UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1230

September Term, 2015

SHAWN T. WAITHE, ET AL.

v.

EDWARD S. COHN, ET AL.

Berger,
Nazarian,
Harrell, Glenn T., Jr.
(Retired, Specially Assigned),

JJ.

Opinion by Harrell, J.

Filed: July 7, 2016

Appellants, Shawn T. Waithe and his wife, Katia Morales Waithe, purchased a home in Baltimore County, Maryland, in 2007. After making payments for a number of years on the loan taken to purchase the property, the Waithes fell into default in 2012. Appellees, collectively the Substitute Trustees on the deed of trust[1], initiated foreclosure proceedings in the Circuit Court for Baltimore County. The Waithes responded with a request for an injunction to block or dismiss the foreclosure, claiming a violation by the original Lender of the Federal Equal Credit Opportunity Act ("ECOA"), 15 U.S.C. § 1691, as regards Private Mortgage Insurance ("PMI") and interest rates associated with the loan-making process. The circuit court found no ECOA violation and allowed the foreclosure proceedings to continue, ratifying ultimately the public auction sale of the property. The Waithes appealed. For the following reasons, we affirm the circuit court's judgment.

FACTS AND LEGAL PROCEEDINGS

On 14 September 2007, the Waithes purchased from the Ryland Group for $403,007 a newly-constructed home located at 602 Moody Road, Middle River, Maryland 21220 (the "Property"). The Waithes executed a Note and Deed of Trust in favor of the original lender, Cardinal Financial. The Waithes stated that their understanding of the loan approved initially for the purchase money was that it was to be

[1] The Substitute Trustees include Edward S. Cohn, Stephen N. Goldberg, Richard E. Solomon, Richard J. Rogers, and Randall J. Rolls. The Substitute Trustees represent the interests of the lender and will be referred to interchangeably throughout this opinion as the Substitute Trustees, the Lender, and Appellees.

an 80/20 loan, which would result in a monthly payment at an interest rate within their budget and without any PMI payment. According to them, prior to closing, Cardinal Financial informed them that the loan product they had agreed to initially was no longer available. The offered new loan terms included a higher interest rate (7.5 percent) and a 3 percent PMI payment. The Waithes alleged Cardinal Financial informed them that a more affordable loan might be available in six months. At the end of the day (metaphorically speaking), the Waithes accepted the revised loan terms, resulting in a monthly payment obligation of over $4,300. Six months after closing, the loan was transferred to Citi Mortgage for servicing and the note was assigned to Nationstar Mortgage.[2] In February 2009, the Waithes' loan terms were modified to reduce the interest rate to 4.5 percent, but the PMI portion of the monthly payments remained the same.

On 2 April 2012, the Waithes became delinquent in their payments. On 5 June 2013, foreclosure proceedings were initiated by the Substitute Trustees. On 2 October 2013, the Waithes filed for Chapter 7 bankruptcy in the U.S. District Court for the District of Maryland. The bankruptcy filings scheduled the balance owed on the home loan as a debt to be discharged. The Substitute Trustees, without objection from the Waithes, caused the automatic stay on the foreclosure proceeding to be lifted on 11

[2] The Notice of Intent to Foreclose lists the Federal National Mortgage Association as the secured party at that time.

December 2013.[3] The Waithes received their official Chapter 7 discharge on 8 January 2014, including their debt under the note.

Mediation was requested in the foreclosure action. It was held in March 2014.[4] As a result, the Waithes were offered an additional loan modification, which they rejected because "it made no change in the extraordinarily high [PMI] payment of over $1,400 per month which was the primary reason Appellants [contend they] were in trouble with their mortgage in the first instance." On April 29, the Waithes received a Notice of Impending Foreclosure Sale scheduling the public auction for 15 May 2014.[5]

On 3 October 2014, the Waithes filed in the foreclosure action a Motion to Stay or Dismiss. An evidentiary hearing was conducted in the circuit court on 29 January 2015. In their motion, the Waithes contended that the original Lender violated the ECOA. They argued that "the original lender, Cardinal, denied the originally agreed upon extension of credit without giving any reason therefor other than that the [original 80/20] loan [product] was no longer available. This by itself constituted a discriminatory act under

[3] Due to the Waithes' bankruptcy filing, an automatic stay was imposed pursuant to 11 U.S.C. § 362. It was lifted after the Substitute Trustees filed a Motion Seeking Relief from the Automatic Stay with the United States Bankruptcy Court for the District of Maryland. The Waithes did not file an opposition to this motion.

[4] An outsider might wonder what was left to mediate as to the terms of the loan debt at this point, which seemed moot due to its discharge in bankruptcy two months earlier.

[5] The Waithes filed on 12 May 2014 an Emergency Motion for a Temporary Stay of Foreclosure Sale Pending a Decision on Defendants' Request for a Loan Modification. The motion was denied for procedural reasons not material to this appeal.

15 U.S.C. § 1691(d)." They maintained that a lack of explanation for the revocation of the previously agreed upon loan terms and the new higher interest rate terms and high PMI payment were examples of the discrimination they were subjected to in the transaction.

The Substitute Trustees retorted that the Waithes' entire argument was based on the fact that "they were paying more than what they thought they should be paying in PMI, the Lender violated the ECOA. There [was] absolutely no evidence to support any alleged violation of the ECOA." The Substitute Trustees asserted further that:

> there is no right to use the ECOA as a "shield" or defense, as they are attempting to do in this case. There is no provision in the ECOA that allowed it to be used as "shield" or defense. The ECOA was enacted to be used as a "sword" with a five year Statute of Limitations.

At the circuit court hearing, Ms. Waithe testified that she and her husband were members of protected classes under the ECOA; she is Hispanic and her husband is African American. She continued that she was told by a representative of the lender "the loan they were expecting could not be offered because the Lender was no longer offering that program."

Ms. Waithe claimed that they "would have withdrawn from the transaction, but they had already abandoned their previous home and needed a place for their family to live." Additionally, she stated that they

> were not able to apply to another bank for financing because under the Financing and Approved Settlement Costs Rider to the sales contract[,] they were required to use Cardinal – Ryland's designated lender. If they did not use Cardinal, they would lose $15,000 of settlement credits and all of the incentives that were provided to them in the sales contract.

The circuit court denied the motion on 7 April 2015 in a written Memorandum Opinion and Order.

In its memorandum opinion, the circuit court found, pursuant to Maryland Rule 14-211, good cause to address the merits of the Waithes' motion, despite its procedural untimeliness, because of the ongoing negotiations between the parties. The circuit court, regarding the ECOA allegations, determined that the Waithes failed to meet their burden of proving that a violation occurred. The court explained that, once a party advancing an ECOA violation claim establishes a *prima facie* case of discrimination, then the other party is obliged to offer evidence consistent with a non-discriminatory reason for the unfavorable credit action. The circuit court concluded that the Substitute Trustees, in satisfaction of the transferred burden of production in the present case, could rely on Ms. Waithe's testimony indicating that the "non-discriminatory reason for Cardinal's withdrawal of the loan offer was because the loan product was no longer available." Under the procedural mechanism established for traditional discrimination claims[6], the Waithes were required then to show that this reason was pretextual, which the circuit court concluded they did not do on the record of the case. Additionally, the circuit court

[6] This procedure is explained more thoroughly *infra* Section I, b. of this opinion.

concluded that a potential ECOA violation was not available to be asserted as an affirmative defense.[7]

On 4 June 2015, the Property was sold to the then holder of the Note, the Federal National Mortgage Association, at an advertised public auction foreclosure sale. The Waithes filed exceptions on 6 July 2015, finding fault with the advertisement for the foreclosure sale. The circuit court overruled the exceptions, without a hearing, on 15 July 2015. An order ratifying the foreclosure sale was entered on 29 July 2015. The Waithes appealed timely to this Court. Additional facts will be provided as necessary within our analysis.

QUESTIONS PRESENTED

The Waithes present two questions for our consideration, which we rephrase as follows:[8]

> 1. Did the circuit court act within its discretion in denying the Waithes' Motion to Dismiss the foreclosure proceedings, concluding there was no proven violation of the Equal Credit Opportunity Act, 15 U.S.C. § 1691?

[7] The circuit court declined to address a statute of limitations challenge noted by the Substitute Trustees.

[8] The Waithes framed their questions as:

> 1. Whether the Circuit Court for Baltimore County erred when it failed to dismiss the instant foreclosure proceedings because the loan transaction violated the Equal Credit Opportunity Act, 15 U.S.C. § 1691, et. seq?
>
> 2. Whether the Circuit Court for Baltimore County erred when it ratified the foreclosure sale even though the sale was not properly advertised?

2. Did the foreclosure sale comply with proper advertising requirements?

For the following reasons, we hold that the Circuit Court for Baltimore County did not abuse its discretion and, thus, we affirm its judgment.

STANDARD OF REVIEW

When a borrower files a motion to dismiss foreclosure proceedings, he or she is petitioning essentially the court "for injunctive relief, challenging 'the validity of the lien or. . . the right of the [lender] to foreclose in the pending action.'" *Bates v. Cohn*, 417 Md. 309, 318-19, 9 A.3d 846, 852 (2010) (quoting Md. Rule 14–211(a)(3)(B)). Because this case was decided under Maryland Rule 14-211, we review the circuit court's denial of the motion to dismiss the foreclosure proceedings for an abuse of discretion: "The grant or denial of injunctive relief in a property foreclosure action lies generally within the sound discretion of the trial court." *Hobby v. Burson*, 222 Md. App. 1, 8, 110 A.3d 796, 800-01 (2015) (citation omitted). Purely legal decisions, however, are reviewed without deference. *Hobby*, 222 Md. App. at 8, 110 A.3d at 800-01 (citation omitted).

DISCUSSION

I. The ECOA Claim

a. Contentions

The Waithes contend that the circuit court should have dismissed the foreclosure proceedings because the evolution of the underlying loan transaction demonstrated a violation of the ECOA. The Waithes, each an acknowledged member of a minority, contend further that the loan transaction as consummated, grounded in discriminatory

conduct, led to their delinquency in making their mortgage payments. They argue that the circuit court's conclusion that the Substitute Trustees could rely on Ms. Waithe's testimony to satisfy their burden of production to demonstrate a non-discriminatory reason for the credit action required unfairly the Waithes to shoulder the ultimate burdens of production and persuasion without the availability of discovery, as is ordinarily the case in foreclosure proceedings.

The Substitute Trustees respond that it was within the sound discretion of the circuit court to deny the Waithes' motion to dismiss the foreclosure proceedings. The Substitute Trustees maintain that the circuit court applied properly the burdens of production and persuasion associated with litigating an ECOA violation allegation and that the Waithes were unable to sustain their burdens.

b. Analysis

The ECOA prohibits creditors and lenders from discriminating against applicants for credit:

> (1) on the basis of race, color, religion, national origin, sex or marital status, or age (provided the applicant has the capacity to contract);
> (2) because all or part of the applicant's income derives from any public assistance program; or
> (3) because the applicant has in good faith exercised any right under this chapter.

15 U.S.C. § 1691. Federal law establishes that an ECOA claim is governed by standards similar to a traditional discrimination claim brought under Title VII of the Federal Equal Employment Opportunity Commission laws. *Matthiesen v. Banc One Mortg. Corp.*, 173 F.3d 1242, 1246 (10th Cir. 1999). A plaintiff may establish a *prima facie* case by

advancing evidence as to each of four required elements: 1) the claimant is a member of a protected class; 2) the claimant applied for a loan; 3) the claimant was qualified for that loan; and 4) the application was denied, although the claimant qualified for the loan. *Matthiesen*, 173 F.3d at 1246.

If a claimant is able to establish a *prima facie* case for a discriminatory adverse credit action[9], even without direct evidence of the discrimination (or intent to discriminate) on the part of the creditor or lender, then the burden of production shifts to the lender to offer evidence that the denial was supported by a legitimate, nondiscriminatory reason. The lender may satisfy this burden "by. . . evidence which, taken as true, would permit the conclusion that there was a nondiscriminatory reason for the unfavorable action." *Anderson v. Wachovia Mortg. Corp.*, 621 F.3d 261, 271 (3d Cir. 2010) (citation omitted). There is no requirement that the lender "even prove that the tendered reason was the actual reason for its behavior." *Id.* (citation omitted).[10]

[9] 15 U.S.C. § 1691(d)(6) covers specifically:

> For purposes of this subsection, the term "adverse action" means a denial or revocation of credit, a change in the terms of an existing credit arrangement, or a refusal to grant credit in substantially the amount or on substantially the terms requested. Such term does not include a refusal to extend additional credit under an existing credit arrangement where the applicant is delinquent or otherwise in default, or where such additional credit would exceed a previously established credit limit.

[10] If a claimant is able to show discrimination by direct evidence, then this burden shifting procedure is rendered unnecessary. It is difficult to prove discriminatory actions through direct evidence, however, which "must be such that it demonstrates that the

(Continued…)

If the lender is able to point to evidence which would allow the court to conclude that there was a nondiscriminatory reason for the loan denial, then "the burden of production rebounds to the [claimant], who must now show by a preponderance of the evidence that the [lender's] explanation is pretextual." *Id.* (citation omitted). Ultimately, this procedure requires that the claimant prove intentional discrimination if a nondiscriminatory explanation is tendered.

For purposes of our analysis, we shall assume (without deciding) that the Waithes were permitted to assert an ECOA claim as either a "sword" or a "shield" in the context of this case. It is undisputed on this record that the Waithes were each a member of a protected class, that they qualified for the loan applied for initially, and that they were denied the 80/20 loan with a lower interest rate and no PMI than the loan made. Accordingly, the Waithes presented arguably a *prima facie* case under the ECOA on three of the required elements, but did not produce any direct evidence of a discriminatory animus by Cardinal Financial with regard to the declination to make a loan on the original terms. Thus, the circuit court looked correctly to the Substitute Trustees to advance, if it could, a nondiscriminatory reason for the denial.

(…continued)
decisionmakers placed substantial negative reliance on an illegitimate criterion in reaching their decision." *Anderson v. Wachovia Mortgage Corp.*, 621 F.3d 261, 269 (3d Cir. 2010). If a claimant is able to show this type of direct evidence, then it is up to the respondent to prove any discrimination did not affect the ultimate outcome: "that it would have made the same decision in the absence of [any] discriminatory animus." *Anderson*, 621 F.3d at 269 (citation omitted).

To meet this obligation, the Substitute Trustees relied on Ms. Waithe's testimony at the hearing regarding what she was told by a Cardinal employee:

> Q: And when, when did you learn that, excuse me, that loan was not going to be available?
> A: Directly before going to closing we received a call to let us know from the Ryland Home Community Office at that time that the package was no longer available.
> Q: And was it explained to you why it was no longer available?
> A: I asked why it was no longer available and an explanation was never given.
> Q: And –
> THE COURT: I'm sorry, ma'am. What did they say? When you say an explanation, did they just not talk?
> THE WITNESS: They – I asked specifically why was the package not available, and they, they simply said it was gone, that that type of loan package was not being offered anymore.
> THE COURT: Okay. So they did give you a response?
> THE WITNESS: Yes
> THE COURT: And the response was it is not available because it is no longer – that package, which was the 80/20 you mentioned, was no longer available, is that what you are saying?
> THE WITNESS: Correct.
> THE COURT: All right, ma'am. Thank you.

The Substitute Trustees relied on this testimony, given under oath, as a facially nondiscriminatory reason for why the Waithes' original 80/20 loan terms were withdrawn prior to closing. This statement, taken at face-value, can be read as a nondiscriminatory reason for the loan withdrawal. Essentially, Ms. Waithe's statement, viewed as a

concession, shifted the burden back on the Waithes to demonstrate that this reason was pretextual.[11]

The Waithes argued that it was inappropriate for the Substitute Trustees to rely on Ms. Waithe's statement, without producing additional or corroborative evidence, arguing that "this statement is not proof that there was no discrimination because it could be consistent with a discriminatory intent that the product was no longer available only to members of the protected groups." Although this may be true, it is an exact depiction of the Waithes' burden in advancing a discrimination claim. They were obliged to show that this statement was consistent in fact with a discriminatory intent and was, therefore, pretextual as offered nakedly and more benignly. They failed to produce any evidence showing that the declination to settle on the 80/20 loan product and to offer instead different terms was not consistent with other than unfortunate timing. The circuit court explained:

> [t]here is no indication that [the Waithes'] PMI rate was increased *because* of any discrimination on the part of the Lender. In fact, it is possible that individuals who do not fall into a protected minority class were charged the same PMI premiums charged to [the Waithes]. Although the evidence suggests that [the Waithes'] PMI premium may have been higher than other loans, [the Waithes'] argument that the increase was motivated by racial animus contains a leap of logic, and is not supported by any of the evidence that is before this Court.

[11] *See Davis v. Baltimore Hebrew Congregation*, 985 F. Supp. 2d 701, 714-15 (D. Md. 2013) (claimant conceded that his termination was for a legitimate non-discriminatory reason and thus the burden shifted "back to him to show that those reasons were merely a pretext for a discriminatory purpose").

The Waithes seek to recover by arguing that, without the benefit of discovery, they were unable to unearth evidence to show that Cardinal Financial's explanation was pretextual and that it is an insuperable burden they were tasked with at the stage (and type) of proceedings when their motion was litigated. This burden, however, was not within the circuit court's discretion to excuse. It is a recognized procedural mechanism for discrimination claims: "throughout this burden-shifting paradigm the ultimate burden of proving intentional discrimination always rests with the [claimant]." *Anderson*, 621 F.3d at 271 (citation omitted).

The Waithes' refined arguments on appeal do not convince us that the circuit court abused its discretion. We agree with the circuit court's determination that Ms. Waithe's statement, taken at face-value, provided a nondiscriminatory reason for the credit action and that the Waithes failed to show that the explanation for the eleventh-hour change in loan terms was pretextual.[12]

[12] The additional arguments presented on appeal by both the Waithes and the Substitute Trustees will not be addressed as they were not teed-up properly on this record. For example, the Substitute Trustees' contention regarding the effect of the Waithes' alleged non-disclosure of their ECOA claim as an asset in the bankruptcy case was not mentioned in the circuit court. In addition, although the question of using an alleged ECOA claim as the basis of a recoupment claim, as advanced by the Waithes on appeal, is an interesting question, this is not the proper case for that issue to be reached. Moreover, because we agree that no ECOA violation was shown, we see no need to consider the implications of whether an ECOA claim may be used as a "sword" or a "shield" in a foreclosure action.

II. Ratification of the Foreclosure Sale

a. Contentions

The Waithes contend that the foreclosure sale should be set aside because it was conducted in a manner inconsistent with the Substitute Trustees' obligation to ensure that the sale obtained the highest price possible for the Property. In filing their exceptions pursuant to Maryland Rule 14-305(d)(1)[13], the Waithes maintain that the advertisement of the sale solely in *The Jeffersonian*, a Baltimore County-oriented publication, was not sufficient advertisement in a newspaper of general circulation because there were other newspapers of greater circulation than *The Jeffersonian* in the Baltimore County market.

The Substitute Trustees respond that it was appropriate for the circuit court to overrule the Waithes' objection because the advertisement was valid. The Substitute Trustees maintain that the Waithes failed to provide any evidence to "suggest that Maryland law requires a foreclosure sale to be advertised in the newspaper with the largest circulation in the relevant [jurisdiction]."

[13] Maryland Rule 14-305(d)(1) requires specifically:

> 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.

b. Analysis

After a foreclosure sale occurs, the filing of exceptions "may challenge *only* procedural irregularities at the sale or the statement of indebtedness." *Bates*, 417 Md. at 320, 9 A.3d at 853 (citation omitted) (emphasis in original). A circuit court will ratify a foreclosure 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." *Id.* (citing Md. Rule 14–305(e)). The decision to grant the exceptions or ratify the foreclosure sale rests within the exercise of the sound discretion of the circuit court.

A primary goal of a foreclosure sale is to "secure the best obtainable price." *Maddox v. Cohn*, 424 Md. 379, 385, 36 A.3d 426, 430 (2012) (citation omitted). The methods for obtaining the best price are left typically to the discretion of the trustees: "When a sale is attacked, it must be shown that the trustee did not abuse the discretion reposed in him, and that the sale was made under such circumstances as may be fairly calculated to bring the best obtainable price." *Maddox*, 424 Md. at 386, 36 A.3d at 430 (quoting *Simard v. White*, 383 Md. 257, 312, 859 A.2d 168, 200 (2004)).

The traditional method of advertising a foreclosure sale is provided for in Maryland Rule 14-210(a), which requires specifically:

> 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.

Although the meaning of "a newspaper of general circulation" is not defined by this rule, it has since been explained in Maryland Code (2014, 2015 Suppl.), General Provisions Article, § 1-113 ("Gen. Provis") as a newspaper that:

> (1) has at least four pages;
> (2) habitually contains news items, reports of current events, editorial comments, advertising matter, and other miscellaneous information that is of public interest and is found generally in an ordinary newspaper;
> (3) has been published and distributed, by sale, from an established place of business at least once a week for 6 months or more before publication of the advertisement or notice;
> (4) has general circulation throughout the community where the publication is published; and
> (5) qualifies for Periodicals rates for mailing through the United States Postal Service.

Here, the Substitute Trustees advertised the foreclosure sale in *The Jeffersonian*, a publication in Baltimore County, the content and distribution of which is geared traditionally toward businesses. The Waithes contend that this focused target audience disqualifies the publication as a newspaper of general circulation. We do not agree.

Because the Waithes are the "party excepting to the sale[, they bear] the burden of showing that the sale was invalid, and must show that any claimed errors caused prejudice." *Fagnani v. Fisher*, 418 Md. 371, 384, 15 A.3d 282, 290 (2011). The only evidence produced by the Waithes were the circulation numbers of two newspapers, *The Jeffersonian* and *The Baltimore Sun* (the latter being a publication of a circulation also

beyond Baltimore County), to demonstrate that *The Jeffersonian* is a much smaller paper in distribution than *The Baltimore Sun*. The evidence was produced in the form of "screenshots" from each respective paper's website evincing the respective paper's average daily circulation number. These numbers were then compared to the total resident population in Baltimore County. Although it is clear from this limited evidence that *The Jeffersonian* is by far not the larger of the two newspapers distributed in Baltimore County, there is no requirement that the advertisement occur in the widest circulated newspaper; only one of general circulation.

The choice of modality of the advertisement is the only issue raised here about the foreclosure sale. The challenged decision falls within the sound discretion of the circuit court. Based on the evidence in the record, no prejudice is evident in the resulting sale and thus, we cannot hold that the circuit court's judgment to ratify the sale exhibited an abuse of discretion on the limited evidence before it.

III. Conclusion

We do not find reversible error in the circuit court's decision to allow the foreclosure proceedings to continue and to ratify ultimately the sale of the Property. Thus, we affirm the circuit court's judgment. The interim stay granted by this Court based on the Waithes' Motion to Set Aside Order Granting Appellees' Motion for

Possession, filed with this Court on 25 April 2016, is hereby lifted and the Motion is denied in light of the outcome of this opinion.

JUDGMENT OF THE CIRCUIT COURT FOR BALTIMORE COUNTY AFFIRMED. APPELLANTS' MOTION TO SET ASIDE ORDER GRANTING APPELLEES' MOTION FOR POSSESSION IS DENIED AND THE STAY ORDERED BY THIS COURT ON 25 APRIL 2016 IS LIFTED. COSTS TO BE PAID BY APPELLANTS.