

UNREPORTED
IN THE COURT OF SPECIAL APPEALS
OF MARYLAND

No. 0829

September Term, 2015

DONNA BARNES DUNCAN

v.

LANE POTKIN, SUCCESSOR TRUSTEE

Eyler, Deborah S.,
Wright,
Rodowsky, Lawrence F.
(Retired, Specially Assigned),

JJ.

Opinion by Rodowsky, J.

Filed: July 14, 2016

*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.

Appellant, Donna Barnes Duncan (Duncan), a pro se litigant, appeals from the denial of a motion, filed April 17, 2015, to vacate a foreclosure sale that was ratified on November 7, 2012, by the Circuit Court for Montgomery County. An appeal from the order of ratification was filed, but voluntarily dismissed. Duncan also appeals the imposition of a \$650 sanction, imposed under Maryland Rules of Procedure, Rule 1-341(a). We agree with the circuit court's implicit finding that there was no substantial justification for asserting that the foreclosure sale was obtained by "fraud, mistake or irregularity" within the meaning of Maryland Rule 2-535(b) and shall affirm.

Based on Duncan's questions presented, her contentions are that the court erred in denying her Rule 2-535(b) motion because

1. "[the] Judgment of Foreclosure was granted to a closed D.C. Estate where the Court lacked authority over the asset of the closed estate[.]"
2. "[the] judgment [was] rendered on behalf of a terminated Personal Representative to a closed D.C. estate where there was a lack of authority from the originating jurisdiction to act on behalf of the closed foreign estate[," and]
3. "[t]he successor trustee initiating the foreclosure lacked authority [f]rom the originating jurisdiction to act on behalf of the closed Estate[.]"

Duncan further contends that the court abused its discretion in imposing sanctions "without a hearing or opinion" because it denied Duncan a default judgment on her motion to vacate based on the lienor's late filed opposition to that motion and because the court "granted execution of a Writ of Restitution and Possession which had not been served on [her]."

Background Facts

Sixteen years ago, on August 22, 1991, Duncan and her mother, as joint tenants, executed a deed of trust for the benefit of one Morris Battle to secure a loan of \$47,500, payable on February 22, 1992, by a lien on property at 9010 Watkins Road, Gaithersburg, Montgomery County, MD (the Property). At some point, Duncan became the surviving tenant. The loan was not repaid. Duncan filed for bankruptcy protection on October 15, 1991, and was discharged March 4, 1993 (U.S. Bankr. Court, District of Maryland, Case No. 91-44901).

The legal effect of that discharge on the subject deed of trust was explained in an opinion of May 30, 2008, by United States Bankruptcy Judge Paul Mannes in an adversary proceeding (AP No. 06-01615PM) brought by Duncan against the Battle estate and its counsel in a later Chapter 13 bankruptcy filed by Duncan (Case No. 06-11284PM). The court found "that the 1991 Deed of Trust represented a valid and subsisting lien securing, *in rem*, the obligation owed by the Plaintiff to the Estate of Morris Battle."¹

Morris Battle, a resident of the District of Columbia, died February 14, 2002. His niece, Eugenie Lucas, was his sole heir and personal representative. On August 6, 2003, she filed in the Land Records of the Circuit Court for Montgomery County a deed appointing the appellee, Lane Potkin, successor trustee of the subject deed of trust. He instituted a foreclosure on April 30, 2004. Duncan filed in bankruptcy. That proceeding

¹ The court also found that the Battle estate was liable to Duncan for \$17,500 in damages for attempting *in personam* collection of the lien. Those damages could be satisfied by the estate's crediting the judgment against the amount due on the lien.

was dismissed. Potkin sold the property, but that sale was set aside. Appellee resumed foreclosure and Duncan filed, on March 9, 2006, the bankruptcy proceeding in which Judge Mannes held that the lien of the subject deed of trust was valid. Judge Roger Titus of the United States District Court for the District of Maryland, in Case No. RWT 09-CV-1178, held that Duncan's attempted appeal regarding the validity of the lien held by the Estate of Morris Battle was not preserved, but noted that the validity issue had been resolved by Judge Mannes.

When free of any bankruptcy stay, appellee revived foreclosure proceedings in the Circuit Court for Montgomery County. Duncan, on June 2, 2009, sought permanently to enjoin foreclosure. Denial of that relief led to an appeal to this Court. *Duncan v. Lane Potkin, Substitute Trustee*, No. 2506, September Term, 2009. In an unreported opinion filed April 11, 2011, we adjudicated adversely to Duncan her issues that the deed of trust was "clearly not under seal," that it was one "in which the Notary Public is also the named trustee," that "a Continuation Statement [was] untimely filed," and that the "action [was] barred by the Statute of Limitations and the Doctrine of Laches." We ruled that "[t]he United States Bankruptcy Court – a court of unassailably competent jurisdiction – gave appellant the opportunity to raise all matters and defenses to the note's validity and limitations in law and fact and ruled on these with a final and valid judgment." Slip opinion at 7-8 (footnote omitted).

Duncan went back to the Bankruptcy Court in June 2011 and filed another Chapter 13 proceeding (Case No. 11-21697). The Battle estate was again required to seek relief

from the automatic stay. That relief was granted by Judge Thomas J. Catliota on December 21, 2011. He found that:

"this case is an abuse of the bankruptcy process and an equitable servitude is appropriate to prevent further filings of a bankruptcy case in the future [t]o prevent the [Battle estate] from realizing the value of its claim."

He also observed that "it appears to this Court that the Debtor is also abusing the litigation process and not only the bankruptcy process."

Confirming Judge Catliota's observation, Duncan, on May 25, 2012, moved in the Circuit Court for Montgomery County to stay foreclosure on an emergency basis. At a hearing that day, the court denied the motion. Appellee sold the Property that day. Duncan did not appeal the denial of the stay of the sale.

Appellee reported the sale on May 29, 2012. Thirty days thereafter Duncan filed exceptions to the sale. They were orally denied at a hearing on September 20, 2012. Two days later Duncan sought reconsideration. The order overruling the exceptions was filed September 25, 2012. Duncan appealed to this Court on October 11, 2012. The foreclosure sale was finally ratified on November 7, 2012. Duncan appealed to this Court on December 6, 2012. Both appeals were voluntarily dismissed by Duncan, then represented by counsel, on April 15, 2013.

Two years later, on April 17, 2015, Duncan filed the Rule 2-535(b) motion, the denial of which is the subject of this appeal. Duncan served the motion on appellee by certified mail on April 20, 2015. On May 11, 2015, she moved for a judgment of default against appellee. The substitute trustee filed his opposition to the Rule 2-535(b) motion on May 12, 2015, together with a request for sanctions. The court, on June 2, 2015, denied

vacating the foreclosure and, thereby, the requested default. It also granted the request for sanctions. Duncan noted this appeal on June 29, 2015. Upon receipt of bills and an affidavit from appellee, the court, on August 26, 2015, determined the sanction to be in the amount of \$650 and entered judgment accordingly.

Additional facts will be stated in the Discussion as required by the analysis.

Discussion

Duncan's principal contention seems to be that the Circuit Court for Montgomery County was without jurisdiction to render the foreclosure judgment. The *Restatement (Second) of Judgments*, Introductory Note to Chapter 2 (1982), explains:

"This Chapter deals with the requirements that must be met before a court properly may undertake an adjudication. There are three such requirements. First, the persons whose interests are to be adjudicated must be given adequate notice of the proceeding and opportunity to be heard. See §§ 2-3. Second, the court must have territorial jurisdiction of the controversy. A court's territorial jurisdiction is limited by the United States Constitution and may further be limited by statute or rule of court. See §§ 4-8. Third, the court must have authority to adjudicate the type of controversy presented to it. This authority is generally referred to as subject matter jurisdiction and is sometimes referred to as competence or competency. See § 11."

Here, Duncan had notice. She delayed the foreclosure by litigating in at least two court systems for at least ten years. She does not challenge territorial jurisdiction. The court below had subject matter jurisdiction. Maryland Rule 14-203 provides:

"(a) **Venue.** An action to foreclose a lien shall be filed in the county in which all or any part of the property subject to the lien is located.

"(b) **Attachment of jurisdiction.** The court's jurisdiction over the property subject to the lien attaches when an action to foreclose is filed."

Here, the "court" is the Circuit Court for Montgomery County. *See* Md. Rule 1-202(i) ("Court' means a court of this State and refers, as applicable under the circumstances, to the court (1) to which the title, chapter, or rule applies or (2) in which the particular action or proceeding has been filed or properly could be filed."). *See also Fairfax Sav., F.S.B. v. Kris Jen Ltd. Partnership*, 338 Md. 1, 14-17, 655 A.2d 1265, 1271-72 (1995) (reviewing approvingly procedure for summary foreclosure pursuant to a power of sale in a deed of trust encumbering realty in Harford County that was instituted in the Circuit Court for Harford County).

Duncan's claimed jurisdictional defect seems to be that the substitute trustee was not the real party in interest and had no standing to sue. She says that the Battle estate was closed when the sole heir, Lucas, appointed the substitute trustee. She submits that Lucas had no authority from the Probate Division of the Superior Court of the District of Columbia to make the substitution and thus the successor trustee had no authority to act, so that the Montgomery County court had no jurisdiction.

We begin by questioning the factual basis for the argument. The deed substituting Lane Potkin as trustee was recorded in Montgomery County on August 6, 2003. He docketed the foreclosure action on April 30, 2004. Duncan has furnished in her "Appendix" an order of that Probate Division in the Battle estate that "extended" Lucas's appointment as "unsupervised" personal representative "for a period of twelve months from [the order's date of November 21, 2005] ... nunc pro tunc from March 27, 2005, and [provided that] the estate shall be deemed to have remained open continuously from that date."

Further, Lucas, as heir or as personal representative, did not need an order of the District of Columbia probate court to acquire the power to substitute the trustee of the deed of trust. That power was conferred by agreement with Duncan under the terms of the deed of trust. She granted the Property to the trustee originally named "with power of sale." She agreed that the "Lender, at its option, may from time to time remove Trustee and appoint a successor." She agreed that the "covenants and agreements of this Security Instrument shall bind and benefit the successors and assignees of Lender and Borrower."

In any event, even if some aspect of District of Columbia probate practice (which is not cited by Duncan) required a probate court authorization to proceed with foreclosure, this cannot be the type of "irregularity" that requires an enrolled Maryland foreclosure judgment to be vacated under Rule 2-535(b). Maryland Code (1974, 2015 Repl. Vol.), § 7-105(b)(5) of the Real Property Article provides, without qualification, that "[i]f a ... deed of trust allows for the appointment or substitution of a trustee or an individual authorized to exercise a power of sale, the holder of the mortgage or deed of trust may make the appointments or substitutions from time to time."

In her May 25, 2012 motion to stay the sale, Duncan raised seventeen issues, the great majority of which are variations on the standing/real party in interest arguments harking back to the Battle probate estate. Duncan did not appeal the denial of the stay. Assuming that her later noted appeals could bring up for review the denial of the injunction, Duncan voluntarily dismissed those appeals. Thus, she has acquiesced in the denial of the stay. Further, the mandates of dismissal issued by the court are res judicata as to matters

that were raised or could have been raised. *Board of Educ. v. Norville*, 390 Md. 93, 106-07, 887 A.2d 1029, 1037 (2005).

Duncan has not included in her "Appendix" the Rule 2-535(b) motion that underlies this appeal and appellee has not furnished it. Nevertheless, to the extent that the motion relies on facts available at the time the stay was sought, but were not included as grounds for the stay, the issues should have been raised pre-sale by requesting an injunction. *See Bates v. Cohn*, 417 Md. 309, 328, 9 A.3d 846, 858 (2010) ("We hold only that ... 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.").

One issue raised by Duncan that was not based on grounds existing when the stay was sought is the denial of her motion for a grant of her Rule 2-535(b) motion on the basis of appellee's default. There is no irregularity, much less an "irregularity" within the meaning of Rule 2-535(b). Rule 2-613, "Default Judgment," on which Duncan relies, is inapplicable. It deals with claims originally asserted. Rule 2-613(a).

The applicable rule is Rule 2-311, "Motions," under which an answer, if any, was due fifteen days after service. There is no automatic default penalty for late filing of an answer under that rule. It provides that "[i]f a party fails to file a response required by this section, the court may proceed to rule on the motion." Rule 2-311(b). The court may rule either way, depending on the circumstances.²

² Duncan also claims that, after the sale, she was not served with the writ of restitution and possession that appellee obtained to put her out. The court's docket entries

(cont'd)

Duncan also appeals from the imposition of the Rule 1-341 sanction for filing her motion to reopen the two-year-old judgment for "fraud, mistake or irregularity,"³

There is no abuse of discretion. The motion is without substantial justification. It seeks to resurrect an argument the grounds for which existed twelve years ago and which are barred by res judicata. The motion continues a campaign that Duncan has waged for over a decade. Over four years before the subject motion was filed, Duncan was reprimanded by the United States Bankruptcy Court for abuse of litigation in attacking this lien, but she has persisted.

For all the foregoing reasons, we shall affirm.

**JUDGMENT OF THE CIRCUIT
COURT FOR MONTGOMERY
COUNTY AFFIRMED**

**COSTS TO BE PAID BY
APPELLANT.**

² (cont'd)

show that the writ was requested January 11, 2013, and that Duncan filed, on January 28, 2013, on an emergency basis, a request to quash that writ. The request was heard March 11, 2013, and denied. The writ was executed March 15, 2013.

³ The Rule, in relevant part, provides:

"Bad faith – Unjustified proceeding.

"(a) **Remedial Authority of Court.** In any civil action, if the court finds that the conduct of any party in maintaining or defending any proceeding was in bad faith or without substantial justification, the court, on motion by an adverse party, may require the offending party ... 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."