed a counterclaim on February 6, 2013. His motion to stay and dismiss was not filed until February 21, 2013.

Capital One contended that Mr. Best's counterclaim should also be stricken as untimely under Maryland Rule 2-331(d), which states that "[i]f a party files a counterclaim . . . more than 30 days after the time of filing that party's answer, any other party may object to the late filing by a motion to strike filed within 15 days of service of the counterclaim." Because answers are not required in foreclosure proceedings, Capital One notes that Mr. Best filed a request for mediation on November 27, 2012 and more than two months passed before he filed his counterclaim. In addition, it argued that adding a new party to the proceeding, and inserting new claims is procedurally improper in a foreclosure action. Not only does the counterclaim seek damages in a foreclosure action, it will unnecessarily delay the foreclosure process.

Alternatively, Capital One argued that the counterclaim should be dismissed because "Mr. Best failed to set forth claims or defenses that on their face state a valid defense to the validity of the lien or the lien instrument or to the right of the secured party to foreclose in the pending action," and "to state a claim upon which relief may be granted." As the successor to Chevy Chase Bank, the original lender, Capital One had informed Mr. Best that it had the original Note and would mail it to him once the loan was paid in full. Furthermore, the Order to Docket included a certification that Capital One was the holder of the Note, and

therefore, mere "generalized claims about Capital One not having noteholder status are not actionable." In Capital One's view, Mr. Best's counterclaim "contains only legal conclusions and lacks any well pled factual basis to conclude [it] is not the noteholder," and "[a]bsent well pled allegations, there can be no basis for relief."

More specifically, Capital One argued that the MCDCA count should have been dismissed because MCDCA §14-202(8) applies to an attempt to enforce a right with knowledge that the right does not exist. Mr. Best, however, did not plead that Capital One had knowledge that the right did not exist, and admitted that he had stopped making payments. Additionally, the statement in the June 28, 2010[13] letter that the obligation owed would be accelerated if the default was not cured did not violate the MCDCA because "the law does not forbid such a statement."

As to the MCPA count, and Mr. Best's claims that Capital One violated the MCPA by overstating the amount required to cure the default and understating the amount of time before foreclosure proceedings would start, Capital One asserted that these claims are not actionable under Maryland law. According to Capital One, the Deed of Trust includes a late payment provision charging 5% of an overdue payment. Therefore, Mr. Best's argument that the reinstatement amount is based solely on monthly payments is wrong, and he cannot

[13] As previously mentioned, the letter to Mr. Best on June 28, 2010 indicated that the loan would go into foreclosure if Capital One did not receive $14,381.14 by July 28, 2010.

establish that Capital One made any misrepresentations. Nor did Mr. Best prove that he relied upon any misrepresentation made by Capital One or demonstrate injury caused by an alleged overstatement of the amount required to cure the default. Capital One also asserted that it did not make any misrepresentation with respect to the 45-day notice. And, as to Mr. Best's breach of contract count, Capital One argued that it gave Mr. Best the opportunity to cure the default, but he chose not to pay the amount owed.

In regard to Mr. Best's motion to stay and dismiss, Capital One asserted that Mr. Best did not comply with Maryland Rule 14-211. More specifically, that: (1) Mr. Best's motion was filed past the 15 day deadline from the time of the foreclosure mediation and the Final Loss Mitigation Affidavit; (2) Mr. Best supplied "a verification page by which he 'solemnly [swore] upon personal knowledge that the facts alleged . . . are true and correct" but it did not include a "traditional averment of oath under penalty of perjury" and was not in the form of an affidavit; and (3) the motion did not set forth any proper defenses to the validity of the lien or the plaintiff's rights to foreclose.

Mr. Best, on April 15, 2013, filed his opposition to Capital One's motion to strike or dismiss counterclaim asserting that the counterclaim stated a valid claim for relief.

An "evidentiary hearing" was held on May 3, 2013, which the court began with the consideration of the motion to stay and dismiss, at which Mr. Best testified. The original note was introduced into evidence along with a statement of account. When asked by the court,

the attorney for the trustees explained that the note had been in the vault of the Chevy Chase Bank, which had merged with Capital One. Capital One sent the note to the attorneys; the attorneys had kept it in their vault, and it had remained in their possession. Mr. Best would not acknowledge that the note produced was the original note or that the signature on the note was his. The court found that the note produced was the original and the signature signed in blue ink was Mr. Best's. The court concluded that the trustees and Capital One had standing and were entitled to foreclose.

After requesting Mr. Best to produce evidence supporting his testimony that he had attempted to cure the default or had been saving the monthly mortgage payment for the past three years, the court found that Mr. Best was "unable or unwilling to make any such production," and thus "[t]here was no basis to stay or dismiss the foreclosure action."[14] Having denied the motion to stay and dismiss, the court found that there was no need for discovery. The court ordered that the foreclosure sale could proceed.

With respect to Mr. Best's counterclaim, the court determined that it was not timely filed, explaining that the Order to Docket was filed on October 23, 2012, his request for mediation was filed on November 27, 2012, and mediation was held on January 16, 2013,

[14] When asked by the court if he had "any evidence for the last 3 years [that he had] been saving $3,000-plus per month for [his] mortgage[,]" Mr. Best replied "that that's not the issue at this moment." Mr. Best argued that "the issue" was whether Capital One and the trustees "have standing."

but the counterclaim was not filed until February 6, 2013. According to the court: "[t]he new[ly] filed counterclaim injected new parties, claims, and theories not previously raised and which may have materially affected how the Substitute Trustees/ lender proceeded with the matter at mediation or at any point in the interim." Therefore, Mr. Best had failed to carry his burden to show that the delay in filing the counterclaim did not prejudice the parties. The court filed its order on May 21, 2013.

Mr. Best filed a Motion for Reconsideration on May 31, 2013. He argued that his sworn testimony was evidence of his attempt to cure the default and that the counterclaim was timely filed because the final loss mitigation statement was filed on January 16, 2013, so he had until February 1, 2013[15] to file a motion to stay and dismiss and until March 1, 2013 to file his counterclaim.

The circuit court denied Mr. Best's motion for reconsideration on June 13, 2013, and this timely appeal followed.

DISCUSSION

We will discuss the Motion to Stay and Dismiss and the Counterclaim in the order they were addressed by the circuit court. Initially, we address the contentions of appellees

[15]In his Motion for Reconsideration, Mr. Best did not address the fact that his motion to stay and dismiss was not filed by February 1, 2013.

that this appeal should be dismissed because a final order of ratification has not been entered, and thus, no appealable final order has been entered by the circuit court.

An order denying a motion to stay and dismiss a foreclosure is an appealable order. "A stay is itself an injunction," *Washington Suburban Sanitary Com'n v. C.I. Mitchell & Best Co.*, 303 Md. 544, 580 (1985), and the refusal to grant an injunction is immediately appealable under Maryland Code (1974, 2013 Repl. Vol.) §12-303(3)(iii) of the Courts and Judicial Proceedings Article ("C.J.P.")."The grant or denial of injunctive relief in a property foreclosure action lies generally within the sound discretion of the trial court. Accordingly, we review the [trial] court's denial of a foreclosure injunction for an abuse of discretion. We review the trial court's legal conclusions de novo." *Svrcek v. Rosenberg*, 203 Md. App. 705, 720 (2012) (internal quotations and citations omitted).

Additionally, when a revisory motion is filed "within ten days of the Order granting the motion to dismiss, appellant is entitled to a review of both the motion to dismiss and the motion [for reconsideration]." *White v. Prince George's County*, 163 Md. App. 129, 140 (2005). We review the denial of a motion for reconsideration based on an "abuse of discretion" standard. *Wilson–X v. Dep't of Human Resources*, 403 Md. 667, 674–75 (2008). "There is an abuse of discretion where no reasonable person would take the view adopted by the [trial] court[] . . . or when the court acts without reference to any guiding rules or

principles." *In re Adoption/Guardianship No. 3598*, 347 Md. 295, 312 (1997) (internal quotations and citations omitted).

Motion to Stay and Dismiss

Making essentially the same arguments they made in the circuit court, appellees assert that the motion did not contain a "traditional averment of oath under the penalty of perjury and the verification is not in the form of an affidavit." Nor was the motion "accompanied by any supporting documents or other material," citing Md. Rule 14-211(a)(3)(c). And, "the motion did not set forth any proper defense or meritorious argument to the validity of the lien or the Appellees' right to foreclose." Moreover, at the hearing on May 3, 2013, Mr. Best refused to acknowledge the original promissory note that was presented at the hearing and did not produce evidence in support of his position that he had attempted to cure his default.

Under Maryland Rule 14-211, a "borrower may file a motion to stay the sale of the property and dismiss the foreclosure action. In other words, 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." *Svrcek*, 203 Md. App. at 720 (internal quotations and citations omitted). Maryland Rule 14–211 provides in pertinent 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.

(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:

(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.

(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;
(C) be accompanied by any supporting documents or other material in the possession or control of the moving party and any request for the

> discovery of any specific supporting documents in the possession or control of the plaintiff or the secured party;

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(B) Initial Determination by Court

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(2) Hearing on the Merits. If the court concludes from the record before it that the motion:

> (A) was timely filed or there is good cause for excusing non-compliance with subsection (a)(2) of this Rule,
> (B) substantially complies with the requirements of this Rule, and
> (C) states on its face a 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 court shall set the matter for a hearing on the merits of the alleged defense. The hearing shall be scheduled for a time prior to the date of sale, if practicable, otherwise within 60 days after the originally scheduled date of sale.

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(e) Final determination. After the hearing on the merits, if the court finds that the moving party has established that the lien or the lien instrument is invalid or that the plaintiff has no right to foreclose in the pending action, it shall grant the motion and, unless it finds good cause to the contrary, dismiss the foreclosure action. If the court finds otherwise, it shall deny the motion.

The hearing on May 3, 2013[16] was identified in a court memorandum to the parties as an "evidentiary hearing" on "all pending motions" and included a list of topics the parties were to address during the hearing, including required payments and "an accounting of the

[16] The motions hearing was originally scheduled for April 9, 2013; however, Mr. Best "did not respond to repeated phone calls" to confirm the date. On April 9, the court rescheduled the hearing for May 3, 2013.

amounts necessary to cure default."[17] At the hearing, the court accepted evidence, took testimony, and made findings of fact that: (1) "the Note produced [was] the original note signed by the parties[;]" (2) "the lender is the Holder of the Note and has standing to initiate the foreclosure[;]" and (3) that Mr. Best "was unable or unwilling to make any such production" of evidence to support his testimony "that he attempted to tender the amount to cure the default, or now could tender the amount to cure the default." Although the court did not express that the motion to stay and dismiss was timely filed or that any late filing was excused, or that it substantially complied with the requirements of the Rule, and stated "on its face a defense to the validity of the lien," the hearing took the form of a merits hearing under Rule 14-211(b)(2).[18] And, in line with Rule 14-211(e), after the hearing, the court made a "final determination" that Mr. Best had not established that the "lien instrument [was]

[17] The trustees presented an accounting showing that $139,063.39 was due to reinstate the loan as of May 3, 2013. That amount included 38 missed payments and late charges. It appears then that the first missed payment was April 1, 2010.

[18] Clearly, the motion on its face challenged the right of appellees to foreclose in the pending action. *See* Md. Rule 14-211(a)(3)(b). As to the issue of timeliness, we note that there was a circuit court order issued on February 14, 2013 to the effect that foreclosure could proceed subject to Mr. Best's right to file a motion to stay and dismiss the action under 14-211. Moreover, the same argument and assertion raised in the counterclaim were effectively the same as those in the motion to stay and dismiss. We will treat it as an implied finding along with a finding that, in the court's view, the motion was timely filed or any late filing was excused and that otherwise, the motion substantially complied with the requirements of the Rule.

invalid or that the plaintiff ha[d] no right to foreclose[,]" and thus denied the motion to stay and dismiss.

Mr. Best argues that the circuit court erred in finding that Mr. Best was "unable or unwilling" to produce evidence that he had attempted to cure the default, and that the motion to stay should be granted because his sworn testimony that he attempted to make a payment was evidence under Maryland Rule 5-603.[19] To be sure, Mr. Best's sworn testimony was evidence of the attempted payment. The court, as the trier of fact, had to weigh the evidence provided at the hearing and assess Mr. Best's credibility and, in doing so, was "entitled to accept—or reject—*all*, *part*, or *none* of the testimony of any witness, whether that testimony was or was not contradicted or corroborated by any other evidence." *Omayaka v. Omayaka*, 417 Md. 643, 659 (2011). In other words, Mr. Best's testimony that he attempted to pay and cure any default may have met his burden of production, but, without any supporting evidence or documentation, it did not meet his burden of persuasion. Weighed against the submission of the original note made payable to Chevy Chase Bank and the Certificate of Merger of Chevy Chase Bank into Capital One and the statement of accounting, the court

[19]Maryland Rule 5-603 states:

> Before testifying, a witness shall be required to declare that the witness will testify truthfully. The declaration shall be by oath or affirmation administered either in the form specified by Rule 1-303 or, in special circumstances, in some other form of oath or affirmation calculated to impress upon the witness the duty to tell the truth.

determined that appellees were entitled to enforce the note. In sum, Mr. Best did not "establish" a valid defense to the lien or lien instrument or that Capital One and the trustees had no right to foreclose. The court neither erred nor abused its discretion in denying the motion to stay and dismiss and the motion for reconsideration.

Counterclaim

The Court of Appeals has recognized that counterclaims are not necessarily prohibited in foreclosure proceedings. *See Fairfax Sav. v. Kris Jen Ltd.*, 338 Md. 1, 22 (1995). As Judge Rodowsky explained in *Kris Jen*:

> Although there is no theoretical obstacle to docketing a counterclaim by the mortgagor in a mortgage foreclosure proceeding, there are innumerable practical difficulties. Obviously, the judicial sale cannot be consolidated with trial of the counterclaim. If the counterclaim is filed before sale, the court may be required to exercise its discretion as to which aspect of the single action on the docket is to proceed first. An informed judicial discretion on the timing issue would consider the provisions of Md. Rule W76.b, "Injunction to Stay Foreclosure," which is based on the legislative policy formerly codified in Md. Code (1957), Art. 66, §§ 16 and 17.

Id. at 22, n. 9.

This case and the many pleadings and papers generated present some of those "innumerable practical difficulties" that arise when a counterclaim is filed in a foreclosure

proceeding especially *prior to sale*. *See id.*. The focus of *Kris Jen* was the ratification of a prior foreclosure sale on a subsequently filed action and its effect on the issues of claim and issue preclusion in light of the Restatement (Second) of Judgments §22 (1982). The issue was under what set of factors would a judgment for a party in the subsequently filed action nullify the ratification of the prior sale. Here, there has been no ratification of the sale to nullify.

After dealing with the motion to stay and dismiss, the circuit court concluded that the counterclaim had not been timely filed and that the late filing was prejudicial to the parties.[20] Because no "answer" is required to be filed in a foreclosure proceeding, the counterclaim's interface with the timing requirements of Rule 2-331 invites the question of from what event in the foreclosure proceeding should the 30 days to file the counterclaim begin to run.

The first procedural response to avoid a foreclosure sale is a Rule 14-211 motion to stay and dismiss. Here, it appears that the time for filing that motion was "no later than the date the final loss mitigation affidavit is filed." Md. Rule 14-211(2)(a)(i). But, as indicated, subsection (2)(c) of the Rule permits the court to excuse non-compliance with that part of the Rule.

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[20] The court's understanding of the operative filing date is not clear. It indicated that proceeding to mediation prior to filing the counterclaim was prejudicial. Rule 2-331(d) states: "Time for Filing. If a party files a counterclaim or cross-claim more than 30 days after the time for filing that party's answer, any other party may object to the late filing by a motion to strike filed within 15 days of service of the counterclaim or cross-claim."

In finding that the counterclaim was not timely filed, the court referred to the Order to Docket filed October 23, 2012, the request for mediation on November 27, 2012, and the mediation held on January 16, 2013. In its order, the court states that Mr. Best filed his counterclaim "four months after the Order to Docket was filed and a month after mediation was held. . . ." In the court's view, the counterclaim "injected new parties, claims, and theories. . ." that may have materially affected the parties' approach to mediation.

Mr. Best contends that his counterclaim of February 6, 2013 was timely because Rule 2-331(d) provides 30 days from an answer to file a counterclaim. And, because motions to stay and dismiss, rather than "answers," are filed in foreclosure actions, he had 30 days from the filing of the motion to stay and dismiss date to file his counterclaim. The final loss mitigation affidavit in this case was filed on January 16, 2013. Therefore, he had 15 days (January 31, 2013) to file a motion to stay and dismiss, and then thirty days (March 2, 2013) to file his counterclaim.

According to appellees, rather than filing a motion to stay and dismiss the foreclosure within 15 days of the final loss mitigation affidavit, Mr. Best's counterclaim on February 6, 2011 "impermissibly circumvent[ed] Rule 14-211." They further argue that because Mr. Best let more than two months pass after he requested mediation before filing his counterclaim, the circuit court did not abuse its discretion in finding that Mr. Best had failed to meet his burden that, "adding a new party to the foreclosure case and inserting new claims and

theories," the delay would not result in prejudice. By the time it was filed, the parties had gone to mediation and the court had issued an order allowing appellees to schedule the foreclosure. In other words, Mr. Best "attempted to thwart the efficient foreclosure regime . . . and unnecessarily delayed the foreclosure process[.]"

We recognize benefits in requiring counterclaims to be filed before the mediation in a residential foreclosure because a full understanding of the issues might contribute to a more global settlement among the parties and further judicial economy. But, if counterclaims are to be permitted in a foreclosure proceeding and we are to reconcile the timing requirement of Rule 2-331 with Rule 14-211, we are persuaded that the focus, consistent with *Kris Jen*, is better directed to the filing of the motion to stay and dismiss, which has some attributes of an answer in a traditional civil case. When we do that in this case, subject to excusal for a late filing under Rule 14-211(a)(2)(c), the following timeline appears:

> Final loss mitigation affidavit filed: January 16, 2013
> Motion to stay and dismiss due: January 31, 2013
> Counterclaim filed: February 6, 2013
> Motion to dismiss filed: February 21, 2013

Under Rule 2-331(d), a counterclaim is to be filed "30 days after the time for filing [the] answer" and, in this case, on or before January 31, 2013. Although, the motion to stay and dismiss was not filed until February 21, 2013, the counterclaim, on February 6, was filed well within 30 days after January 31, 2013. If we look to the final loss mitigation affidavit filing as the triggering event, we are not persuaded that the counterclaim was untimely.

On the other hand, we can affirm a dismissal on "'any ground adequately shown by the record, whether or not relied upon by the trial court.'" *Parks v. Alpharma*, 421 Md. 59, 65 n.4 (2011) (quoting *City of Frederick v. Pickett*, 392 Md. 411, 424 (2006)). "In other words, we can affirm when the trial court's decision was right for the wrong reasons." *Yaffe v. Scarlett Place Residential Condominium, Inc.*, 205 Md. App. 429, 440 (2012).

The factual basis underlying both the motion to stay and dismiss and the counterclaim are essentially the same. In summary, Mr. Best claimed: that the substitution of trustees by Capital One was invalid because Capital One was not entitled as either a lender or holder to enforce the Note and the lien instrument securing it; that the contract was breached and the "clean hands" doctrine was violated by Capital One's refusal to accept his tendered payment; and that as a result, he was not in default. The circuit court proceeded by first considering the motion to stay and dismiss. The factual findings of the court in considering the motion to stay and dismiss undermined the factual predicates for the counterclaim, which rose or fell on whether appellees, in their respective capacities, were entitled to foreclose.

Even though a court ordinarily accepts the alleged facts of a counterclaim as true for the purpose of a motion to dismiss a counterclaim, to do so would be illogical in the case of a counterclaim filed in a foreclosure proceeding in which the same alleged facts have been rejected after a Rule 14-211 merits hearing. To hold otherwise would provide Mr. Best with two hearings to determine the same facts with possibly two different fact finders. The

General Assembly has modified the foreclosure process and "tipp[ed] the playing field to protect debtors" by "slowing down the foreclosure process" and providing "opportunities for homeowners to avoid foreclosure[,]" including mediation. *Maddox v. Cohn*, 424 Md. 379, 387, 393 (2012). We are not persuaded that the modifications to process extend that far.

The factual predicate to Counts I and II of Mr. Best's counterclaim (violations of the MCDCA and MCPA) is that Capital One was not the holder of the note and, therefore, was not legally authorized to appoint substitute trustees and to enforce the note. In the hearing on the motion to stay and dismiss, the court found that Capital One was the holder of the Note and that the trustees were entitled to enforce the lien. Count III alleges that Capital One breached its contract by "refusing to accept [Mr. Best's] tender of the legal amount due as of June 28, 2010." The court, however, found that Mr. Best did not satisfy his burden of production and persuasion on the issue because he was "unwilling or unable" to provide documents supporting his claim.

The court's fact-finding from the hearing on the motion to stay and dismiss effectively settled the disputed claims as the right or interest of the appellees to enforce the lien. After a sale, Mr. Best could, of course, file post-sale exceptions challenging the sale procedure and also take exception to the auditor's statement of account. *See Greenbriar Condominium v. Brooks*, 387 Md. 683, 746 (2005) *rev'd on other grounds*; *see also Thomas v. Nadel*, 427 Md. 441, 453-54 (2012) (a general allegation of fraud may not be raised in post-sale exceptions).

JUDGMENTS AFFIRMED. COSTS TO BE PAID BY APPELLANT.