Circuit Court for Prince George's County
Case No. Case CAEF-17-37000

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1259

September Term, 2021

DANCING MARLBORO, LLC

v.

LAMMOND, et al.

Beachley,
Albright,
Sharer, J. Frederick,
(Senior Judge, Specially Assigned)

JJ.

Opinion by Albright, J.

Filed: October 3, 2022

Dancing Marlboro, LLC ("Dancing Marlboro"), appellant, returns to this Court in another attempt to rescind its foreclosure purchase of real property in Prince George's County from appellee, Council, Baradel, Kosmerl & Nolan, P.A. (the "Substitute Trustee").[1] After its foreclosure purchase was ratified by the Circuit Court for Prince George's County, Dancing Marlboro undertook due diligence and discovered that land use restrictions and governmental proceedings affected the property that it had purchased. It then began to seek rescission. Last year, we dismissed Dancing Marlboro's premature first appeal, which was noted after the circuit court issued an interlocutory order requiring Dancing Marlboro to close on its ratified purchase contract. *See Dancing Marlboro, LLC v. Council, Baradel, Kosmerl & Nolan, P.A.*, No. 1686, Sept. Term, 2019, 2021 WL 59595, at *6-7 (Md. App. Jan. 7, 2021) ("*Dancing Marlboro I*"). Dancing Marlboro continued to refuse to close, and the Substitute Trustee eventually received approval from the circuit court to resell the property to the foreclosing lender, a sale that occurred at a lower price. The circuit court ratified the resale, and it awarded damages to the Substitute Trustee to compensate for, among other things, the resale expenses and the reduced sale price.

[1] Brian T. Gallagher, an attorney with the law firm of Council, Baradel, Kosmerl & Nolan, P.A., was appointed as a substitute trustee under the relevant deed of trust and appeared in the circuit court on behalf of the law firm. We will adopt the parties' convention of referring to Council, Baradel, Kosmerl & Nolan, P.A. and Mr. Gallagher interchangeably as the "Substitute Trustee." Cibel Lammond and Thomas Lammond, also designated as appellees here, did not take part in this appeal.

Dancing Marlboro now appeals, renewing claims that it is entitled to rescind its original sale contract. In so doing, Dancing Marlboro presents four questions for our review, which we have consolidated and rephrased into three:[2]

1. Did the circuit court err in denying Dancing Marlboro's request to rescind its ratified foreclosure sale contract under PGC § 2-162.01 requiring notice of condemnation proceedings affecting real property in Prince George's County?

2. Did the circuit court err in denying rescission based on Dancing Marlboro's claim that the Substitute Trustee could not convey marketable title to the Property?

3. Did the circuit court err in awarding damages following re-sale of the Property?

[2] In its brief, Dancing Marlboro framed its questions as follows:

1. Did the trial court err in denying Foreclosure Purchaser's request to set aside the sale and instead ultimately entering judgment against Foreclosure Purchaser where the plain language of County Code Sec. 2-162.01 holds that it applies to "all contracts for the sale of real property in this County" and extrinsic evidence did not support the trial court's interpretations of the statute?

2. Did the trial court [err] by not vacating the original sale due to Foreclosure Purchaser's unrebutted evidence demonstrating the Substitute Trustee could not convey marketable title?

3. Did the trial court err by crediting the Substitute Trustee's change of its bid for the purpose of the resale damages hearing where the Substitute Trustee abused its duties and discretion by reporting a resale bid that was $150,000.00 lower than the price on the original auctioneer-signed Memorandum of Purchase and the Substitute Trustee concealed the original resale Memorandum of Purchase from everyone?

4. Did the trial court err by entering a substantial money judgment against Foreclosure Purchaser solely based on statements by counsel without supporting witness testimony and inadequate proof of damages where the Substitute Trustee's asserted consequential damages were not foreseeable nor directly caused by the Foreclosure Purchaser's conduct?

For the reasons below, we answer these questions in the negative and conclude that the circuit court did not err in awarding damages, despite Dancing Marlboro's requests for rescission. We hold that Dancing Marlboro waived its objections to the validity of its purchase contract and the amount of the resale price by failing to file foreclosure sale exceptions under Maryland Rule 14-305(e)(1). As such, we will affirm the judgment of the circuit court. We will deny the Substitute Trustee's separate motion for attorney's fees.

BACKGROUND

I. The Original Foreclosure Sale

In 2017, the Substitute Trustee initiated this foreclosure proceeding under a deed of trust with respect to real property in Upper Marlboro, Maryland.[3] Foreclosure proceedings moved forward, and the property was sold at a foreclosure action in July 2018. The Substitute Trustee presided over the auction.

At that auction, Dancing Marlboro won the bidding. It agreed to pay a $401,000 total purchase price for the property, posted a $65,500 deposit, and executed a sale contract. Under that contract, Dancing Marlboro agreed to close on the sale by paying the remaining balance due within ten days of ratification by the Circuit Court for Prince

[3] The address of the property is 5510 Old Crain Highway, Upper Marlboro, Maryland, 20772. The relevant deed of trust as to the property secured debt on an unpaid note in favor of AIM Manassas School Building, LLC.

George's County.[4] The contract also provided that, if Dancing Marlboro failed to pay the balance due, its deposit "may be" forfeited and the property resold at Dancing Marlboro's risk and expense.[5]

The contract further noted that the property was being sold in "as is condition" and "subject to all covenants, conditions, liens, restrictions, easements, rights-of-way as may affect same, if any, and with no warranty of any kind." To that end, it included a specific warning that, "PROSPECTIVE PURCHASERS ARE URGED TO PERFORM THEIR OWN DUE DILIGENCE WITH RESPECT TO THE PROPERTY PRIOR TO THE FORECLOSURE AUCTION." Dancing Marlboro signed the contract beneath that warning. After the sale, in August 2018, the Substitute Trustee filed a report of the sale with the circuit court.

Seven months passed. During that time, Dancing Marlboro did not seek to intervene as a party, file exceptions to the sale, or heed the sale contract's warning by asking its title company to review the property's title. Receiving no exceptions, the circuit court ratified the sale on February 8, 2019.

[4] Under Maryland's rules for judicial sales, the circuit court must ratify a sale if both of the following requirements are satisfied: "(1) the time for filing exceptions . . . has expired and exceptions . . . either were not filed or were filed but overruled, and (2) the court is satisfied that the sale was fairly and properly made." *See* Md. Rule 14-305(f).

[5] The contract employed language similar to that in the Maryland Rules, which provide, in the context of a judicial sale, that "[i]f the purchaser defaults, the court, on application and after notice to the purchaser, may order a resale at the risk and expense of the purchaser . . . ." Md. Rule 14-305(h).

As it turned out, however, significant land use restrictions affected the property, including certain plans by the Maryland-National Capital Park and Planning Commission. Among other things, portions of the property were proposed to be condemned or taken for use as public trails and transportation routes. The streams covering other portions of the property (and partially obstructing one of the few viable access points) were also protected. Indeed, it appears that even the road providing access to the property was subject to restrictions: Dancing Marlboro contended that the road qualified as a scenic and historic road, such that Dancing Marlboro's ability to widen it for development would likely have been limited.

II. Dancing Marlboro's Intervention and Attempt to Rescind the Sale

After its purchase was ratified, Dancing Marlboro asked its title company to perform a title review. It was only then that Dancing Marlboro discovered the legal proceedings and land use restrictions that might thwart its plans to develop the property. Dancing Marlboro balked. Instead of proceeding to closing, Dancing Marlboro asked for an extension to find a replacement buyer through an online auction sale. The Substitute Trustee agreed, but the online auction failed to identify any potential buyers.

In May 2019, approximately three months after its purchase was ratified, Dancing Marlboro moved to intervene in the foreclosure action and rescind its purchase. Dancing Marlboro asserted that the property's value was impaired by restrictions and governmental proceedings, and that the potential for such restrictions and proceedings should have been disclosed in the contract of sale itself. Citing section 2-162.01(a) of the Prince George's County Code, Dancing Marlboro argued that it had a right to rescind

based upon the Substitute Trustee's failure to include, in the sale contract, a mandatory certification that might have alerted Dancing Marlboro to the possibility of land use restrictions and governmental plans for the property. Dancing Marlboro also cited two prior deeds of trust that were once recorded with respect to the property, arguing that—even though the Substitute Trustee represented that a tax sale judgment foreclosed the rights of any such lienholders under those deeds—Dancing Marlboro had never received "copies of the tax sale foreclosure case to prove that the tax sale was conducted correctly."

After granting Dancing Marlboro's request to intervene,[6] the circuit court scheduled an evidentiary hearing. It then considered the parties' arguments and ordered Dancing Marlboro to close on the property within 30 days, or else the Substitute Trustee would be free to resell the property at a later foreclosure sale (with damages to be determined at a later hearing, including forfeiture of the $65,000.00 deposit).[7]

III. Resale of the Property to the Foreclosing Lender

Dancing Marlboro again failed to close on the property, and the Substitute Trustee held a resale auction in December 2019. A representative of Dancing Marlboro attended the auction, but did not bid. Because there were no other bidders, the foreclosing lender

[6] The Substitute Trustee consented to Dancing Marlboro's intervention, and also provided a copy of the order in the tax sale case showing that the prior lienholders' rights were foreclosed.

[7] As discussed previously, Dancing Marlboro noted an appeal from that order, an appeal we dismissed in *Dancing Marlboro I*.

ultimately bought the property for $250,000. A report of the resale was filed with the circuit court later that month, noting the purchase price. Dancing Marlboro again did not file any exceptions, and the circuit court ratified the resale in May 2021.

IV. The Damages Hearing Before the Circuit Court

After the resale, the Substitute Trustee moved for its damages, seeking the difference between the resale price and Dancing Marlboro's earlier sale price, as well as certain additional costs incurred in the resale.[8] A damages hearing was held in August 2021, and Dancing Marlboro again raised its arguments concerning the notice provision in Prince George's County Code, Section 2-162.01(a), and the unmarketability of the property's title.

Dancing Marlboro also attempted to dispute the resale price of $250,000 by pointing to handwritten notes on the contract of sale used during the resale auction. Specifically, in addition to the new purchase price,[9] the contract of sale also contained certain notations at the top of its first page. Relevant here, two numbers were written on the right-hand side of that page: "400,000" and "250,000[.]"[10] The latter appeared directly beneath the former. After the exceptions period for the resale had passed, Dancing Marlboro obtained a copy of the contract with those handwritten notations.

[8] In its motion for damages, the Substitute Trustee mistakenly listed the resale price as $225,000.00, rather than $250,000.00. This mistake was later corrected on the record in circuit court.

[9] The new price was also handwritten on the contract in the proper field.

[10] The other notations are the name "Brian" and a few illegible words that appear to include a time of "11:00[.]" There is no further context for the notations.

Arguing that the notations were evidence of an improper resale auction, Dancing Marlboro began to claim, among other things, that the foreclosing lender had initially entered an opening bid of $400,000 at the resale auction, and that the lender had then been allowed to lower its bid to $250,000 to improperly inflate the damage calculation (to Dancing Marlboro's detriment). That argument was based entirely on the two handwritten numbers in the contract of sale.

In response, however, the Substitute Trustee explained that he was present at the resale auction and that he saw the auctioneer write those numbers on the contract of sale. He stated that the foreclosing lender had entered only a single bid at $250,000, and that the handwritten notes simply memorialized instructions he had given to the auctioneer to open the bidding at $400,000, and to reduce the price if there were no bids until it reached $250,000.

After considering the parties' positions, the circuit court held that Dancing Marlboro had waived any arguments concerning the price of the resale or the conduct of the resale auction by failing to file exceptions. Dancing Marlboro made an oral motion to strike the prior report of sale "as being inaccurate, and lacking the information necessary for my client to have filed the exceptions that the Court is suggesting." The circuit court denied that motion.

In a written opinion following the damages hearing, the circuit court further explained that Dancing Marlboro's failure to file exceptions or otherwise raise its arguments before ratification constituted waiver, and that Dancing Marlboro could not object to a damages award by relying upon those arguments:

[Dancing Marlboro] raised several objections as to the validity of the original sale and to [the Substitute Trustee's] request for damages as to the re-sale of the Property. A foreclosure action under a power of sale "is intended to be a summary, in rem proceeding,' the "primary object of [which] is to determine the rights of all persons as to their interests in the subject property." *Daughtry v. Nadel*, 248 Md. App. 594, 601 (2020). In an action to foreclose a property, a party may file exceptions to the sale. Exceptions may be in writing, shall set forth the alleged irregularity with particularity, and shall be filed within thirty (30) days after the date of a notice issued by the clerk of the court or the filing of the report of sale if no notice is issued. Md. Rule 14-305. "Ordinarily, upon the court's ratification of a foreclosure sale objections to the propriety of the foreclosure will no longer be entertained." *Manigan v. Burson*, 160 Md. App. 114, 120 (2004). Any matter not specifically set forth in the exceptions is waived unless the court finds that justice requires otherwise. Md. Rule 14-305 . . . . "There is a presumption in favor of the validity of a judicial sale. After a foreclosure . . . a debtor may file exceptions challenging *only* procedural irregularities in the foreclosure sale." *Jones v. Rosenberg*, 178 Md. App. 54, 69 (2008).

> The equities cannot be maintained – and are not intended to be maintained – after the foreclosure sale by any method other than the filing of exceptions. . . Challenges, by means of filing exceptions to the foreclosure sale . . . prior to the Circuit Court's ratification of the sale generally assert procedural irregularities in the sale itself. These might include allegations such as the advertisement of the sale was insufficient or misdescribed the property, the creditor committed a fraud by preventing someone from bidding or by chilling the bidding, challenging the price as unconscionable, etc. *Bates v. Cohn*, 417 Md. 309, 321 (2010).

The effect of final ratification of sale is *res judicata* as to the validity of such sale, except in case of fraud or illegality. *Pulliam v. Dyck-O'Neal*, 234 Md. App. 134, 144 (2019); *c.f. Jones*, 178 Md. App. at 72 (2008).

In the instant case, the docket reflects after the sale to [Dancing Marlboro], the report of sale was filed on August 14, 2018, and after the re-sale, the report of sale was filed on December 18, 2019. On neither occasion, did [Dancing Marlboro] contest either sale by filing exceptions. Conversely, the Court ratified the sale to [Dancing Marlboro], along with the subsequent re-sale. The Court finds [that Dancing Marlboro's] inaction constitutes waiver of any alleged irregularity of the sale.

(Emphasis omitted). The circuit court then entered a damages award of $122,305.54 against Dancing Marlboro.[11] Later, the circuit court denied Dancing Marlboro's motion to amend that judgment, and Dancing Marlboro timely noted this appeal.

STANDARD OF REVIEW

In a foreclosure action, like in other actions, we review the circuit court's factual findings under a "clearly erroneous" standard, meaning that we do not substitute our judgment for that of the circuit court, and we give "due consideration" to the circuit court's "opportunity to observe the demeanor of the witnesses, to judge their credibility and to pass upon the weight to be given their testimony." *Jones v. Rosenberg*, 178 Md. App. 54, 68 (2008). We review the circuit court's legal conclusions *de novo*. *Burson v. Capps*, 440 Md. 328, 342 (2014). We review a circuit court's denial of a request to revise its final judgment for an abuse of discretion. *See Jones*, 178 Md. App. at 72.

[11] This award was calculated as follows:

Original Sale [to Dancing Marlboro]	$401,000.00
Re-Sale of the Property	(250,000.00)
	$151,000.00
Auctioneer fees	300.00
Additional advertising costs	345.00
Cost to amend title report	380.00
Bond	150.00
Interest	$ 35,472.54
	$187,305.54
Less: Foreclosure Purchaser deposit	(65,000.00)
Damages	$122,305.54

In assessing waiver, we apply a clearly erroneous standard when the question of waiver turns on a factual analysis, such as the intent of the party. *See Anderson v. Great Bay Solar I, LLC*, 243 Md. App. 557, 607 (2019). "[W]hen questions of waiver turn on law rather than fact," however, we review the circuit court's conclusions of law *de novo*. *Cain v. Midland Funding, LLC*, 452 Md. 141, 150-51 (2017).

THE PARTIES' CONTENTIONS

Dancing Marlboro first challenges the circuit court's damages award by arguing that the circuit court erred for two reasons in denying Dancing Marlboro's request to rescind its ratified foreclosure sale. *First*, Dancing Marlboro argues that it had a right to rescind, even after ratification, under Section 2-162.01 of the Prince George's County Code ("PGC"). According to Dancing Marlboro, that provision requires a disclosure that would have alerted Dancing Marlboro that condemnation and taking plans and land use restrictions might affect the property, and provides for a right of rescission if such a disclosure is not provided. PGC § 2-162.01. Interpreting that right of rescission as absolute, Dancing Marlboro argues that the circuit court erroneously limited the terms of the PGC by refusing to allow Dancing Marlboro to rescind its purchase of the property after ratification.[12] *Second*, Dancing Marlboro contends that the circuit court should have credited its "unrefuted evidence" that the Substitute Trustee "could not deliver

[12] Additionally, citing Section 7-105.15 of the Real Property Article, Dancing Marlboro further argues that there is no preemption problem in applying the PGC to the ratified foreclosure sale here because local governments are permitted to require supplemental disclosures and notices in foreclosure transactions.

marketable title" and allowed Dancing Marlboro to rescind the ratified sale on that ground as well.

Separately, Dancing Marlboro also challenges the circuit court's award of damages after resale by disputing the amount and proof of those damages. In essence, Dancing Marlboro alleges that the foreclosing lender initially bid $400,000 at the resale auction, that the Substitute Trustee "actively concealed and misreported" that bid, and that the Substitute Trustee ultimately credited a lower bid of $250,000 by the foreclosing lender. Dancing Marlboro also argues that the Substitute Trustee failed to adequately prove damages by relying upon proffers by counsel at the circuit court's damages hearing, and that any harm from the lower resale price was entirely "self-inflicted" and not the result of Dancing Marlboro's failure to close.

In response, the Substitute Trustee counters that the circuit court was correct in finding that Dancing Marlboro was not entitled to rescission because it waived its objections and otherwise failed to establish any fraud, mistake, or irregularity that would warrant relief under Maryland Rule 2-535. The Substitute Trustee points out that Dancing Marlboro declined to file exceptions to both its original purchase of the property and to the resale, and that the circuit court ratified both transactions. It argues that Dancing Marlboro failed to sufficiently address the circuit court's finding of waiver on appeal.

As to the amount of its damages, the Substitute Trustee notes that it submitted documentary evidence to the circuit court supporting its damages figure, and thus argues that it met its burden of proof. It further points out that Dancing Marlboro did not object at the damages hearing to any of the Substitute Trustee's evidence or dispute the amount

of the Substitute Trustee's damages, except as to damages resulting from the decrease in price between the original foreclosure sale and the resale.

The Substitute Trustee also requests attorney's fees under Maryland Rule 1-341. It argues that there is no support in the record for Dancing Marlboro's allegations on appeal that the Substitute Trustee attempted to artificially inflate the damages calculation by allowing the foreclosing lender to reduce its bidding price, or by concealing a higher bid at the resale auction. The Substitute Trustee also alleges that Dancing Marlboro misrepresented the Substitute Trustee's statements made during the circuit court's damages hearing.[13]

DISCUSSION

The party taking exception to a foreclosure sale bears the burden of proving that the sale was invalid and that any cited irregularities caused actual prejudice. *Fagnani v. Fisher*, 190 Md. App. 463, 470 (2010) *aff'd*, 418 Md. 371 (2011). The circuit court's ratification of a foreclosure sale is "presumed to be valid[,]" and "there is a presumption that the sale was fairly made, and that the antecedent proceedings, if regular on the face

[13] In its reply brief, Dancing Marlboro offers only a few lines in response to the Substitute Trustee's fee request. It asserts, without further support, that the fee request is "frivolous" and that Dancing Marlboro made at least "colorable arguments" concerning whether the Substitute Trustee placed a $400,000 bid at the resale auction. It says this is evidenced by "the fact that this contested debate exists[.]" Separately, Dancing Marlboro paraphrases Shakespeare to assert that "the Substitute Trustee doth protest too much." (cleaned up). Dancing Marlboro does not otherwise respond to the Substitute Trustee's request for attorney's fees.

of the record, were adequate and proper . . . .” *Burson*, 440 Md. at 342-43 (quotations and citations omitted).

Indeed, when a circuit court ratifies a foreclosure sale, the ratification operates as a final judgment, adjudicating all rights concerning the subject property. *See Daughtry v. Nadel*, 248 Md. App. 594, 601 (2020). As such, in the usual case, ratification cuts off any further challenges concerning the sale, except in cases of “fraud, mistake, or irregularity”:

> [upon ratification], the purchaser acquires complete equitable title to the property and becomes the substantial owner of the property, retroactive to the date of the sale. *Simard v. White*, [383 Md. 257, 313 (2004)]. Among other things, the purchaser then becomes entitled to seek possession of the property. *See Empire Props., LLC v. Hardy*, 386 Md. 628, 650 (2005).
>
> The Court of Appeals has held that “[a]n order ratifying a sale is a judgment” within the meaning of the rule limiting a circuit court’s power to revise an enrolled judgment, “because it is an ‘order of court final in its nature.’” *Hughes v. Beltway Homes, Inc.*, 276 Md. 382, 384 (1975) . . . “Thus, after final ratification of [a] foreclosure sale, [a] trial court [is] authorized to review the validity of the sale only upon a finding of fraud, mistake or irregularity.” *Bank of New York Mellon v. Nagaraj*, 220 Md. App. 698, 708 (2014) (citing *Manigan v. Burson*, 160 Md. App. 114, 120 (2004)). “‘[T]he final ratification of the sale of property in foreclosure is *res judicata* as to the validity of such sale, . . . and hence its regularity [ordinarily] cannot be attacked in collateral proceedings.’” *Manigan v. Burson*, 160 Md. App. at 120 (quoting *Ed Jacobsen, Jr., Inc. v. Barrick*, 252 Md. at 511) (further quotation marks omitted); *see also Walker v. Ward*, 65 Md. App. 443, 447 (1985).

Huertas, 248 Md. App. 187, 203 (2020) (cleaned up).

The exception for fraud, mistake, or irregularity is the same as found in Maryland Rule 2-535, which provides for revisory power over judgments. *See Manigan v. Burson*, 160 Md. App. 144, 120 (2004); *see also* Md. Rule 2-535(b). Fraud in this context typically does not include “intrinsic” fraud, such as the use of forged documents, perjured

testimony, or other artifices that could have been exposed at the trial level, regardless whether they were actually exposed. *Facey v. Facey*, 249 Md. App. 584, 633-34 (2021); *Jones*, 178 Md. App. at 72-73.[14] Similarly, mistake generally refers to jurisdictional mistakes. *See Cain v. Midland Funding* LLC, 475 Md. 4, 22 (2021); *Facey*, 249 Md. App. at 605. And irregularity refers to an "irregularity of process or procedure" that departs from truth or accuracy, rather than a simple error; it does not include any irregularity that the defendant had sufficient notice to challenge. *Manigan* 160 Md. App. at 120-21 (2004).

I. Dancing Marlboro Waived Its Arguments That It Is Entitled To Rescind Its Foreclosure Purchase.

Under the Maryland Rules, any party who wishes to challenge a foreclosure sale may file timely exceptions with the court.[15] *See* Md. Rule 14-305 (requiring parties to file exceptions within 30 days of the filing of the foreclosure sale report). "Any matter not

[14] Instead, only "extrinsic" fraud will suffice. *See Facey*, 249 Md. App. at 632 (explaining that extrinsic fraud "perpetrates an abuse of judicial process by preventing an adversarial trial [or] impacting the jurisdiction of the court" by, for example, keeping a party ignorant of the action itself, preventing the dispute from being submitted to the fact finder, or fraudulently procuring jurisdiction).

[15] As the purchaser at a foreclosure auction, Dancing Marlboro was not initially a party to the foreclosure proceeding, but it was entitled to intervene as of right because it could claim an interest in property that was the subject of the foreclosure, and it was "so situated that the disposition of the action may as a practical matter impair or impede the ability to protect that interest . . . ." *See* Md. Rule 2-214(a). This interest arose when Dancing Marlboro executed the contract of sale. At that point, Dancing Marlboro had ample time to check the property's title, and to intervene in the foreclosure proceeding and file exceptions as necessary. Dancing Marlboro, however, exercised its right to intervene only after the exceptions period had passed and its purchase had been ratified.

specifically set forth in the exceptions is waived unless the court finds that justice requires otherwise." Md. Rule 14-305(e)(1). As such, once the exception period has passed and a sale is ratified, parties are typically prevented from further "prosecut[ing] or defend[ing] their rights with respect to the property." *Huertas*, 248 Md. App. at 206 (2020); *see also Fagnani v. Fisher*, 418 Md. 371, 384 (2011) (once a foreclosure sale is ratified, courts presume "that the sale was fairly made, and that the antecedent proceedings, if regular on the face of the record, were adequate and proper, and the burden is on the one attacking the sale to prove the contrary") (quotations and citations omitted).

A party who files exceptions to a judicial sale has the burden of showing that the sale was invalid and that any claimed errors caused prejudice. *See Fagnani v. Fisher*, 418 Md. 371, 384 (2011). Exceptions may challenge the sale price and any "procedural irregularities in the sale itself[,]" such as fraud committed during the sale. *See Bates v. Cohn*, 417 Md. 309, 320-21 (2010). The exceptions, however, must be in writing and "set forth the alleged irregularity with particularity . . . ." Md. Rule 14-305(e)(1). "Any matter not specifically set forth in the exceptions is waived unless the court finds that justice requires otherwise." Md. Rule 14-305(e)(1); *see also Moss v. Annapolis Sav. Inst.*, 177 Md. 135, 143 (1939) ("There must of necessity be some end of litigation. The state can do no more than give the litigant 'a day in court'; if he . . . suffers the decision to go against him by default, he is [] conclusively and finally bound by it . . .").

Because it failed to file exceptions, Dancing Marlboro has waived its arguments that its foreclosure purchase should be rescinded. Dancing Marlboro did not move to

intervene until about ten months after a report of sale was filed as to its purchase—well beyond the 30-day period provided for in Maryland Rule 14-305(e)(1)—and three months after its sale was ratified. Moreover, on appeal, Dancing Marlboro does not appear to challenge the circuit court's conclusion that it waived its arguments. After the Substitute Trustee pointed this out in its opposition brief, Dancing Marlboro filed a reply in which it again failed to address the circuit court's waiver holding.[16] As such, Dancing Marlboro cannot now avail itself of the arguments that it could have raised in filed exceptions:

First, Dancing Marlboro contends that it is entitled to rescission under section 2-162.01 of the Prince George's County Code. That section, which purports to apply to "[a]ll contracts for the sale of real property" in Prince George's County, provides for a right of rescission "at any time prior to settlement" if a contract to sell real property does not include a specific warning about the potential for condemnation or taking proceedings:

> (a) All contracts for the sale of real property located in this County shall contain the following terms of sale, or other wording identical in its effect:
>
> "Seller(s) certifies that Seller(s) has no knowledge of any published preliminary or adopted land use plan (or adopted Zoning Map Amendment) which may result in condemnation or taking any part of Seller's(s') property. Buyer(s) acknowledge(s) that Buyer(s) is aware that information relative to (1) government plans for land use, roads, highways, parks, transportation, etc., and (2) rezoning is available for inspection at the County Administration Building,

[16] There is only a single mention of waiver in Dancing Marlboro's reply. There, it contends that that the *Substitute Trustee* waived one of its arguments. Nowhere does Dancing Marlboro directly respond to the Substitute Trustee's contention, or the circuit court's finding, that it waived its own arguments by failing to file exceptions.

> Upper Marlboro, Maryland, at www.PGAtlas.com, and http://www.pgplanning.org/Planning_Home. Buyer(s) further acknowledges, and is strongly encouraged to take advantage of his/her opportunity to examine the above referenced information and any other information pertaining to the property that is relevant to Buyer prior to signing or entering into the contract of sale".
>
> . . . .
>
> (i) The failure of a contract to comply with the requirements of Subsection[] (a) . . . shall enable a party to the contract who is aggrieved by such failure to rescind the contract at any time prior to settlement. The right of rescission provided by this Subsection is not an exclusive remedy, and any other right or cause of action available to a party to the sales contract shall remain.

PGC § 2-162.01. Dancing Marlboro implies, though does not expressly argue, that its right to rescission under that provision was not waived—even after ratification—because the right to rescission can be exercised "at any time prior to settlement[,]" *id.*, and Dancing Marlboro refused to close on the transaction. This argument is unavailing. At its core, waiver is simply the "intentional relinquishment of a known right, or such conduct as warrants an inference of the relinquishment . . ." *Anderson*, 243 Md. App. at 607 (quotation and citation omitted). Even if we were to assume that section 2-162.01 of the PGC applies in full here,[17] that section only provides a limited right to rescind, which

[17] We are somewhat skeptical that it does. Section 2-162.01 of the PGC is part of Prince George's County's consumer protection laws, located in "Division 8. – Consumer Protection" of the county code. Within that division, "Consumer" is defined as a "natural person" who makes a purchase "for her personal, family household or agricultural purposes." PGC § 2-142(a)(4). Dancing Marlboro is not a natural person, and it appears that its purchase was for business purposes. Further, it is not clear that foreclosure purchases are among the types of consumer transactions intended to be included in the language of Section 2-162.01 of the PGC. Although consumer-homeowners can certainly purchase their homes through judicial sales, those types of transactions are more complex, can carry more risk, and involve greater oversight by the courts than available alternatives.

naturally expires at "settlement." PGC § 2-162.01(i). It does not say that this right cannot be waived, and Dancing Marlboro does not point to any authority to suggest that the right is un-waivable. By allowing the exceptions period to lapse, Dancing Marlboro waived, by operation of law, any right to rescind that it might have had under section 2-162.01 of the PGC. *See* Md. Rule 14-305(e)(1).

Second, Dancing Marlboro seeks rescission based upon alleged unmarketability of title to the property related to a prior tax foreclosure. Dancing Marlboro, however, declined to conduct due diligence on its purchase of property (by inspecting the title beforehand), even though it received and signed a warning in the sale contract advising it to do just that. It was not until after Dancing Marlboro missed the exceptions period *and*

Indeed, Section 2-162.01 of the PGC refers to "settlement"—a term that is often used when buying a home outside of a judicial sale, but not in the foreclosure context.

We need not, however, decide this question today. Dancing Marlboro has waived its argument that it is entitled to rescission under the PGC. And even if Section 2-162.01 did apply, a violation of that section would not render Dancing Marlboro's sale contract "illegal" such that it could not be enforced. Illegal contracts are those prohibited by law, either in their formation or their performance. *See, e.g.*, *DeReggi Const. v. Mate*, 130 Md. App. 648, 653-661 (2000) (collecting cases). Unlike in cases involving consumer-protection licensing, for instance, which *prohibit* unlicensed persons from providing certain services, *see id.* at 654-57 (referencing statutory language that "[n]o person may engage in or transact any home improvement business" without a license) (citation omitted), here the PGC does not evidence an intent to prohibit real property sale contracts that do not include the required disclosures. If a disclosure is absent, the PGC simply provides a right of rescission—a right that naturally expires at settlement, and that need not be exercised at all. As such, though the PGC does evidence an intent to protect consumers for some time beyond the formation of a real estate contract, it also demonstrates an intent to wholly enforce real estate contracts when the right to rescission is not exercised or waived, regardless of the presence of the required disclosure. In sum, even if a disclosure were required here, Dancing Marlboro's contract would not be illegal in its absence.

the sale was ratified that it performed due diligence on its purchase and sought rescission. By remaining silent during the exceptions period, it has waived this argument as well.

II. Dancing Marlboro Waived Its Challenges To The Foreclosure Resale.

For similar reasons, Dancing Marlboro has likewise waived its arguments that the resale was improper. Dancing Marlboro makes much of handwritten notations on the contract used at the resale, which include the numbers "400,000" and "250,000" without additional explanation or context. In the circuit court, Dancing Marlboro contended that these notes demonstrated that the resale auction was effectively rigged, with the foreclosing lender being allowed to first enter a bid of $400,000, and then lower it to $250,000—inflating the damages calculation to Dancing Marlboro's detriment. At the damages hearing in the circuit court, however, counsel for the Substitute Trustee explained that he saw the auctioneer write those numbers, and that they merely represented instructions to open the bidding at $400,000, and to reduce it if there were no bidders until it reached $250,000, at which time the foreclosing lender would enter its bid. Notwithstanding that explanation, Dancing Marlboro continues to forward its argument on appeal, now alleging that the Substitute Trustee "concealed and misreported" the true bidding at the resale auction and engaged in "deceptive conduct" by tactically swapping bids.

That may be a lot to read into two numbers.[18] Nonetheless, we will not reach the merits of this contention because the circuit court was correct that the argument was waived. By the time the resale occurred, Dancing Marlboro had already intervened in the foreclosure proceeding in the circuit court. Even after receiving notice of the $250,000 resale price, Dancing Marlboro did not file any exceptions under Maryland Rule 14-305. The exception period then closed, and the resale was ratified by the circuit court. The circuit court later found that Dancing Marlboro had waived its arguments that the resale was improper. Moreover, Dancing Marlboro has failed to challenge that portion of the circuit court's holding (in either of its briefs) in this appeal.

We further note that such "deceptive conduct"—even if we were to assume that it had occurred—would not qualify as the kind of challenge based in fraud, mistake, or irregularity that could survive ratification. *See Huertas*, 248 Md. App. at 203. It would, at most, constitute an intrinsic fraud that could have been discovered in the foreclosure proceeding itself. Although true that Dancing Marlboro did not obtain the copy of the contract with the handwritten notes until after ratification of the resale, a representative of Dancing Marlboro attended the resale auction and observed proceedings. If a bid was swapped, Dancing Marlboro could have taken exception. It also could have simply filed

[18] This is particularly so because, about two months before the circuit court's damages hearing, the representative of Dancing Marlboro who attended the resale auction executed an affidavit, stating that "the only bid" at the resale auction "came from the foreclosing lender at $250,000.00 and this was the winning bid for the Property." We struggle to see how Dancing Marlboro's interpretation of these notes is consistent with the sworn statement of its representative, who provided an eyewitness account of the resale.

exceptions to the resale price of $250,000 generally, if it felt this price inadequate.[19] Yet once the exceptions period passed, Dancing Marlboro waived its ability to take exception. And once the resale was ratified, the transaction became presumptively fair and valid. *See Fagnani*, 418 Md. at 384. There does not appear to be any fraud, mistake, or irregularity here that would allow for revisiting the ratified resale.

III. Dancing Marlboro Failed To Preserve Its Remaining Challenge To The Circuit Court's Damages Award.

Having determined that Dancing Marlboro waived its challenges to the amount of the resale price and the propriety of the resale auction, we now turn to Dancing Marlboro's final argument: that the evidence was insufficient to support the circuit court's damages award. Specifically, Dancing Marlboro contends that damages related to the reduced resale price were based upon a "mere proffer[]" by counsel, rather than independent witness testimony, which it says cannot support that portion of the circuit court's damages award.[20]

When a foreclosure purchaser defaults, the purchaser generally bears the risk of liability for the difference between its agreed sale price and the resale price. *See Burson v. Simard*, 424 Md. 318, 328 (2012); *Simard v. White*, 383 Md. at 320 (noting that a defaulting purchaser is responsible for "shortages" between the price that the purchaser

[19] Dancing Marlboro's potential exposure to damages for a shortfall in the resale price would have allowed it to file exceptions. *See Simard v. White*, 383 Md. 257, 320-22 (2004).

[20] Dancing Marlboro does not appear to dispute the remaining portion of the damages award, which includes various fees and costs related to the resale.

originally bid and the resale price). Typically, however, "[a] mere announcement by counsel as to the amount of damages the plaintiff seeks does not constitute proof of damages." *Zdravkovich v. Bell Atl.-Tricon Leasing Corp*., 323 Md. 200, 208 (1991).

That said, Dancing Marlboro has failed to preserve its evidentiary challenge. *See* Md. Rule 8-131(a) ("Ordinarily, the appellate court will not decide any other issue unless it plainly appears by the record to have been raised in or decided by the trial court . . . ."). When the Substitute Trustee moved for its damages, it attached supporting documents to its motion. At the damages hearing, Dancing Marlboro did not move to strike those documents, nor did it request that evidence be introduced or that the hearing be rescheduled to accommodate the introduction of evidence. It also did not attempt to dispute either its purchase price of $401,000 or the resale price of $250,000.[21] Indeed, Dancing Marlboro did not object to proceeding by proffer (or raise any other objection at

[21] Of course, Dancing Marlboro did claim that the $250,000 figure represented a second bid by the foreclosing lender, but as we have already concluded, the circuit court properly disregarded that argument as waived.

Separately, Dancing Marlboro also asserts on appeal (but not at the damages hearing), that the mistaken figure of $225,000, which was referenced in argument in the Substitute Trustee's motion, constitutes evidence against the $250,000 figure. We will not credit this argument. The Substitute Trustee corrected that mistake on the record at the damages hearing, and in any event the arguments of counsel are not evidence. Dancing Marlboro also did not dispute the correction when it was made, nor did it otherwise dispute that the foreclosing lender bid $250,000 for the property.

the hearing), and it proceeded by proffer itself. As such, we decline to reach Dancing Marlboro's argument.[22]

IV. The Substitute Trustee's Claim for Attorney's Fees Under Md. Rule 1-341

The Substitute Trustee requests attorney's fees under Maryland Rule 1-341 for Dancing Marlboro's conduct in briefing this appeal, which it contends is an example of "textbook bad faith." This conduct can be grouped into two categories. *First*, the Substitute Trustee alleges that Dancing Marlboro's opening brief contained an argument that has no support in the record: that the foreclosing lender was allowed to swap its bid at the resale auction to inflate the damages calculation in the circuit court, and that the Substitute Trustee concealed that deception from the circuit court. *Second*, the Substitute Trustee alleges that Dancing Marlboro's opening brief misrepresented statements that were made by the Substitute Trustee at the circuit court's damages hearing in August 2021.

[22] Even if Dancing Marlboro had presented a valid challenge to the sale and resale prices and objected to the use of proffers, we are not sure that there would be insufficient evidence here to support the circuit court's damages award. Although no evidence was introduced at the damages hearing itself, evidence existed elsewhere in the record, including Dancing Marlboro's contract of sale containing the $401,000 purchase price. Separately, among other things, Dancing Marlboro submitted an affidavit from its representatives stating that the winning bid at the resale auction was $250,000. And the filed reports of sale (which prompted no exceptions from any party) contained those figures as well. To be sure, not all of this material would constitute evidence in the context of a contested damages trial, but its presence here lends additional support to the circuit court's damages award on the Substitute Trustee's motion.

Under Maryland Rule 1-341, if a court finds that the conduct of a party in maintaining a proceeding was in "bad faith or without substantial justification," it may order that reasonable attorney's fees and other expenses be paid to the adverse party:

> (a) Remedial Authority of Court. In any civil action, if the court finds that the conduct of any party in maintaining . . . any proceeding was in bad faith or without substantial justification, the court, on motion by an adverse party, may require the offending party or the attorney advising the conduct or both of them to pay to the adverse party the costs of the proceeding and the reasonable expenses, including reasonable attorneys' fees, incurred by the adverse party in opposing it.

Md. Rule 1-341(a). An award of attorney's fees, however, is considered an extraordinary remedy and is not routinely granted. *See Christian v. Maternal-Fetal Med. Assocs. of Md., LLC*, 459 Md. 1, 19 (2018) ("Because the rule serves as a deterrent and is intended to compensate as opposed to punish, an award of attorney's fees is considered an extraordinary remedy, which should be exercised only in rare and exceptional cases.") (citations omitted).

Appellate courts, as well as trial courts, have the power to impose original sanctions under Rule 1-341. *Talley v. Talley*, 317 Md. 428, 436-37 (1989). To do so, however, the court must make two separate findings: that the conduct represented bad faith or was done without substantial justification, *and* that the conduct also warrants the assessment of attorney's fees. *Christian*, 459 Md. at 20-21. A litigation position lacks substantial justification when it is "not fairly debatable, colorable, or within the realm of legitimate advocacy." *See id*. at 22 (cleaned up). "[B]ad faith exists when a party litigates with the purpose of intentional harassment or unreasonable delay." *Barnes v. Rosenthal Toyota, Inc.*, 126 Md. App. 97, 105 (1999). In making our determination, we must view

the challenged conduct at the time when it occurred, rather than with hindsight. *See Christian*, 459 Md. at 22-23.

We now turn to the conduct at issue. During the August 2021 damages hearing, the Substitute Trustee denied any allegations of bid swapping or deceptive conduct, explaining instead that the foreclosing lender entered only a single bid for $250,000, and that the property was originally offered at $400,000:

> Your Honor, the defaulting purchaser spends a lot of time addressing the issue that they believe that they were wronged for the sale back to the lender for $250,000 after they failed to close at $401,000. Your Honor, what that document evidences is the fact that the property . . . was initially offered at the second sale, the opening price offered by the auctioneer was $400,000. If you look in the top right-hand corner of that document, you will see two numbers. So those are the instructions that I, as the trustee in that sale, provided to the auctioneer. Started at 400, offer it until – you know, reduce the price until 250. If there's not any takers, then it will go back to the lender at that price.
>
> So the argument that the defaulting purchaser was wronged by the fact that it was offered initially at 250, it is simply not an accurate assessment . . . of the facts. I was there. That document there contains the instructions that I provided to the auctioneer. I saw him write those numbers in the top right-hand corner of that document. And it was done in the interest of fairness, because I was concerned that we would find ourselves exactly where we were today. And that's why I instructed the auctioneer to offer the property, beginning at 400,000.

This explanation was consistent with a prior affidavit executed by a representative of Dancing Marlboro itself. As discussed earlier, this representative personally attended the resale auction and stated that the "only bid" came from the foreclosing lender at $250,000.

Nonetheless, in its opening brief on appeal, Dancing Marlboro continues to accuse the Substitute Trustee of deceptive conduct by, among other things, "conceal[ing] the

foreclosing lender's actual bid" of $400,000. It also appears to mischaracterize the Substitute Trustee's statements at the circuit court's damages hearing, writing in its opening brief that "[t]he Substitute Trustee made clear at the [damages] hearing that it initially bid $400,000 and then revised its bid down to $250,000 after the sale . . . for the benefit of the Substitute Trustee's lender[.]" It appears that these arguments are based on nothing more than the handwritten notations in the resale contract and the statements of the Substitute Trustee at the damages hearing.

Put differently, the arguments in Dancing Marlboro's opening brief seem divorced from the facts of this case, particularly considering that the affidavit of Dancing Marlboro's representative appears to contradict (at least in part) its position now. We are also concerned about Dancing Marlboro's characterization of the Substitute Trustee's statements at the damages hearing—the Substitute Trustee simply did not say what Dancing Marlboro now writes that it did. We agree with the Substitute Trustee that Dancing Marlboro's arguments in this appeal concerning the propriety of the resale auction are implausible (at best), and that Dancing Marlboro has misstated the record at least once before this Court.

At this time, however, we will decline to award attorney's fees. On the whole, Dancing Marlboro's brief raised a novel question about the application of the Prince George's County Code to a judicial sale that, although waived, was far from frivolous. To be sure, other elements of that same brief give us pause, and Dancing Marlboro's conclusory reply to the fee request leaves something to be desired. Nonetheless, we are not yet convinced that, in context, this is the type of extraordinary circumstance in which

a fee award on appeal is appropriate. We caution Dancing Marlboro and its counsel that misstating the record and disparaging, without significant support, the candor and business practices of the Substitute Trustee, could warrant future relief.

JUDGMENT OF THE CIRCUIT COURT FOR PRINCE GEORGE'S COUNTY AFFIRMED. MOTION FOR ATTORNEY'S FEES UNDER MARYLAND RULE 1-341 DENIED. COSTS TO BE PAID BY APPELLANT.