

Circuit Court for Calvert County
Case No. 04-C-12-001260

UNREPORTED
IN THE COURT OF SPECIAL APPEALS
OF MARYLAND

No. 1337

September Term, 2020

VERNON CHARLES DONNELLY

v.

RICHARD E. HAGERTY, ET AL.

Graeff,
Leahy,
Wright, Alexander, Jr.
(Senior Judge, Specially Assigned),
JJ.

Opinion by Leahy, J.

Filed: December 13, 2021

*This is an unreported opinion and therefore may not be cited either as precedent or as persuasive authority in any paper, brief, motion, or other document filed in this Court or any other Maryland court. Md. Rule 1-104.

On December 30, 2020, the Circuit Court for Calvert County, Maryland, denied the exceptions filed by DiGiovanni’s Dock of the Bay, Inc. (“DiGiovanni”) and Vernon Charles Donnelly to the completed foreclosure sale of an undeveloped commercial property in Solomons, Maryland, following more than eight years of litigation, including two appeals to this Court.¹ Only Mr. Donnelly appealed the circuit court’s decision.

Appellee Richard Hagerty (“Substitute Trustee”) is the Substitute Trustee under a deed of trust securing a first mortgage on the Property. Appellee LSCG 11, LLC (“LSCG”), is the holder of that deed of trust and the successor in interest to BB&T, the first mortgage lender.

Mr. Donnelly presents three questions,² which we have condensed and rephrased as one: Did the circuit court err by denying Mr. Donnelly’s post-sale exceptions? We answer that question in the negative and affirm the order of the circuit court.

¹ *Donnelly v. McNelis*, No. 2347, Sept. Term 2018 (filed Apr. 9, 2020); *Donnelly v. McNelis*, No. 2029, Sept. Term 2015 (filed Mar. 15, 2018).

² The questions as posed by Mr. Donnelly are:

“I. Did the trial court err when it failed to grant Appellant’s exceptions regarding the deficiencies in the Notice of Publication.

II. Did the trial court err when it failed to grant DiGiovanni’s exceptions regarding the deficiencies in the Notice of Publication.

III. Was [sic] the trial court’s findings on certain key material facts erroneous?”

FACTS AND PROCEEDINGS

On July 27, 2006, DiGiovanni sold a 15,000 square foot unimproved lot located at 14554 South Solomons Island Road (“the Property”), to Solomons Two, LLC, a Maryland limited liability company (“Solomons Two”)³ for \$950,000. The deed on the Property, executed on the same date and recorded in the Land Records of Calvert County on September 6, 2006, named both Solomons Two and Mr. Donnelly as grantees and, under an “Explanatory Statement,” set out “an undivided interest in the Property” between Solomons Two, at 90%, and Donnelly, in his individual capacity, at 10%. We draw additional background facts from our recent unreported decision filed by this Court in *Donnelly v. McNelis*, No. 2347, Sept. Term 2018 (filed Apr. 9, 2020):

In order to purchase the Property, Solomons [Two] took out a commercial loan with BB&T for \$696,000. BB&T and Solomons [Two] executed a Promissory Note (“the Note”) as part of the financing agreement and each member executed individual Guarantee Agreements. Solomons [Two] executed a Deed of Trust with BB&T, securing the Note with 90% interest.

Donnelly, No. 2347, at 3. That deed of trust (the “First Deed of Trust”) was recorded among the Land Records for Calvert County (“the Land Records”) on September 20, 2006. For some unknown reason, Mr. Donnelly was not a party to the First Deed of Trust, leaving his 10% interest in the Property unsecured under the instrument.

³ Mr. Donnelly was a member of Solomons Two along with Deborah Steffen, Catherine McNelis, and Christine Erickson-File. Mr. Donnelly held a one percent interest, Ms. Steffen held a 49% interest, and Ms. McNelis and Ms. Erickson-File jointly held the remaining 50% interest in the company.

On the same date that the First Deed of Trust was executed, Solomons Two and Mr. Donnelly jointly financed a portion of the purchase price for the Property with a Promissory Note secured by a deed of trust (the “Second Deed of Trust”) in favor of DiGiovanni for \$75,000. This instrument was recorded among the Land Records on September 20, 2006 and was expressly subordinated to the First Deed of Trust. Then,

[s]everal modifications were made to the [BB&T Promissory] Note, including one on January 5, 2010, which extended the maturity date and decreased the principal amount of the loan. It provided that the borrowers, without prior written consent of the bank, shall not “sell, lease, or otherwise dispose of any assets or properties except in the ordinary and usual course of business.”

Donnelly, No. 2347, at 3. On January 24, 2012, BB&T rerecorded the First Deed of Trust with an attached description of the Property.

In February 2012, BB&T required Mr. Donnelly to execute a “Deed of Trust and Security Agreement” including his 10% interest and, on April 9, 2012, it recorded the new deed of trust (“2012 Deed of Trust”). The 2012 Deed of Trust was recorded to “correct an error in the original Deed of Trust recorded on September 20, 2006, . . . , whereby the Grantor [Mr. Donnelly] failed to convey his undivided [10%] interest in the real property to secure the Note made by Borrower [Solomons Two] of which Grantor is a member.”

In August 2012, BB&T declared the note secured by the First Deed of Trust, as supplemented by the 2012 Deed of Trust, in default, and, on October 16, 2012, filed the underlying foreclosure action. Immediately thereafter, Mr. Donnelly filed a separate action for partition or, in the alternative, for sale in lieu of partition. *See V. Charles*

Donnelly v. Solomons Two, LLC, et al., Case No. 04-C-12-1434. The circuit court stayed the foreclosure case pending resolution of that matter.

Nearly eight years later, on January 17, 2020, the circuit court lifted the stay. In the interim, on November 30, 2012, BB&T sold and assigned the First Deed of Trust, as supplemented by the 2012 Deed of Trust, and the note secured by it, to LSCG. On March 9, 2015, LSCG appointed Mr. Richard Hagerty as the Substitute Trustee.

The Property was scheduled for auction on July 16, 2020 at the entrance to the Circuit Court for Calvert County. The advertisement of sale represented that the Substitute Trustee was selling the Property subject to the power of sale in the First Deed of Trust “as re-recorded . . . to add the legal description, and as supplemented by [the 2012 Deed of Trust.]” It did not reference the Second Deed of Trust (in favor of DiGiovanni for \$75,000).

Less than eighteen hours before the auction, according to the Substitute Trustee, Mr. Donnelly moved to dismiss the action or for a stay of the foreclosure sale. He argued 1) that the Substitute Trustee could not convey good title to the Property because DiGiovanni’s Second Deed of Trust was an intervening lien separating the First Deed of Trust and the 2012 Deed of Trust and 2) that the notice of sale created “the impression” that valuable pier rights were included in the sale, though those rights were undefined and the subject of litigation.

The Property was sold at auction on July 16, 2020 to Jason Kutcher, who was acting as LSCG’s agent, for \$400,000, the “highest and only amount bid at the

foreclosure auction.” Thereafter, Mr. Donnelly’s motion to dismiss and/or stay, which the Substitute Trustee had opposed, was denied as moot. Mr. Donnelly does not appeal from the denial of that motion.

On July 20, 2020, the Substitute Trustee filed a report of sale and affidavit of fairness of the sale and truth of report, supported by the certificate of publication, affidavit of notice by mail prior to sale, and affidavit of purchaser. Within thirty days of the notice of report of sale filed by the Clerk of the Court, DiGiovanni and Mr. Donnelly separately filed exceptions to the sale. DiGiovanni argued that the Second Deed of Trust was the priority lien with respect to Mr. Donnelly’s 10% interest in the Property and that BB&T’s “purported ‘supplementation’” of the First Deed of Trust did not alter the lien priorities. DiGiovanni maintained that the company was “entitled to share in the distribution of the foreclosure sale price and/or proceeds of the sale of the Property[.]” DiGiovanni attached to the exceptions copies of the deeds of trust, the report of sale, and the notice of the sale that was mailed to it by the Substitute Trustee.

In his exceptions, Mr. Donnelly incorporated the “information” in DiGiovanni’s exceptions. He argued, citing *Fagnani v. Fisher*, 418 Md. 371, 396 (2011), that the advertisement of sale “did not clearly identify what interests were being sold” because it did not identify DiGiovanni’s Second Deed of Trust and that because the Property was sold to LSCG’s agent, the fairness of the sale should be reviewed with “heightened scrutiny.”

The Substitute Trustee responded, arguing that the exceptions should be overruled. He maintained that the issue of lien priority was not a procedural irregularity in the sale and that neither DiGiovanni nor Mr. Donnelly had identified any such irregularities. The Substitute Trustee emphasized that the sale was advertised in compliance with the Maryland Rules, that notice was provided to Mr. Donnelly and DiGiovanni, and that Mr. Donnelly and at least six other persons attended the auction.

On October 26, 2020, the court held a non-evidentiary hearing on the exceptions. Mr. Donnelly argued that the sale was improper because the Circuit Court for Calvert County was closed at that time and “very few people . . . showed up[.]” He represented that most of the potential bidders were in “the LSCG camp,” though he acknowledged there were “a couple of, I guess, potential buyers.” He argued that many community members were confused by the notice of sale, believing that a residential property owned by Mr. Donnelly was being foreclosed upon. Further, though the sale was advertised to take place at the entrance to the courthouse, because of COVID testing occurring in a tent at that location, the actual auction occurred “down at the end of the front part of the [courthouse] property[.]” He argued that the advertisement of sale also was deficient because it did not advertise the valuable pier rights.⁴

⁴ This was contrary to Mr. Donnelly’s argument in his motion to dismiss and stay, which was that the pier rights should *not* have been included in the notice of sale because they were the subject of litigation. The notice of sale stated that the Property was being sold “[t]ogether with all pier rights identified and described in” a 1957 Plat and a related right of way agreement.

DiGiovanni argued, through counsel, that the Substitute Trustee could not provide clear title because of the intervening Second Deed of Trust and asked for a “decree or finding that DiGiovanni’s does have a priority and superior interest as to Donnelly’s 10 percent interest [in the Property].” DiGiovanni maintained that it was entitled to a share of the proceeds for the 10% interest and that the auditor should consider that when it made its final accounting. DiGiovanni did not take issue with the sale itself, however.

The Substitute Trustee argued that the sale was conducted fairly and consistent with the law; that five independent parties in addition to the purchaser were present at the auction; that the location of the auction “to the left of the entrance to the courthouse” was “of no consequence”; and that the advertisement of the sale was appropriate. With respect to the lien priority issue, the Substitute Trustee did not concede that the Second Deed of Trust took priority with respect to Mr. Donnelly’s 10% interest, but assuming the correctness of that position, maintained that there were two options: 1) the Property was sold subject to DiGiovanni’s Second Deed of Trust for the 10% interest, or 2) the Property was sold free and clear and it would be up to the auditor to sort out the priorities in distributing the proceeds of the sale. In any event, the dispute over lien priority did not invalidate the sale.

At the end of argument, the court framed the issues before it as follows: 1) whether the notice and advertisement of sale was appropriate, 2) “whether the COVID issues had any effect on [the sale],” and 3) whether the priority of liens was appropriately addressed in exceptions or whether the issue should be addressed after the auditor’s

report was issued. The parties all affirmed on the record that these were the only issues before the court. The court took the matter under advisement.

On December 30, 2020, the court issued a memorandum opinion and order overruling the exceptions. The court found that Mr. Donnelly and DiGiovanni “failed to identify any error or irregularities with particularity in the foreclosure sale and failed to show any prejudice to its rights.” The exceptions did not “present a proper basis for overturning . . . the foreclosure sale[.]” The lien priority issue was not an irregularity in the sale and was appropriate for resolution after the auditor’s report was filed.

The court concluded that Mr. Donnelly’s contention that the advertisement of sale was deficient because it did not reference DiGiovanni’s lien interest was without merit because the notice described the Property with sufficient particularity and consistent with the Maryland Rules. That the Property was sold to LSCG’s agent, standing alone, did not render it unfair and Mr. Donnelly had not provided any evidence of unfairness beyond vague and ambiguous allegations of irregularities.

On January 21, 2021, the court issued a separate order ratifying the sale and referring the matter to the auditor. This timely appeal followed.

STANDARD OF REVIEW

This Court reviews a circuit court’s denial of foreclosure sale exceptions under the “clearly erroneous” standard set out in Maryland Rule 8-131(c). *Fagnani v. Fisher*, 190 Md. App. 463, 470 (2010), *aff’d* 418 Md. 371 (2011). Thus, we “review the case on both the law and the evidence . . . [and] will not set aside the judgment of the trial court on the

evidence unless clearly erroneous, . . . giv[ing] due regard to the opportunity of the trial court to judge the credibility of the witnesses.” Md. Rule 8-131(c). When reviewing the circuit court’s factual findings, “we are mindful that the exceptant to a foreclosure sale bears the burden of proving that the sale was invalid.” *Fagnani*, 190 Md. App. at 470-71 (citing *J. Ashley Corp. v. Burson*, 131 Md. App. 576, 582 (2000)). We review the court’s legal conclusions *de novo*. *Id.*

DISCUSSION

In this Court, Mr. Donnelly abandons his arguments made before the circuit court that the sale was unfair or irregular on account of where it took place, the identity of the purchaser, or the number of persons present at the auction. Instead, he focuses upon the priorities of the liens and the contents of the advertisement of sale with respect to the liens, making numerous arguments he did not raise before the circuit court in his written exceptions or at the exceptions hearing.⁵ We shall address only those arguments raised in or decided by the circuit court. 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[.]”).

The Maryland Rules provide “two avenues by which a borrower may challenge a foreclosure sale.” *Hood v. Driscoll*, 227 Md. App. 689, 693 (2016). “One is a motion to

⁵ For example, he argues for the first time that the First Deed of Trust is defective because it did not include the property description as an exhibit or the tax identification number for the Property. He also references a 2012 title report solicited by BB&T which was not part of the record below and is not included in the extract.

dismiss the foreclosure action or stay or enjoin a threatened sale; the other is to file exceptions to a sale that already has occurred.” *Id.* at 693-94 (footnote omitted). “Before a foreclosure sale takes place,” a borrower “may file a motion to ‘stay the sale of the property and dismiss the foreclosure action.’” *Bates v. Cohn*, 417 Md. 309, 318 (2010) (quoting Md. Rule 14-211(a)(1)). The function of such a motion is “to raise a challenge to the foreclosure action itself[,]” i.e., a challenge “to whether there should be a sale at all.” *Hood*, 227 Md. App. at 694 (footnote omitted). On the other hand, post-sale exceptions have “a more narrow focus on the conduct of the sale, not whether the trustee had the right to have the property sold.” *Id.* at 695. Further, “[t]he party excepting to the sale bears the burden of showing that the sale was invalid, and must show that any claimed errors caused prejudice.” *Fagnani*, 418 Md. at 384 (citing *Ten Hills Co. v. Ten Hills Corp.*, 176 Md. 444, 449 (1939)).

Mr. Donnelly argues that the Substitute Trustee only had the power to sell Solomon Two’s 90 percent fractional interest in the Property held by LSCG under the First Deed of Trust. Relatedly, he argues that the Substitute Trustee’s advertisement of sale was deficient because it failed to “clarify what interests were being sold.” Mr. Donnelly recognizes that a fractional interest in property may be sold at foreclosure, *see Fagnani*, 418 Md. at 388 (holding that a trustee had the power to sell a 50 percent undivided interest in real property at foreclosure), but argues that the advertisement of sale must specify that a fractional interest is being sold.

As a threshold matter, Mr. Donnelly’s argument that the Substitute Trustee only could sell a 90 percent interest in the Property goes to the power of the trustee to sell the property and is not appropriately raised in post-sale exceptions.⁶ *Hood*, 227 Md. App. at 694. And, his argument that the advertisement of sale was deficient, though appropriately raised, lacks merit. The advertisement of sale described the Property and specified that it was being sold by virtue of the power and authority contained in the First Deed of Trust, as supplemented by the 2012 Deed of Trust. The Substitute Trustee published the advertisement in the Calvert Recorder for the requisite period and sent notice by mail to Mr. Donnelly, DiGiovanni and numerous other parties with interests in the Property. By doing so, the Substitute Trustee complied with Maryland Rule 14-210 governing notice prior to sale in foreclosure actions. *See, e.g., Fagnani*, 418 Md. at 392 (“The standard for evaluating the substance of the advertisement is whether a person of ordinary intelligence may understand the identity of the property to be sold interpreted in the light of practical common sense.”) (cleaned up).

Even if we agreed with Mr. Donnelly that the advertisement of sale was deficient for failing to identify DiGiovanni’s interest in the Property, which we do not, we would hold that Mr. Donnelly did not demonstrate how he was prejudiced by that deficiency. As DiGiovanni acknowledged at the exceptions hearing, the competing lien interests may

⁶ We emphasize that Mr. Donnelly granted BB&T and its successor in interest, LSCG, a security interest in his 10% undivided interest in the Property to secure repayment of the note executed by Solomons Two, as modified from time to time.

be resolved by the auditor. If the auditor determines that the Second Deed of Trust has priority over the 2012 Deed of Trust vis-à-vis Mr. Donnelly's 10% undivided interest in the Property, the impact upon Mr. Donnelly would be to decrease his personal liability to DiGiovanni and increase his liability in the same amount to LSCG for the deficiency. For all these reasons, we shall affirm the order ratifying the sale and referring the matter to the auditor.

**ORDER OF THE CIRCUIT
COURT FOR CALVERT
COUNTY AFFIRMED.
COSTS TO BE PAID BY THE
APPELLANT.**