

UNREPORTED
IN THE COURT OF SPECIAL APPEALS
OF MARYLAND

No. 1891

September Term, 2014

MITZI VIRGINIA HARDING

v.

M & T BANK, ET AL.

Krauser, C.J.,
Berger,
Reed,

JJ.

Opinion by Berger, J.

Filed: October 20, 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.

This appeal arises out of a foreclosure action initiated in the Circuit Court for Baltimore City by Substitute Trustees Laura H.G. O’Sullivan, Erin M. Brady, Diana C. Theologou, Laura L. Latta, Jonathan Elefant, Laura T. Curry, and Chasity Brown, (collectively, the “Substitute Trustees”), appellees, against mortgagor Mitzi Virginia Harding (“Harding”), appellant.

On appeal, Harding presents six questions for our review,¹ which we have rephrased

¹ The questions presented in Harding’s brief are:

1. Did the Circuit Court err in not recognizing . . . M&T Bank . . . intentionally or unintentionally obligated themselves to the conditions and consequences and of the entire law?
2. Did the Circuit Court err when it ordered Appellant’s “Request to Make Void and Declare the Sale of Property Address 4701 Sunbrook Avenue Baltimore Md 21206” Denied . . . ?
3. Did the Circuit Court err in not enforcing the statutes of CFPB Regulation X § 1024.41 . . . ?
4. Did a Circuit Court Judge sign the following order “Final Order Ratifying Sale” on 11/3/2-14 . . . as submitted by the Appellees specifically the Substitute Trustees, Laura H. G. O’Sullivan et al? Can the Appellant respectfully request COSA to make sure all the affidavits submitted by the Appellees . . . comply with all statutory and Rule requirements . . . ?
5. Can the Appellant respectfully request COSA to subpoena the three; the recording of the call between the Appellant and Nick Walker of M&T made on May 8, 2014, Nick Walker who made the commitment to submit the necessary information to stop the foreclosure sale by

(continued...)

and consolidated as follows:

1. Whether the circuit court erred in denying Harding’s exceptions to the foreclosure sale.
2. Whether the circuit court erred in ratifying the foreclosure sale.
3. Whether the Court of Special Appeals has jurisdiction to issue a subpoena.

For the reasons that follow, we answer all these questions in the negative.

Accordingly, we shall affirm the judgments of the Circuit Court for Baltimore City.

FACTS AND PROCEEDINGS

On July 9, 2004, Harding executed a note for the amount of \$173,600.00 to SunTrust Mortgage, Inc., in consideration for real property located at 4701 Sunbrook Avenue, Baltimore, Maryland 21206 (“the property”). The note was secured by a deed of trust executed by Harding. The original lender, SunTrust, subsequently indorsed the note to the Maryland Community Development Administration.

¹ (...continued)

the Substitute Trustees and Roz Delang of M&T Bank who stated she listened to the call between the Appellant and Nick Walker on May 8, 2014.

6. Did the Circuit Court err in not making M&T Bank accountable for violating their own procedures and the statutes of CFPB Regulation X 1024.41 Loss Mitigation Procedures according to the letter sent to the Appellant dated May 5, 2014 [?]

(emphases omitted).

Harding fell into default on July 2, 2012, still owing \$155,088.03 on the note. A loss mitigation package was delivered to Harding on October 1, 2012, but as of January 24, 2013, it had not been returned to the lender. The Substitute Trustees docketed this foreclosure action on February 1, 2013. The parties underwent two foreclosure mediation sessions on April 22, 2013, and June 11, 2013. No resolution was reached at either mediation session. Moreover, the Substitute Trustees aver that as of June 21, 2013, they had yet to receive a complete loss mitigation workout package from Harding.

Thereafter, a foreclosure sale was scheduled for October 2, 2013. The sale, however, was canceled because Harding filed for bankruptcy pursuant to Chapter 13 in the U.S. Bankruptcy Court. As a result, an automatic stay of the foreclosure proceedings ensued until March 7, 2014, when the stay was lifted once the Bankruptcy Court dismissed Harding's claim for relief under Chapter 13.

Harding received a confirmation letter dated May 5, 2014, notifying her that her loss mitigation workout package was received. The letter, however, does not articulate whether the workout package was complete. Incomplete portions of an e-mail correspondence between Harding and M & T Bank indicate, however, that Harding was still in the process of completing her loss mitigation package as late as May 12, 2014. On May 7, 2014, the Substitute Trustees sent Harding a notice of the impending foreclosure sale, setting forth the time and location of the foreclosure sale scheduled for May 23, 2014. The property was sold on May 23, 2014 for a purchase price of \$173,204.03. In June of 2014, the Substitute

Trustees filed a report of sale with the circuit court. At the time of the foreclosure sale, Harding owed \$169,559.07 on the note.

After the foreclosure sale occurred, Harding filed a motion styled as a “Request to make void and declare the sale of the property . . . illegal” with the circuit court. Harding argued that it was improper for the Substitute Trustees to hold a foreclosure sale while the parties were negotiating a modification of her loan agreement. The Substitute Trustees filed a response in opposition to Harding’s motion, arguing that Harding’s objections related to the lender’s right to foreclose, rather than challenges to the propriety of the sale. Accordingly, the Substitute Trustees averred that Harding’s arguments were improperly raised through post-sale exceptions. The circuit court agreed with the Substitute Trustees, and denied Harding’s motion pursuant to the Court of Appeals’ decision in *Bates v. Cohen*, 417 Md. 309 (2010).

Harding then filed this timely appeal. Additional facts will be discussed as necessitated by the issues presented.

DISCUSSION

I. Harding’s Exceptions to the Foreclosure Sale Were Properly Denied

At the onset, we do not reach the question of whether M & T Bank complied with the requirements imposed by 12 C.F.R. § 1024.41, or whether the Substitute Trustees or M & T Bank engaged in fraud. Indeed, for the reasons stated herein, Harding’s failure to timely raise these issues in a pre-sale motion precludes her from relief pursuant to the Court

of Appeals’ holding in *Bates, supra*, 417 Md. 309. Moreover, assuming, *arguendo*, that we were inclined to consider Harding’s issues on the merits, the untimeliness of this argument prohibits us from deciding that question with the benefit of a developed record.²

An owner of real property is “possessed of three means of challenging a foreclosure: obtaining a pre-sale injunction pursuant to Maryland Rule [14-211], filing post-sale exceptions to the ratification of the sale under Maryland Rule 14–305(d), and the filing of post-sale ratification exceptions to the auditor’s statement of account pursuant to Maryland Rule 2–543(g), (h).” *Wells Fargo Home Mortg., Inc. v. Neal*, 398 Md. 705, 726 (2007). The means by which a litigant may challenge a foreclosure become increasingly limited after a sale has occurred.

Pursuant to Md. Rule 14-211, a borrower must raise issues relating to a lender’s right to foreclose prior to the foreclosure sale through a motion to stay or dismiss rather than post-sale through the filing of exceptions. *Bates, supra*, 417 Md. at 329. Further, “[a]fter [a

² As the Court of Appeals observed in *Bates, supra*, if we were inclined to opine on the merits of Harding’s argument, the best we could do would be to remand the case to the trial court for additional fact-finding. *Bates, supra*, 417 Md. at 311, 328 n.14 (“On the legal question upon which the Circuit Court decided this case, the trial judge was not required to engage in much fact-finding Were we not to agree with the legal ground of the trial court’s ruling, a remand for further fact-finding would have been necessary.”). Furthermore, although Harding made her agreement with respect to Regulation X at the circuit court, this appeal is the first instance that Harding presents allegations of fraud. For the reasons stated herein, these arguments were untimely raised in post-sale exceptions to the foreclosure. Additionally, as the Substitute Trustees observe, Harding’s failure to raise her allegations of fraud with the circuit court renders her argument unpreserved. *See* Md. Rule 8-131 (“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 . . .”).

foreclosure] sale, the borrower is ordinarily limited to raising procedural irregularities in the conduct of the sale[.]” *Thomas v. Nadel*, 427 Md. 441, 442-43 (2012).

Procedural irregularities that may be raised through post-sale exceptions are generally limited to issues “such as the advertisement of 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.” *Greenbriar Condo. v. Brooks*, 387 Md. 683, 741 (2005), *superseded by rule*, Md. Rule 14-305, *as recognized in Thomas*, *supra*, 427, Md. at 445.

In the action *sub judice*, Harding avers that the Substitute Trustees had no right to initiate a foreclosure sale because the Substitute Trustees failed to comply with the loss mitigation procedures outlined in Regulation X, promulgated under the authority of the Real Estate Settlement Procedures Act (“RESPA”). 12 C.F.R. § 1024.41. Regulation X was promulgated so that “[i]f a borrower submits an application for a loss mitigation option, the servicer is generally required to acknowledge the receipt of the application in writing within five days and inform the borrower whether the application is complete and, if not, what information is needed to complete the application.” Mortgage Servicing Rules Under the Real Estate Settlement Procedures Act (Regulation X), 78 Fed. Reg. 10,696, 10,698 (Feb. 14, 2013).

We further observe, that the RESPA “does not annul, alter, or affect, or exempt any person . . . from complying with, the laws of any State with respect to settlement practices,

except to the extent that those laws are inconsistent with any provision of this chapter.” 12 U.S.C. § 2616. Indeed, Maryland lenders are obliged to comply with federal mortgage regulations, and the federal regulations preempt Maryland’s rules to the extent they are inconsistent with the federal rules. Where, as here, the federal regulations do not conflict with Maryland’s foreclosure procedure, both are applied simultaneously. Accordingly, Maryland courts will enforce federal mortgage regulations within our existing foreclosure procedural construct. Therefore, assuming, *arguendo*, that Harding may have had a claim to relief under Regulation X, Harding is nevertheless required to abide by the procedural requirements imposed by Md. Rule 14-305.

In the present action, not only do we derive our controlling rule of law from *Bates*, *supra*, but that case is also factually analogous to this case. *See generally Bates, supra*, 417 Md. 309. In *Bates, supra*, a borrower defaulted on a loan and the lender initiated foreclosure proceedings. *Id.* at 313. Subsequently, the borrower attempted to participate in a loan modification program that required her to “complete and submit [a] financial ‘package’ for [the lender]’s analysis.” *Id.* at 314. Notwithstanding Bates’ efforts to obtain a loan modification, the property was sold at a public auction. *Id.* at 315. Subsequently, through post-sale exceptions, Bates asserted “that [the lender] did not comply with the federal HUD/FHA pre-foreclosure loss mitigation requirements referred to in her deed of trust.” *Id.*

In *Bates, supra*, the Court of Appeals quoted notes accompanying revisions made to Rule 14-211 in 2010 by the Court’s Standing Committee on Rules of Practice and Procedure for the proposition that: “[t]he failure to grant *loss mitigation* . . . in an action to foreclose a lien on owner-occupied residential property may be a defense to *the right of the [lender] to foreclose in the pending action.*” *Id.* at 319 (alterations and emphases in original). Further, the Court observed that “Rule 14-305 is not an open portal through which any and all pre-sale objections may be filed as exceptions, without regard to the nature of the objection or when the operative basis underlying the objection arose and was known to the borrower.” *Id.* at 327. Accordingly, the Court held that:

given the limitations of Rule 14-305 . . . , a homeowner/borrower ordinarily must assert known and ripe defenses to the conduct of a foreclosure sale prior to the sale, rather than in post-sale exceptions. **A lender’s failure to comply with pre-sale loss mitigation requests is one such defense, which must be raised ordinarily pre-sale in an effort to prevent the sale from occurring.**

Bates, supra, 417 Md. at 328 (emphasis added).

Harding’s arguments--that M & T Bank failed to comply with Regulation X, and engaged in fraud with respect to her bankruptcy proceedings--relate not to the procedure of the sale, but to whether the lender had a right to foreclose on the property. Accordingly, the proper time to challenge M & T Bank’s alleged violation of Regulation X (or to make allegations of fraud relating to the right of the lender to foreclose), would have been prior to the foreclosure sale pursuant to Md. Rule 14-211. Indeed, post-sale exceptions to a

foreclosure sale filed under Md. Rule 14-305 are reserved for irregularities that undermine the integrity of the process through which the property was sold.

Harding argues that *Bates, supra*, is not controlling because that case dealt with a different regulation. We recognize that the federal regulations that are the subject of this appeal have been amended since *Bates, supra*, was decided in 2010. Changes to the federal regulations, however, do not absolve a borrower from compliance with the Maryland Rules with respect to the procedure of foreclosure proceedings. Accordingly, Harding's argument that *Bates, supra*, is not controlling is unavailing.

Here, Harding does not argue that the advertisement for the sale, or the description of the property, was inadequate. Nor does she argue that the bidding process was influenced inappropriately or by means of fraud.³ Critically, none of Harding's grievances relate the integrity of the sale, but rather they relate to the lender's right to foreclose. Indeed, Harding's arguments exemplify the type of questions that must be resolved prior to the foreclosure sale. We, therefore, hold that the circuit court did not err in denying Harding's motion to void the foreclosure sale after the sale had occurred.

We acknowledge that this rule may seem hyper-technical. Indeed, the drawback to this rule is that it may, under some circumstances, preclude a litigant from setting forth a

³ Harding cites us to her notice of appeal where she alleges that a fraudulent statement was made in the context of her bankruptcy proceedings. Exceptions under Md. Rule 14-305, however, are only available to remedy fraud that influenced the outcome of the foreclosure sale, not fraud that weighs on the lender's right to foreclose.

potentially meritorious argument because of procedural timing limitations.⁴ On the other hand, however, this rule also works to the significant benefit of borrowers such as Harding.

The Court of Appeals’ holding in *Bates, supra*, reflects the law’s interest in the finality of proceedings, and fairness to borrowers during the foreclosure process. The rule in *Bates, supra*, allows bidders at a foreclosure sale to bid with the confidence that the title they acquire from the sale will not later be subject to question. Harding’s position that she should be able to challenge a lender’s right to foreclose after a sale would require those who participate at foreclosure auctions to discount their bids to accommodate the risk of the ongoing litigation that would inevitably ensue. Indeed,

the spectre of foreclosure is as daunting as it is disheartening, if a borrower was able to raise any sort of exception after the foreclosure sale, there undoubtedly would be a chilling effect on interested prospective purchasers coming to sales. Prospective third-party purchasers would be unable—based on most practical notions of what constitutes due diligence—to gauge against such claims the risk of an intended investment. Being a bona fide purchaser for value then would not mean as much or even offer the traditional safe harbor underlying that status.

Bates, supra, 417 Md. at 329-30.

⁴ We do not mean to imply that Harding’s arguments are, in fact, meritorious. Indeed, the trial judge properly denied Harding’s motion without taking evidence or making a ruling with respect to Harding’s arguments. We emphasize that we cannot say, based upon the facts in the record, whether there is merit to Harding’s claims because the question was, appropriately, not considered by the trial court in the first instance. *See Bates, supra*, 417 Md. at 311, 328 n.14 (“Were we not to agree with the legal ground of the trial court’s ruling, a remand for further fact-finding would have been necessary.”).

In short, we are sympathetic to litigants who are foreclosed from making arguments because of procedural technicalities. Lest we forget, that but for this rule, the probability that the proceeds from the foreclosure sale would otherwise be sufficient to satisfy Harding’s outstanding obligation—thereby preventing a deficiency judgment from being rendered against her—is significantly decreased. Accordingly, we hold that the circuit court did not err in denying Harding’s motion “to make void and declare the sale of the property . . . illegal.”

II. The Circuit Court’s Ratification Was Otherwise Proper

Harding further asks us to confirm that the trial judge complied with the requirements of Md. Rule 14-305(e) when she ratified the foreclosure sale. Furthermore, Harding petitions us to subpoena certain phone calls made between her and M & T Bank officials. Harding’s requests, however, are not properly presented before this appellate court. Moreover, Harding has failed to present an argument that would overcome the presumption of validity we afford to the ratification of a foreclosure sale.

Maryland Rule 14-305(e) provides:

[t]he court shall ratify the sale if (1) the time for filing exceptions pursuant to section (d) of this Rule has expired and exceptions to the report either were not filed or were filed but overruled, and (2) the court is satisfied that the sale was fairly and properly made. . . .

Md. Rule 14-305(e). “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.” *Fagnani v. Fisher*, 418 Md. 371, 384 (2011) (quoting *Webster v. Archer*, 176 Md. 245, 253 (1939)).

A. Request for Confirmation

In her brief, Harding asks us to “make sure all the affidavits submitted by the Appellees . . . do not [sic] comply with all statutory and Rule requirements” and confirm that the circuit court judge signed the ratification order. “The appellate court[, however,] is not an advocate tasked with searching for each party’s winning argument. Rather, the appellate court is limited ordinarily to issues preserved by the parties.” *Granados v. Nadel*, 220 Md. App. 482, 499 (2014); *see also* Frank M. Coffin, *The Ways of a Judge: Reflections from the Federal Appellate Bench* 52 (1980) (“Deciding an appeal is not a matter of approaching the problem as if for the first time. It is determining whether another, earlier, carefully structured decision should be upheld.”). Indeed, on appeal, it is not within our province to decide, in the first instance, whether the requirements for a foreclosure are satisfied. Rather, we are tasked with determining whether a mistake was made at an earlier proceeding. It is for this reasons that we require an appellant to set forth, in their brief, “questions presented . . . indicating the legal propositions involved and the questions of fact at issue. . . .” Md. Rule 8-504.

In the case *sub judice*, Harding’s request for a generalized confirmation that there were no errors throughout the foreclose does not amount to a question regarding any particular legal issue. Indeed, Harding makes no specific allegations of err, but rather asks

that we ensure this foreclosure was “absolutely legal and just and all procedures were followed to the letter of the law.”⁵ Harding asks us to ensure that the judge’s signature on the ratification order is authentic, but she identifies no facts or law that would lead us to conclude otherwise. Likewise, Harding asks us ensure that the transfers of her note were properly documented, but she identifies no facts or law that would lead us to conclude otherwise. “[W]e are mindful that the exceptant to a foreclosure sale bears the burden of proving that the sale was invalid.” *Hobby v. Burson*, 222 Md. App. 1, 13 (2015). Harding’s request for confirmation belies the presumption of validity we afford to the ratification of a foreclosure sale, and undermines unambiguous legal precedence that affirmatively places the burden on her to present some fraud, mistake, or irregularity that inappropriately influenced the sale.

We are unwilling to assume the posture of an advocate and search the record for a reason to vacate the ratification on Harding’s behalf. Accordingly, we hold that Harding’s

⁵ The Substitute Trustees, perhaps reasonably, have framed these issues as relating to preservation, *see* Md. Rule 8-131, or the failure to plead an argument with sufficient particularity, *see Buckingham v. Fisher*, 223 Md. App. 82, 91 (2015) (“vague allegations fail to meet the standard of particularity.” (quoting *McCormick v. Medtronic, Inc.*, 219 Md. App. 485, 527 (2014))). For the reasons stated above, we agree that Harding’s allegations of fraud are: (1) untimely, and (2) not preserved. We, however, cannot analyze the issues of Harding’s request for a subpoena or confirmation under either of those doctrines in the absence of a question relating to an allegation of error that occurred during the proceedings at the circuit court. Indeed, these requests are neither pleadings governed by title 2 of the Maryland Rules, nor are they questions directed at the proceedings below. Rather, Harding asks us directly to make factual findings and issue a subpoena, as distinguished from reviewing an allegation of error arising from a previous proceeding.

request for confirmation fails to allege any error that would overcome the presumption of legitimacy afforded to a ratification order.

B. Request for Subpoena

Likewise, we deny Harding’s request to subpoena certain phone calls made between her and representatives of M & T Bank. Maryland Rule 2-510 sets forth the purposes for and procedures by which a subpoena may be issued at the trial court. A subpoena is issued by the clerk of the circuit court upon request only for the purposes of “giv[ing] testimony, [or] produc[ing] designated documents, electronically stored information, or tangible things at a court proceeding.” Md. Rule 2-510(a)(1)(A). Harding does not allege (1) that she had a right to a subpoena from the clerk of the Circuit Court for Baltimore City; (2) that she sought a subpoena from the clerk; (3) that she was inappropriately denied a subpoena; or (4) that the trial court rendered an erroneous adverse judgment with respect to a request for a subpoena. Rather, she asks for us, in the first instance, to subpoena phone calls made between her and representatives of M & T Bank. Accordingly, Harding’s request for a subpoena fails to comply with the requirements of Md. Rule 2-510.

Additionally, notwithstanding the procedural requirements of Md. Rule 2-510, we have no jurisdiction to issue a subpoena in the first instance. “[T]he appellate court has a purely appellate function; we have no power to consider [evidence] not considered by the trial court in reaching its decision when we review its decision.” *Douglas v. First Sec. Fed. Sav. Bank, Inc.*, 101 Md. App. 170, 177 (1994) (citing *Burke v. Burke*, 204 Md. 637 (1954))

(“This Court has no original jurisdiction, its function being purely appellate.”); *accord Stanley v. Safe-Deposit & Trust Co.*, 87 Md. 450, 459 (1898) (“We must deal with cases as they are brought before us by the record transmitted from the court below, and we have no power, while reviewing a particular order from which an appeal has been taken, to receive evidence . . .”). Indeed, our appellant function prohibits us from receiving evidence, and requires us to view the issues through the same lense though which the circuit court peered to reach its findings. Accordingly, we have no jurisdiction over the relief Harding seeks, and, therefore, we deny her request to subpoena new evidence.

III. Conclusion

For the reasons stated above, the circuit court did not err in denying Harding’s exceptions to the foreclosure sale presented in her “[r]equest to make void and declare the sale of the property . . . illegal.” We further deny Harding’s request to the extent her arguments can be read as a petition for us to receive new evidence and re-assess the propriety of this foreclosure in the first instance.

**JUDGMENT OF THE CIRCUIT COURT FOR
BALTIMORE CITY AFFIRMED. APPELLANT
TO PAY COSTS.**