UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 0604

September Term, 2015

BOBBY HAIGHT, ET AL.

v.

JEROME A. KUTA,
SUBSTITUTE TRUSTEE

Eyler, Deborah S.,
Berger,
Reed,

JJ.

Opinion by Reed, J.

Filed: April 26, 2016

This appeal emanates from the foreclosure of the deed of trust secured by the property located at 3791 Old Washington Road, Waldorf, Maryland 20602 (hereinafter the "Property"), which, at the time of the foreclosure, was owned by Bobby Haight and Lensome Group, LLC. The Property was sold at a foreclosure auction on January 27, 2015, by Jerome A. Kuta, the appellee, in his role as substitute trustee. On appeal, Bobby Haight, his business partner Paul Barnes, and Lensome Group, LLC (hereinafter collectively referred to as the "appellants") present three questions for our review, which we have reduced to one and rephrased:[1]

> 1. Did the circuit court err where it denied the appellant's Motion to Rescind the Trustee's Sale or, in the Alternative to Amend or Alter the Judgement?

For the following reasons, we answer this question in the negative and, therefore, affirm the judgment of the circuit court.

[1] The appellant presents the following questions in his brief:

> 1. Did the notice given by the mortgag[e] lender [in this] foreclosure process violate the Appellant's right to due process of law as guaranteed by the Fourteenth Amendment to the United States Constitution and Article [24 of the Maryland Declaration of Rights]?
>
> 2. Did the trial court err by not setting the sale aside . . . using its revisory power?
>
> 3. Did the circuit court err by denying appellant's motion without holding a hearing?

FACTUAL AND PROCEDURAL BACKGROUND

On December 12, 2002, Bobby Haight purchased the Property along with his wife, Eloise Haight, as tenants by the entirety. On September 5, 2013, Bobby Haight deeded the Property to himself and Lensome Group, LLC. It appears that sometime between those two dates, Eloise predeceased Bobby.

On May 16, 2011, Bobby Haight, Paul Barnes, and the Lensome Group, LLC executed a deed of trust in favor of KDG, LLC in exchange for a loan in the amount of thirty thousand dollars ($30,000.00). The deed, titled "Deed of Trust for Business Purposes Only," was secured by the Property and recorded in the land records of Charles County, Maryland on May 27, 2011. It provided, in part:

> **Borrower acknowledges that this loan is given under Commercial Law Article, Title 12, Subtitle 10, of the Annotated Code of Maryland.**
>
> **The Borrower represents and warrants that the indebtedness evidenced by this Note is being obtained for the purpose of carrying on a business or investment and all proceeds of such indebtedness will be used solely in connection with such business or investment. Borrower further represents and warrants that the indebtedness evidenced by this Note is not incurred for personal[,] family[,] or household purposes.**

(emphasis in original deed). On February 6, 2014, KDG appointed the appellee as substitute trustee in place of one Jackie O'Neal, the trustee originally named in the deed.

On June 1, 2014, and July 1, 2014, the appellants defaulted on the loan by failing to make an installment payment and failing to pay real property taxes due, respectively.[2] Based on these defaults, on October 23, 2014, the appellee filed the foreclosure case that is the subject of this appeal in the Circuit Court for Charles County. The October 23, 2014, filing included an affidavit signed by the appellee indicating that both a Notice of Intent to Foreclose and a Notice of Default and Right to Cure were sent to each appellant on August 29, 2014, in accordance with Md. Code (1974, 2010 Repl. Vol., 2012 Supp.), Real Prop. ("RP") § 7-105.1. On October 24, 2014, at the location of the Property, the appellee had Bobby Haight personally served by a process server with the documents filed in the foreclosure action. At the same time and location, the appellee's process server also attempted to perform service on Paul Barnes personally as well as on the Lensome Group, LLC, but these attempts were unsuccessful. The server attempted to serve Mr. Barnes and the Lensome Group for a second time on October 28, 2014, again at the Property. This time, no one answered the door. Therefore, the server posted the documents to the front door of the Property with tape. Two days later, the appellee mailed the foreclosure documents to Mr. Barnes and the Lensome Group in accordance with Md. Rule 14-209(b).

On December 2, 2014, the appellee mailed a Notice of Impending Foreclosure Sale to each appellant advising that the Property was scheduled to be sold on December 23, 2014, at 10:00 a.m. The sale was advertised in a Charles County newspaper for three

[2] The record indicates that the appellants had previously entered into default on February 1, 2013, and again in August of 2013. However, both of these defaults were subsequently cured.

consecutive weeks leading up to the scheduled date of sale. The sale took place as scheduled, resulting in a third party bidder purchasing the Property for forty-six thousand dollars ($46,000.00). However, this sale was withdrawn on January 5, 2015, because on December 23, 2014, at 9:48 a.m., twelve (12) minutes prior to the sale, Bobby Haight filed for bankruptcy in the United States Bankruptcy Court for the District of Maryland.

On December 30, 2014, the bankruptcy court issued an Order dismissing the case filed by Bobby Haight. That Order was followed by a Notice of Dismissal indicating that the automatic stay imposed by 11 U.S.C. § 362(a) was thereby terminated. Therefore, another foreclosure sale of the Property was scheduled for January 27, 2015. Notices of the upcoming sale were mailed to the appellants on January 7, 2015, and the sale was again advertised in a Charles County newspaper three consecutive weeks leading up to the sale. The second foreclosure sale was conducted as scheduled and resulted in a different third party bidder than the first purchasing the Property for the same price of forty-six thousand dollars ($46,000.00). On March 9, 2015, a Final Order of Ratification of Sale was entered by the Circuit Court for Charles County.

On March 17, 2015, the appellants filed a motion entitled "Defendant's Motion to Rescind the Trustee's Sale or, in the Alternative to Amend or Alter the Judgment" (hereinafter the "Motion"). The appellee filed an Opposition to the Motion on March 27, 2015. The Motion was ultimately denied by the circuit court by Order dated April 28, 2015. No hearing was held on the Motion prior to its being denied. On May 28, 2015, the appellants noted a timely appeal.

DISCUSSION

I. MOTION TO RESCIND THE FORECLOSURE SALE

A. Parties' Contentions

As we indicated *supra*, the appellants present three questions to this Court on appeal. We have reduced these questions to one because they each pose a different basis on which the circuit court allegedly erred in denying the Motion. The first of these is equivalent to the appellants' first argument, which is that their due process rights under the Fourteenth Amendment to the United States Constitution and Article 24 of the Maryland Declaration of Rights were violated by virtue of the appellee's failure to follow the procedures for notification required by Md. Rule 14-210. Specifically, the appellants argue that "[a] copy of the certified mail receipt and an affidavit showing personal service to only . . . Bobby Haight[] does not prove that . . . Paul Barnes ever received the Order to Docket." The appellants assert that the notice was mailed to Paul Barnes at an undeliverable address, which proves that he had no knowledge of the foreclosure sale. Furthermore, regardless of whether Mr. Barnes received the notice that was mailed to him, the appellants contend that "the affidavit of service by mailing . . . coupled with posting is not sufficient notice without personal service."

The second argument advanced by the appellants on appeal is that the circuit court should have used its revisory power under Md. Rule 2-535(a) to set aside the sale for "irregularity" where the appellee only advertised the sale in the newspaper for fourteen

(14) days prior to January 27, 2015, instead of the statutorily-required three (3) consecutive weeks.

Third, the appellants assert the sale should be set aside because the appellee "breached his fiduciary duty by not getting a higher price for the property." According to the appellants, the Property sold for "a shocking 20% of [its] fair market value of [two-hundred thirty thousand dollars ($230,000.00)]."

Finally, the appellants contend that the circuit court committed a reversible abuse of discretion by not holding a hearing before ruling on the Motion.

The appellee advances a number of opposing arguments. First, citing our holding in *Devan v. Bomar*, 225 Md. App. 258 (2015), the appellee asserts that the appellants waived the issues raised in the Motion when they did not previously bring them before the circuit court in a Md. Rule 14-211 motion to stay the sale and dismiss the action, or otherwise as exceptions to the sale under Md. Rule 14-305(d).

Next, in response to the appellants' due process argument, the appellee contends that the assertions contained in the Motion that Paul Barnes did not receive service and the other various notices by mail are unsupported in the record. As such, the appellee argues that under Md. Rule 2-311(d), "[i]t was incumbent on the appellants to file an affidavit [along with their Motion]," which they did not. Thus, according to the appellee, because "the affidavits of service and mailings filed in this matter and the certificates of publication are uncontroverted," the circuit court had no choice but to deny the Motion.

The appellee goes on to assert that the appellants' argument that Paul Barnes was entitled to personal service is misguided. Specifically, the appellee contends that because this case involves the foreclosure of a deed of trust with the power of sale, process did not issue pursuant to Md. Rule 14-207(a)(1).

The appellee further contends that despite the appellants' assertion to the contrary, no hearing was required on the Motion under the Maryland Rules. Here, the appellee points to Md. Rule 2-311(e), which states only that "[w]hen a motion is filed pursuant to Rule 2-532, 2-533, or 2-534, the court shall determine in each case whether a hearing will be held, *but it may not grant the motion without a hearing*." Md. Rule 2-311(e) (emphasis added). However, notwithstanding his argument that a hearing was not required, the appellee argues that the appellants failed to request a hearing properly under Md. Rule 2-311(f).

Finally, the appellee responds to the appellants' assertion that he breached his fiduciary duty by not procuring a higher sale price for the Property. The appellee contends that an issue like this is waived if not raised as an exception to the sale under Md. Rule 14-305(d). Nevertheless, the appellee argues that under Maryland case law, inadequate sale price is insufficient to set aside a sale unless it is coupled with at least some other indicia of unfairness that does not exist in the present case.

B. Standard of Review

We have outlined the standard of review that applies to a circuit court's decision to deny a motion such as the one central to this appeal as follows:

> We review the circuit court's decision to deny a request to revise its final judgment under the abuse of discretion

> standard. *See Mullaney v. Aude,* 126 Md. App. 639, 666, 730 A.2d 759 (1999). The effect of a final ratification of sale is *res judicata* as to the validity of such sale, except in the case of fraud or illegality. *See Bachrach v. Wash. United Co-op.,* 181 Md. 315, 320, 29 A.2d 822 (1943); *Manigan v. Burson,* 160 Md. App. 114, 120, 862 A.2d 1037 (2004) (citations omitted). The burden of proof in establishing fraud, mistake, or irregularity is clear and convincing evidence. *See Billingsley v. Lawson,* 43 Md. App. 713, 718, 406 A.2d 946 (1979).

Jones v. Rosenberg, 178 Md. App. 54, 72 (2008); *See also Prince George's Cty. v. Hartley*, 150 Md. App. 581, 586 (2003) ("An order granting a motion to alter or amend judgment is ordinarily reviewed under the abuse of discretion standard."). The Court of Appeals has explained that an abuse of discretion occurs

> where no reasonable person would share the view taken by the trial judge. *In re Adoption/Guardianship No. 3598,* 347 Md. 295, 312, 701 A.2d 110, 118 (1997). Recently, this Court observed:
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> > "[A] ruling reviewed under the abuse of discretion standard will not be reversed simply because the appellate court would not have made the same ruling. The decision under consideration has to be well removed from any center mark imagined by the reviewing court and beyond the fringe of what that court deems minimally acceptable."

Brown v. Daniel Realty Co., 409 Md. 565, 601 (2009).

C. Analysis

i. Notice

We shall first address the issue of whether the appellees were provided insufficient notice throughout the foreclosure proceedings on the Property. As we indicated above, the appellants allege that Mr. Barnes and the Lensome Group were not given proper notice

under Md. Rules 14-209 and 14-210, and that the newspaper advertisement of the sale was insufficient under Md. Rule 14-210(a). We disagree and shall explain.

Maryland Rules 14-209 and 14-210 govern service of process and notice in actions to foreclose on residential and non-residential property, respectively. The former provides, in relevant part:

> **(a) Service on Borrower and Record Owner by Personal Delivery.** When an action to foreclose a lien on residential property is filed, the plaintiff shall serve on the borrower and the record owner a copy of all papers filed to commence the action, accompanied (1) by the documents required by Code, Real Property Article, § 7-105.1 (h) and (2) if the action to foreclose is based on a certificate of vacancy or a certificate of property unfit for human habitation issued pursuant to Code, Real Property Article, § 7-105.11, by a copy of the certificate and a description of the procedure to challenge the certificate. Except as otherwise provided by section (b) of this Rule, service shall be by personal delivery of the papers or by leaving the papers with a resident of suitable age and discretion at the dwelling house or usual place of abode of each person served.
>
> **(b) Service on Borrower and Record Owner by Mailing and Posting.** If on at least two different days a good faith effort to serve a borrower or record owner pursuant to section (a) of this Rule was not successful, the plaintiff shall effect service by (1) mailing, by certified and first-class mail, a copy of all papers filed to commence the action, accompanied by the documents required by Code,Real Property Article, § 7-105.1 (h), to the last known address of each borrower and record owner and, if the person's last known address is not the address of the residential property, also to that person at the address of the property; and (2) posting a copy of the papers in a conspicuous place on the residential property. Service is complete when the property has been posted and the mailings have been made in accordance with this section.

(c) Notice to All Occupants by First-Class Mail. When an action to foreclose on residential property is filed, the plaintiff shall send by first-class mail addressed to "All Occupants" at the address of the property the notice required by Code, Real Property Article, § 7-105.9 (b).

* * *

(e) Affidavit of Service, Mailing, and Notice. (1) *Time for Filing.* An affidavit of service under section (a) or (b) of this Rule and mailing under section (c) of this Rule, and notice under section (d) of this Rule shall be filed promptly and in any event before the date of the sale.

(2) *Service by an Individual Other Than a Sheriff.* If service is made by an individual other than a sheriff, the affidavit shall include, in addition to other requirements contained in this section, the name, address, and telephone number of the affiant and a statement that the affiant is 18 years of age or older.

(3) *Contents of Affidavit of Service by Personal Delivery.* An affidavit of service by personal delivery shall set forth the name of the person served and the date and particular place of service. If service was effected on a person other than the borrower or record owner, the affidavit also shall include a description of the individual served (including the individual's name and address, if known) and the facts upon which the individual making service concluded that the individual served is of suitable age and discretion.

(4) *Contents of Affidavit of Service by Mailing and Posting.* An affidavit of service by mailing and posting shall (A) describe with particularity the good faith efforts to serve the borrower or record owner by personal delivery; (B) state the date on which the required papers were mailed by certified and first-class mail and the name and address of the addressee; and (C) include the date of the posting and a description of the location of the posting on the property. . . .

Md. Rule 14-209.

Maryland Rule 14-210 outlines the following procedures for pre-sale notice when the property in a foreclosure action is non-residential:

> **(a) By Publication.** Before selling property in an action to foreclose a lien, the individual authorized to make the sale shall publish notice of the time, place, and terms of the sale in a newspaper of general circulation in the county in which the action is pending. Notice of the sale of an interest in real property shall be published at least once a week for three successive weeks, the first publication to be not less than 15 days before the sale and the last publication to be not more than one week before the sale. Notice of the sale of personal property shall be published not less than five days nor more than 12 days before the sale.
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> **(b) By Certified and First-Class Mail.** Before selling the property subject to the lien, the individual authorized to make the sale shall also send notice of the time, place, and terms of sale (1) by certified mail and by first-class mail to (A) the borrower, (B) the record owner of the property, and (C) the holder of any subordinate interest in the property subject to the lien and (2) by first-class mail to "All Occupants" at the address of the property. The notice to "All occupants" shall be in the form and contain the information required by Code, Real Property Article, § 7-105.9 (c). Except for the notice to "All Occupants," the mailings shall be sent to the last known address of all such persons, including to the last address reasonably ascertainable from a document recorded, indexed, and available for public inspection 30 days before the date of the sale. The mailings shall be sent not more than 30 days and not less than ten days before the date of the sale.
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> * * *
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> **(e) Affidavit of Notice by Mail.** An individual who is required by this Rule to give notice by mail shall file an affidavit stating that (1) the individual has complied with the mailing provisions of this Rule or (2) the identity or address of the borrower, record owner, or holder of a subordinate interest is not reasonably ascertainable. If the affidavit states that an identity or address is not reasonably ascertainable, the affidavit shall state in detail the reasonable, good faith efforts that were made to ascertain the identity or address. If notice was given to the

> holder of a subordinate interest in the property, the affidavit shall state the date, manner, and content of the notice.

Id.

As an initial matter, the appellee asserts that he was not required to serve process on the appellants because this foreclosure action is of the type contemplated by Md. Rule 14-207(a)(1), which provides that "[a]n action to foreclose a lien pursuant to a power of sale shall be commenced by filing an order to docket. No process shall issue." *Id.* However, because we shall hold that the appellee properly served each of the appellants in accordance with both Md. Rule 14-209 and Md. Rule 14-210, we need not address the merits of this particular argument. It is to the applicability of those two Rules that we now turn our attention.

Whether Md. Rule 14-209 or Md. Rule 14-210 applies in a given foreclosure action is dependent on whether the subject property constitutes a "residential property" as defined by Md. Rule 14-202(q).[3] If the subject of a foreclosure action is a residential property, then Md. Rule 14-209 applies; otherwise, Rule 14-210 apples. In this case, the parties disagree as to whether the Property fits the definition of a "residential property." Nevertheless, the

[3] Md. Rule 14-202(q) provides:

> "Residential property" means real property with four or fewer single family dwelling units that are designed principally and are intended for human habitation. It includes an individual residential condominium unit within a larger structure or complex, regardless of the total number of individual units in that structure or complex. "Residential property" does not include a time share unit.

record contains uncontroverted affidavits of compliance with Md. Rule 14-209 and 14-210. Therefore, whether the Property is a "residential" one is non-dispositive to our analysis.

As the appellee points out in his brief, Md. Rule 2-311(d) provides that "[a] motion or a response to a motion that is based on facts not contained in the record shall be supported by affidavit and accompanied by any papers on which it is based." *Id.* We have scoured the record and come to agree with the appellee that the arguments contained in the appellants' Motion regarding improper service and notice amount to bare allegations. The appellants specifically argue the notices that were sent to Paul Barnes were returned undelivered, but they make no references to the record in support of that allegation. Furthermore, they have no explanation for why Paul Barnes was not receiving mail at either the Property's address, which was designated in the Deed of Trust and the Deed of Trust Note as a proper mailing address for all the appellants, or P.O. Box 90704, Washington, DC 20090, which was a mailing address apparently provided to the appellee for Mr. Barnes and the Lensome Group. Quite simply, the appellants' claim that Mr. Barnes was not provided sufficient notice throughout the pendency of this foreclosure action amounts to nothing more than a "[b]are assertion[] of error without substantiation in the record [that] afford[s] no ground for relief." *Jones v. Warden, Md. Penitentiary*, 244 Md. 720, 721 (1966).

Regarding the sufficiency of the newspaper advertisement, Md. Rule 14-210(a), *supra*, provides that "[n]otice of the sale of an interest in real property shall be published at least once a week for three successive weeks, the first publication to be not less than 15

days before the sale and the last publication to be not more than one week before the sale." *Id.* Here, the appellee published an advertisement in a Charles County newspaper on January 9, 2015, January 16, 2015, and January 23, 2015. The appellants concede that the appellee published advertisements on these dates, but nevertheless allege that the publications were insufficient to satisfy Md. Rule 14-210(a) because the first and last publications were only separated by fourteen (14) days. This argument is without merit. The advertisements were each one week apart, with the first being "not less than 15 days before the sale and the last . . . be[ing] not more than one week before the sale." *Id.* Therefore, the advertisements in the present case were sufficient.

ii. Sale Price

The appellants also assert that the appellee breached his fiduciary duty by selling the Property for a mere twenty percent (20%) of its fair market value. In their brief, the appellants do not specify how they arrived at the conclusion that the Property is valued at two-hundred thirty thousand dollars ($230,000.00). However, in their Motion, the appellants presented to the circuit court that "[the P]roperty has a fair market value range of $176,000.00 to $235,000.00 as evidenced for [sic] similar properties in the neighborhood." The sale price of forty-six thousand dollars ($46,000.00), according to the appellants in their Motion, "shocks the conscience."

Again, there is no factual support in the record for the appellants' claim. We cannot be expected to perform our own investigation to determine the fair market value of a property sold through foreclosure. As the Court of Appeals has explained, "inadequate

[sale price] . . . standing alone is insufficient to set aside a foreclosure sale; unless, of course, the price is so inadequate as to shock the conscience of the Court." *Waring v. Guy*, 248 Md. 544, 549 (1968). In the present case, there is simply no evidence in the record to support the appellants' argument that the sale price was inadequate, much less unconscionable.

iii. Hearing

Finally, the appellants argue that the circuit court committed an abuse of discretion where it did not hold a hearing on the Motion. Again, we disagree. Maryland Rule 2-311(e) & (f) provide:

> **(e) Hearing--Motions for Judgment Notwithstanding the Verdict, for New Trial, or to Amend the Judgment.** When a motion is filed pursuant to Rule 2-532, 2-533, or 2-534, the court shall determine in each case whether a hearing will be held, but it may not grant the motion without a hearing.
>
> **(f) Hearing--Other Motions.** A party desiring a hearing on a motion, other than a motion filed pursuant to Rule 2-532, 2-533, or 2-534, shall request the hearing in the motion or response under the heading "Request for Hearing." The title of the motion or response shall state that a hearing is requested. Except when a rule expressly provides for a hearing, the court shall determine in each case whether a hearing will be held, but the court may not render a decision that is dispositive of a claim or defense without a hearing if one was requested as provided in this section.

Id. We have already established that the Motion amounted to a motion pursuant to Md. Rule 2-534. Therefore, Md. Rule 2-311(e) governs. By the plain language of that section, the court has discretion to deny a Rule 2-534 motion without a hearing. *See In re Adoption/Guardianship of Joshua M.*, 166 Md. App. 341, 358 (2005) ("Thus a court is not

required to hold a hearing prior to denying a motion under Rule 2-534."). For the reasons stated throughout this opinion, "the evidence proffered by appellant[s] was insufficient to warrant a hearing on her motion top alter or amend." *Id.* Accordingly, the circuit court did not abuse its discretion where it denied the appellants' Motion without a hearing.

JUDGMENT OF THE CIRCUIT COURT FOR CHARLES COUNTY AFFIRMED. COSTS TO BE PAID BY APPELLANT.