Circuit Court for Montgomery County
Case No. 408212v

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1684

September Term, 2016

VICTOR NJUKI

v.

DIANE S. ROSENBERG, *et al.,*
Substitute Trustees

Leahy,
Reed,
Eyler, James R.,
(Senior Judge, Specially Assigned),

JJ.

Opinion by Eyler, James R., J.

Filed: February 23, 2018

In this appeal, Victor Njuki, appellant, challenges the judgment of the Circuit Court for Montgomery County ratifying the foreclosure sale of his Gaithersburg residence. Because neither the record nor the law supports Njuki's contentions, we shall affirm the judgment.

FACTS AND LEGAL PROCEEDINGS

Njuki defaulted on a loan secured by a deed of trust, under which Diane S. Rosenberg, Mark D. Meyer, Kenneth R. Savitz, Jennifer Rochino, and John A. Ansell, III, appellees, were appointed as Substitute Trustees. Over Njuki's objections, the property was sold at auction. From the judgment ratifying that sale, Njuki noted this timely appeal.

The record pertinent to this appeal is set forth in the following time line.

May 25, 2006	PROMISSORY NOTE and DEED OF TRUST Njuki executed a promissory note (the "Note") and deed of trust (the "Deed of Trust") in favor of original lender CitiMortgage, Inc., securing repayment of a loan in the principal amount of $322,700 (the "Loan"), secured by Njuki's interest in 8432 Mountain Laurel Lane, Gaithersburg, Maryland 20879 (the "Property"). The Deed of Trust was recorded among the Land Records of Montgomery County, Maryland at Liber 32581 Folio 533.
December 2, 2014	NONPAYMENT – DEFAULT BEGINS After failing to make a Loan payment, Njuki remained in default thereafter.
January 14, 2015	NOTICE OF INTENT TO FORECLOSE As owner of the Note, Federal National Mortgage Association ("Fannie Mae"), through its mortgage servicer, Nationstar Mortgage, LLC ("Nationstar"), the transferee and holder of the Note for purposes of enforcement and conducting the foreclosure sale, provided written notice to Njuki of its intent to foreclose under the Deed of Trust.
August 20, 2015	ORDER TO DOCKET FORECLOSURE ACTION

April 28, 2016	NJUKI'S MOTION TO VOID JUDGMENT AND SET ASIDE ALL ORDERS AND JUDGMENTS GRANTING A FORECLOSURE
May 25, 2016	FORECLOSURE MEDIATOR'S NOTICE THAT NO AGREEMENT WAS REACHED
June 21, 2016	ORDER AUTHORIZING SCHEDULING OF FORECLOSURE SALE
June 29, 2016	NJUKI'S MOTION TO STAY FORECLOSURE SALE
July 24, 2016	APPOINTMENT OF SUBSTITUTE TRUSTEES
July 26, 2016	ORDER DENYING MOTION TO STAY FORECLOSURE SALE
	NJUKI'S MOTION TO RECONSIDER ORDER DENYING FORECLOSURE STAY
	ORDER DENYING MOTION TO RECONSIDER ORDER DENYING FORECLOSURE STAY
June 29, 2016	NJUKI'S MOTION TO VACATE ORDER TO DOCKET, STAY SALE, DISMISS FORECLOSURE ACTION
July 26, 2016	ORDER DENYING MOTION TO VACATE ORDER TO DOCKET ETC.
	NJUKI'S MOTION TO RECONSIDER MOTION TO STAY FORECLOSURE
August 2, 2016	FORECLOSURE SALE The Property was sold to Fannie Mae at foreclosure auction, for $278,000.00.
August 9, 2016	REPORT OF SALE
August 29, 2016	NJUKI'S MOTION TO VACATE THE RATIFICATION
August 30, 2016	ORDER DENYING MOTION TO RECONSIDER MOTION TO STAY FORECLOSURE

October 12, 2016 ORDER DENYING MOTION TO VACATE THE RATIFICATION

October 13, 2016 ORDER FINALLY RATIFYING SALE

October 17, 2017 NJUKI'S MOTION TO VOID JUDGMENT

ORDER DENYING MOTION TO VOID JUDGMENT

NJUKI'S NOTICE OF APPEAL

DISCUSSION

In his *pro se* brief to this Court, Njuki challenges the judgment ratifying the foreclosure sale on the following grounds:

> The Substitute Trustees brought this foreclosure case on behalf of Federal Home National Bank Association (Fannie Mae) and Nationstar Mortgage. The Note having been securitized into stock makes it void and therefore the Deed of Trust is Null Void (chain of title is broken) because the Note carries the Mortgage.
>
> The Note dated May 25th, 2006 was endorsed in blank. Therefore no proper assignments were recorded. Appellant never executed a Loan Modification Agreement with Nationstar Mortgage as alleged Lender. As the Note was endorsed in blank, Nationstar Mortgage by virtue of the Loan Modification Agreement became the holder of the alleged Note. In appellants [sic] bankruptcy case, NO. 16-12542 filed in the U.S. Bankruptcy Court for the District of Maryland, Appellee's Attorney who was also listed as the Substitute Trustee, filed a Motion for Relief from Automatic Stay. Attached to that Motion was a copy of the Loan Modification Agreement.
>
> If the Note does not bear the necessary endorsement to the party attempting to foreclose, the Note is not payable to the transferee. In that situation the transferee is not the holder and must account for its possession of the instrument "by proving the transaction through which the transferee acquired it . . . . Moreover the transferee must show that they possess the rights of a "holder". If this evidence is not available the party may not foreclose. If the Appellee held the Note prior to May 25th, 2006, then there is no endorsement on the Note from the Appellee to Nationstar Mortgage to allow them to substitute their name as "lender". During the hearing on July the 25th, 2016 the court should have allowed for Appellant's request for proof

> of discovery, a physical contract agreement between Appellee. If Fannie Mae d/b/a/ Nationstar Mortgage servicer for the Appellee, had the right to enter into a Loan Modification Agreement, then the court should have required that they produce a power of attorney granting the right to enter into the Loan Modification Agreement as "Lender" rather than the Trustee. Based on Maryland Rule 14-211, Stay of Sale, Dismissal, if lien not valid or No Foreclosure.

The Substitute Trustees interpret Njuki's arguments as presenting the following three contentions:

> (1) Special indorsements are required in order to be a holder of a secured instrument entitled to foreclose; (2) securitization of a promissory note renders it void; and (3) assignments/transfers of promissory notes must be recorded in the land records.

Based on our review of the record, including all *pro se* pleadings filed by Njuki in an effort to prevent or vacate the foreclosure sale, we agree with the Substitute Trustees' interpretation of Njuki's contentions. Applying the standards governing judicial review of foreclosure sales, we explain why none of Njuki's challenges merits reversal of the judgment ratifying the foreclosure sale of this Property.

Standards Governing Challenges to Foreclosure Sale and Ratification

Maryland Rule 14-211 governs injunctive relief in pending foreclosure proceedings, authorizing stay or dismissal of a foreclosure action "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[.]" Md. Rule 14-211(e) (2018). Once a foreclosure sale has occurred, however, a party may oppose ratification only by filing exceptions in accordance with Maryland Rule 14-305. In pertinent part, that rule provides:

> (d) **Exceptions to Sale.** (1) *How Taken.* A party, and, in an action to foreclose a lien, the holder of a subordinate interest in the property subject to the lien, may file exceptions to the sale. Exceptions shall be in writing, shall set forth the alleged irregularity with particularity, and shall be filed within 30 days after the date of a notice issued pursuant to section (c) of this Rule or the filing of the report of sale if no notice is issued. Any matter not specifically set forth in the exceptions is waived unless the court finds that justice requires otherwise. . . .
>
> (e) **Ratification.** The court shall ratify the sale if . . . (2) the court is satisfied that the sale was fairly and properly made. If the court is not satisfied that the sale was fairly and properly made, it may enter any order that it deems appropriate.

As this Court has explained, appellate review of a judgment ratifying a foreclosure sale is limited.

> The ratification of a foreclosure sale is . . . presumed to be valid. It is settled law that, "there is a presumption 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 upon one attacking the sale to prove the contrary." The party excepting to the sale bears the burden of showing that the sale was invalid, and must show that any claimed errors caused prejudice. Additionally, "[i]n reviewing a court's ratification of a foreclosure sale, we will disturb the circuit court's findings of fact only when they are clearly erroneous." Further, "if a mortgagee or his assignee complies with the terms of the power of sale in the mortgage, and conducts the foreclosure sale properly, the court will not set aside the sale merely because it brings loss and hardship upon the mortgagor."

Fagnani v. Fisher, 418 Md. 371, 383-84 (2011). *See Hobby v. Burson*, 222 Md. App. 1, 13-14 (2015). "We review the court's legal determinations *de novo*." *Fagnani v. Fisher*, 190 Md. App. 463, 471 (2010), *aff'd*, 418 Md. 371 (2011).

Njuki's Challenges

Njuki challenges the authority of Nationstar to foreclose on his Property, on the grounds that the securitized Note[1] "does not bear the necessary endorsement to the party attempting to foreclose," and that the assignment of the Note to Nationstar was not recorded. As explained below, we conclude that the circuit court did not err in ratifying this foreclosure sale.

We begin by recognizing that

> [a] deed of trust securing a negotiable promissory note "cannot be transferred like a mortgage; rather, the corresponding note may be transferred, and carries with it the security provided by the deed of trust." Thus, once the note is transferred, "the right to enforce the deed of trust follow[s]."

[1] A securitized promissory note is one that has been aggregated with other notes for the purpose of creating an investment opportunity. As the Court of Appeals has explained,

> [s]ecuritization starts when a mortgage originator sells a mortgage and its note to a buyer, who is typically a subsidiary of an investment bank. The investment bank bundles together the multitude of mortgages it purchased into a "special purpose vehicle," usually in the form of a trust, and sells the income rights to other investors. A pooling and servicing agreement establishes two entities that maintain the trust: a trustee, who manages the loan assets, and a servicer, who communicates with and collects monthly payments from the mortgagors.
>
> A special purpose vehicle "is a business entity that is exclusively a repository for the loans; it does not have any employees, offices, or assets other than the loans it purchases."

Deutsche Bank Nat'l Tr. Co. v. Brock, 430 Md. 714, (2013) (quoting *Anderson v. Burson*, 424 Md. 232, 237 (2011)).

Deutsche Bank Nat'l Tr. Co. v. Brock, 430 Md. 714, 718 (2013) (quoting *Anderson v. Burson*, 424 Md. 232, 237 (2011)).

As Njuki concedes, the Note secured by his Property was transferred to Nationstar with a blank indorsement. "A blank indorsement is usually the signature of the indorser on the back of the instrument without other words."[2] Md. Code (1974, 2013 Repl. Vol.), § 3-205 of the Commercial Law Article ("Com. Law") (comment 2). Such an instrument may be enforced by "the holder of the instrument." Com. Law § 3-301. A holder is defined as the person "in possession of a negotiable instrument that is payable either to bearer or to an identified person that is the person in possession." Com. Law § 1-201(21)(i). A negotiable instrument is payable to the bearer when the instrument

> (1) [s]tates that it is payable to bearer or to the order of bearer or otherwise indicates that the person in possession of the promise or order is entitled to payment; (2) [d]oes not state a payee; or (3) [s]tates that it is payable to or to

[2] An indorsement "means a signature . . . made on an instrument for the purpose of . . . negotiating the instrument[.]" Com. Law § 3-20. Under Com. Law § 3-205, a blank indorsement is any indorsement that does not qualify as a special indorsement:

> (a) If an indorsement is made by the holder of an instrument, whether payable to an identified person or payable to bearer, and the indorsement identifies a person to whom it makes the instrument payable, it is a "special indorsement". When specially indorsed, an instrument becomes payable to the identified person and may be negotiated only by the indorsement of that person. . . .
>
> (b) If an indorsement is made by the holder of an instrument and it is not a special indorsement, it is a "blank indorsement". When indorsed in blank, an instrument becomes payable to bearer and may be negotiated by transfer of possession alone until specially indorsed.

> the order of cash or otherwise indicates that it is not payable to an identified person.

Com. Law § 3-109(a). Thus, "the person in possession of a note, either specially indorsed to that person *or indorsed in blank*, is a holder entitled generally to enforce that note." *Deutsche Bank Nat'l Tr.,* 430 Md. at 719-20 (emphasis added).

Applying these principles in *Deutsche Bank v. Brock*, 430 Md. 714, the Court of Appeals upheld the validity of a foreclosure by a servicing agent for a mortgage lender, based on a securitized and indorsed-in-blank promissory note. We find that decision and rationale dispositive of Njuki's challenges.

The *Deutsche Bank* Court held that the servicing agent was a holder who was entitled to enforce the note by foreclosing under the accompanying deed of trust. *Id*. at 728-30. Even though the servicing agent was not the owner of the instrument, it was the holder by virtue of its possession of the blank-indorsed note. *Id*. at 732-33. The securitization of the note did not extinguish the servicing agent's right to enforce it by foreclosing under the deed of trust. *Id*.

Here, Njuki concedes that the Note was indorsed in blank by the original lender, CitiMortgage, and acquired in that same state by Fannie Mae. When Njuki defaulted on his monthly payments, Fannie Mae transferred the Note to Nationstar for the express purpose of enforcing it by foreclosing under the Deed of Trust. This transfer was accomplished by delivering the Note and Deed of Trust into the possession of Nationstar.

Nothing in the commercial law article conditions the effectiveness of such a transfer on recording in the land records. To the contrary, "[t]he right to payment is transferred by

delivery of possession of the instrument" when, as in this case, such delivery is made "for the purpose of giving to the person receiving delivery the right to enforce the instrument[.]" Com. Law § 3-203 & comment 1. In turn, delivery "vests in the transferee any right of the transferor to enforce the instrument, including any right as a holder in due course[.]" Com. Law § 3-203. This is consistent with the longstanding principle that an unrecorded assignment of rights under a mortgage instrument (i.e., a promissory note secured by a deed of trust) is enforceable. *See, e.g., Hewell v. Coulbourn*, 54 Md. 59, 63 (1880) ("the assignment of the mortgage debt accompanied by the delivery of the chose in action and mortgage, constituted in equity, a transfer of the debt which required no registration to perfect it").

Following *Deutsche Bank*, we hold that neither the securitization of the Note, nor its blank indorsement, nor the failure to record its transfer defeated Nationstar's right as holder to enforce the Note by foreclosing under the Deed of Trust. *See id.* at 729-30. Accordingly, Nationstar, by virtue of its possession of the blank-indorsed Note transferred by Fannie Mae, is a holder with the concomitant rights to receive payment under the Note, to require the sale of Njuki's Property under the Deed of Trust, and to appoint the Substitute Trustees to conduct that foreclosure. Upon their appointment, the Substitute Trustees had authority to exercise the power of sale in the Deed of Trust, in accordance with Md. Rule 14-214(b)(2) ("An individual appointed as trustee in a deed of trust or as a substitute trustee shall conduct the sale of property subject to a deed of trust."). Because this foreclosure

was "authorized and fair," we shall affirm the judgment ratifying the sale. *See* Md. Rule 14-305(e).

JUDGMENT AFFIRMED. COSTS TO BE PAID BY APPELLANT.