UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1908

September Term, 2014

PAULA C. WALKER

v.

JOHN E. DRISCOLL, III, ET AL.,
SUBSTITUTE TRUSTEES

Meredith,
Friedman,
Eyler, James R.
(Retired, Specially Assigned),

JJ.

Opinion by Eyler, James R.

Filed: February 16, 2016

Paula C. Walker, appellant, contends that the Circuit Court for Prince George's County erred in denying her emergency motion to stay the foreclosure sale and dismiss the foreclosure action pertaining to her home located at 11705 Redwood Drive East, Brandywine, Maryland ("the Property"). John E. Driscoll, III, et al., substitute trustees under a deed of trust and appellees herein, initiated the foreclosure action.[1] Appellant raises two questions which we rephrase and consolidate into one:

Did the circuit court err in denying the motion to stay the foreclosure sale and dismiss the foreclosure action?[2]

Perceiving no error, we affirm.

[1]The substitute trustees are identified as Driscoll, Gantt, Harris, Lane, and Reynolds.

[2] As phrased by appellant, the questions are:

> 1. Did the Circuit Court err as a matter of law when it denied a motion to stay a foreclosure sale after the foreclosing mortgagee failed to comply with federally mandated loss mitigation procedures and set a sale date in violation of federal law?
>
> 2. Were Nationstar Mortgage and Substitute Trustees prohibited from conducting a foreclosure sale, because the Homeowners submitted a complete loss mitigation package more than 37 days before the foreclosure sale date?

BACKGROUND

Appellant purchased the Property on March 30, 2007. She obtained a mortgage loan in the amount of $376,000 and executed a promissory note, secured by a deed of trust to the Property.[3] Nationstar Mortgage, LLC (Nationstar) is the secured party and mortgage servicer.

In December 2011, appellant defaulted on her mortgage payments because her "household income decreased considerably due to the economy." In addition, she and her husband were injured in car accidents which caused them to incur medical bills. On March 14, 2012, appellees, as required by statute, sent to appellant a notice of intent to foreclose with supporting information. On July 24, 2013, appellees filed an action to foreclose. In September 2013, appellant was reviewed for a loan modification. The offer for modification was denied based on appellant's debt-to-income ratio. In October 2013, appellant was again reviewed for loss mitigation options, but she declined the modification offer.

On April 24, 2014, appellees filed a Final Loss Mitigation Affidavit ("Final Affidavit"). In response, appellant requested mediation pursuant to Maryland Rule 14-209.1(c)[4] and § 7-105.1(k) of the Real Property Article (RP) of the Maryland Code (2015

[3] Appellant's husband, Anthony Walker, lives with her and is a signator to the deed of trust, but he is not a co-obligor on the promissory note.

[4]Rule 14-209.1(c) provides that upon receipt of a notice of foreclosure, the borrower may file a request for foreclosure mediation.

Repl.Vol.).[5] The mediation took place on June 17, 2014, but it was unsuccessful. As a result, the court ordered that appellees could schedule the foreclosure sale. See RP § 7-105.1(m) (permitting scheduling of foreclosure sale after an unsuccessful mediation).

Following the mediation, the parties agreed that Nationstar would again consider a loan modification if appellant submitted a complete financial package by June 23, 2014. The agreement was confirmed by e-mail. The parties further agreed that while the application was being considered, no sale would occur, but if the complete application package was not provided, appellees would proceed with a sale. On June 20, 2014, counsel for appellant submitted an incomplete loan modification package.

Between June 20, 2014 and July 29, 2014, appellant's counsel submitted additional loan documents to Nationstar at Nationstar's request. Appellant's position is that the financial package was "facially complete" no later than July 11, 2014. Pursuant to 12 C.F.R. § 1024.41(c)(2)(iv)(2014), an application is facially complete when a borrower submits all the missing documents and information as requested pursuant to 12 C.F.R. § 1024.41(b)(2)(i)(B) or no additional information is requested. Appellees' position is that the application was not complete until July 24, 2014.

[5]Real Property § 7-105.1(k)(1) provides that within 5 days of receipt of a request for foreclosure mediation, the court shall transmit the request to the Office of Administrative Hearings for scheduling. Pursuant to § 7-105.1(k)(2)(i), the Office of Administrative Hearings shall conduct the mediation within 60 days of receipt of the transmittal.

Appellees issued a notice of impending foreclosure sale on August 4, 2014, with a foreclosure sale date of August 28, 2014.[6] Appellant then filed an emergency motion to stay the foreclosure sale and to dismiss the foreclosure action. The court denied appellant's emergency motion, finding that appellant did not "state a valid defense or present [a] meritorious argument, pursuant to Md. Rule 14-211(b)" and "fail[ed] to state [a] factual and legal basis, pursuant to Md. Rule 14-211(a)(3)(B)." On August 28, 2014, the Property was sold at foreclosure to AMT Homes LLC, a third-party purchaser. This appeal followed. The circuit court granted a stay pending appeal.

DISCUSSION

I.
Standard of Review

Pursuant to Md. Rule 14-211(a)(1), a borrower may petition for an injunction to stay a foreclosure sale of property and for dismissal of the foreclosure action. Rule 14-211(b)(1) provides:

> (1) *Denial of Motion*. The court shall deny the motion, with or without a hearing, if the court concludes from the record before it that the motion:
>
> > (A) was not timely filed and does not show good cause for excusing non-compliance with subsection (a)(2) of this Rule;

[6] We note that the initial notice of intent to foreclose dated March 14, 2012, indicated that the date of default was December 2, 2011. Over two (2) years elapsed before the foreclosure notice was issued on August 5, 2014, indicating an extended history of non-payment.

> (B) does not substantially comply with the requirements of this Rule; or
>
> (C) does not on its face state a valid defense to the validity of the lien or the lien instrument or to the right of the plaintiff to foreclose in the pending action.

Rule 14-211(a)(3)(B) provides that the motion shall be (1) under oath or supported by affidavit and (2) "state with particularity the factual and legal basis of each defense" to the validity of the lien or the right to foreclose.

"The grant or denial of injunctive relief in a property foreclosure action lies generally within the sound discretion of the trial court." *Anderson v. Burson*, 424 Md. 232, 243 (2011)(citations omitted). Ordinarily, we review the circuit court's denial of a foreclosure injunction for an abuse of discretion. *Burson v. Capps*, 440 Md. 328, 342 (2014)(citations omitted). "We will reverse under this standard if we determine that 'no reasonable person would take the view adopted by the [trial] court[.]'" *Fishman v. Murphy ex rel. Estate of Urban*, 433 Md. 534, 546 (2013)(quoting *Aventis Pasteur, Inc. v. Skevofilax*, 396 Md. 405, 419 (2007)). Here, appellant contends the court committed an error of law. We review the trial court's legal conclusions *de novo*. *Buckingham v. Fisher,* 223 Md. App. 82, 92-93 (2015).

II.
Analysis

The Real Estate Settlement Procedures Act of 1974 (RESPA) became effective on June 20, 1974. 12 U.S.C. § 2601, *et seq*. In 2010, Congress enacted the Dodd-Frank Wall

Street Reform and Consumer Protection Act and, in so doing, granted rule-making authority under RESPA to the Consumer Financial Protection Bureau (CFPB). Pub. L. 111-203 (July 10, 2010), 12 USC §§ 5491, 5511, 5512,5513; 15 USC § 1639d. Subsequently, the CFPB issued a final rule amending Regulation X of RESPA, effective January 10, 2014. One of the specific provisions of Regulation X at issue is subsection 1024.41(g), governing loss mitigation, which provides:

> Prohibitions on foreclosure sale. If a borrower submits a complete loss mitigation application after a servicer has made the first notice or filing required by applicable law for any judicial or non-judicial foreclosure process but more than 37 day before a foreclosure sale, a servicer shall not move for foreclosure judgment or order of sale, or conduct a foreclosure sale.

12 C.F.R. § 1024.41(g) (2014).

Appellant observes that the CFPB, *inter alia*, intended to restrict dual tracking. Dual tracking is when a mortgage servicer moves forward with foreclosure while exploring alternative measures. See CFPB Rules Establish Strong Protections for Homeowners Facing Foreclosure, CFPB at 1-5 (Jan. 17, 2013), a publication issued by the CFPB. Consistent with that goal, § 1024.41(g) provides that if a borrower submits a complete loss mitigation package more than 37 days before a sale, the servicer may not pursue foreclosure until after the modification is denied. The 37-day requirement explains the relevance of the parties' disagreement as to when appellant's loan modification package was complete. Appellant points out that the notice of foreclosure sale was dated August 4, 2014, and was received on August 7, 2014. Thus, the sale was scheduled while appellant's loan modification request

was pending. Appellant argues that the loss mitigation package that she submitted on June 20, 2014, was facially complete on July 11, 2014, more than 37 days before August 28, 2014 (the foreclosure sale date); therefore, the court should not have permitted Nationstar to proceed with the foreclosure sale because Nationstar had not yet completed its loss mitigation review. Appellant also argues that Regulation X preempts State law to the contrary, specifically, RP § 7-105.1(m).

Appellant relies on *Wells Fargo Home Mortgage, Inc. v. Neal*, 398 Md. 705 (2007) for the proposition that a violation of a mortgage servicing regulation may be grounds to stay a foreclosure sale because the violation invalidates a declaration of mortgage default. In *Neal*, the Court of Appeals held that an alleged violation of federal HUD regulations did not constitute an affirmative cause of action for breach of contract, but the borrower could raise the alleged violation as a defense to foreclosure. *Id*. at 719, 727. Appellees argue that, in *Neal*, the loan was insured by the Federal Housing Administration, secured by a deed of trust that referred to mortgage servicing regulations of the Department of Housing and Urban Development. In contrast, according to appellees, the deed of trust in the case before us does not mention mortgage servicing regulations, and thus, there is no basis for an argument for incorporation by reference.

Appellees argue that the loan modification package (1) was not timely because it was not submitted by the agreed date of June 23, 2014 and (2) was not complete until July 24,

2014, less than 37 days before the foreclosure sale. Thus, as to the latter argument, appellees conclude there was no violation of the regulation.

Appellees also argue that § 1024.41(g) does not apply because appellant was previously reviewed for loss mitigation options in 2013, and Nationstar was under no obligation to review Walker yet again. Appellees rely upon subsection (i) of the regulations, which provides: "Duplicative requests. A servicer is only required to comply with the requirements of this section for a single complete loss mitigation application for a borrower's mortgage loan account." 12 C.F.R. § 1024.41(i).

Appellant responds that her 2013 loss mitigation evaluations are irrelevant because they occurred prior to the regulation's effective date of January 10, 2014. Therefore, she claims that the prohibition against duplicative requests found at 12 C.F.R. § 1024.41(i) does not bar her January 20, 2014 application because it was her first application after the regulations became effective. Appellant maintains that Regulation X is not retroactive, and applying it to pre-regulation activity or communications would constitute a retroactive application.

Appellant's sole argument on appeal is that Nationstar was not permitted to schedule a foreclosure sale while her loss mitigation application was pending. She does not assert that Nationstar was obligated to grant a loan modification or that Nationstar violated any requirement of Regulation X other than dual tracking. We conclude that there was no

violation of Regulation X because appellant was not entitled to a loss modification review in 2014. Consequently, we need not address the other issues.

We look to the legislative history of Regulation X and the loss mitigation regulations for guidance in resolving the parties' conflicting interpretations of the relevant provisions. Before doing so, we note our agreement with the position of both parties that Regulation X is not retroactive. There is nothing in the language or legislative history indicating that it should have retroactive effect.

"[I]n determining a statute's meaning, courts may consider the context in which the statute appears, including related statutes and legislative history." *Ridge Heating, Air Conditioning & Plumbing, Inc. v. Brennen, et ux.*, 366 Md. 336, 350-51 (2001). When seeking to determine legislative intent, "the court may consider the consequences resulting from one meaning rather than another, and adopt that construction which avoids an illogical or unreasonable result or one which is inconsistent with common sense." *Kaczorowski v. Mayor & City Council of Baltimore*, 309 Md. 505, 513 (1987)(citation omitted). "[O]ur endeavor is always to seek out the legislative purpose, the general aim or policy, the ends to be accomplished, the evils to be redressed by a particular enactment." *Morris v. Prince George's County*, 319 Md. 597, 603-04 (1990)(citations omitted).

C.F.R. § 1024.38 contains a statement of the objectives of the mortgage servicing requirements. With respect to loss mitigation applications, it requires servicers to provide accurate and timely information to borrowers and properly evaluate a loss mitigation

application. The CFPB's final rule and official interpretations regarding the loss mitigation regulations provide relevant insight to the prohibition against multiple requests:

> The Bureau believes that it is appropriate to limit the requirements in §1024.41 to a review of a single complete loss mitigation application. Specifically, the Bureau believes that a limitation on the loss mitigation procedures to a single complete loss mitigation application provides appropriate incentives for borrowers to submit all appropriate information in the application and allows servicers to dedicate resources to reviewing applications most capable of succeeding on loss mitigation options[.]

Mortgage Servicing Rules Under the Real Estate Settlement Procedures Act (Regulation X) 78 Fed.Reg. 10696, 10836 (Feb. 14, 2013).

It is apparent that the deliberate inclusion in the regulations of a limitation as to a single loan application per borrower was based on a policy decision that the allocation of available resources to a single application serves the best interests of borrowers and loan servicers alike. The CFPB's response to comments further indicates that the CFPB recognized that some mortgage loan servicers were already providing loss mitigation options to borrowers in default:

> Potential benefits and costs to consumers. . . . [T]he benefits discussed below are mitigated to the extent that servicers are already in compliance with the provision of § 1024.41. For example servicers that are servicing loans subject to investor or guarantor loss mitigation requirements, such as requirements imposed by Fannie Mae, Freddie Mac, or government insurance programs, or servicers subject to regulatory consent orders or the national mortgage settlement, must already comply with policies regarding evaluation of a loss mitigation application for a loss mitigation option.

78 Fed.Reg. 10696, 10858.

In cases in which borrowers had been receiving mitigation loss assistance, the enactment of the loss mitigation regulations would be of limited added benefit.

We conclude that the objectives of the loss mitigation regulations were met in this case. According to the Final Affidavit filed in the circuit court, appellant was reviewed for loss mitigation on two previous occasions.[7] She was reviewed on September 23, 2013, pursuant to the Home Affordable Modification Program. She was denied a modification because her debt-to-income ratio was less than 31%, and therefore, she did not meet the minimum requirements for modification under that program. She was reviewed again on October 18, 2013, but she declined the modification offered to her. In an affidavit, appellant stated that her "attempt to get a modification through NACA, the Neighborhood Assistance Corporation of America, in 2013 was unsuccessful." It is unclear whether the NACA application is one of the two modification applications referenced in the Final Affidavit or whether the NACA application constituted a third application in 2013. In any event, it is undisputed that appellant was reviewed for at least one loan modification prior to the June 20, 2014 application.

[7] In her reply brief, appellant argues that this Court should not consider the Final Affidavit "without supporting documentation." The Final Affidavit was filed in the circuit court with the Notice of Foreclosure Action and is included in the record on appeal. There is no indication in the record that appellant challenged the accuracy of the Final Affidavit in the circuit court or, for that matter, in this Court. *See* Maryland Rule 2-322 ("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[.]"). *See also Strauss v. Strauss*, 101 Md.App. 490, 509 n.4 (1994)("A reply brief cannot be used as a tool to inject new arguments.").

All parties agree that the substantive provisions in Regulation X do not apply to the pre-2014 loss mitigation reviews. Appellant does not argue that the process required by Regulation X is different from the process that was in fact followed in 2013. Thus, appellant received the benefit of loss mitigation review. Appellant points to language in a publication by the CFPB entitled Help for Struggling Borrowers, at 27 (Jan. 28, 2014), which provides:

> These new rules became effective on January 10, 2014. Any borrower who files a complete loss mitigation application on or after January 10, 2014 and more than 37 days before a foreclosure sale is entitled to an evaluation of the complete loss mitigation application for all available loss mitigation options (so long as the conditions of 12 C.F.R.1024.41 are met). The servicer must conduct this evaluation even if the borrower previously filed for, or was granted, or was denied a loss mitigation plan before January 10, 2014.

Publications by the CFPB do not have the force of law and, as acknowledged in the publication, "is not a substitute for the rules." In addition, the quoted passage above states that the conditions of § 1024.41 must be met. As stated in that section, a servicer is only required to evaluate one loss mitigation application.

Consistent with the policy objectives of the loss mitigation regulations, we conclude that appellant's June 20, 2014 loan modification application was a duplicative request. Accordingly, appellant's claim that Nationstar violated Regulation X by scheduling a foreclosure sale before completing the review of her June 20, 2014 loan modification application is not a defense to Nationstar's foreclosure action.

JUDGMENT OF THE CIRCUIT COURT FOR PRINCE GEORGE'S COUNTY AFFIRMED.
COSTS TO BE PAID BY APPELLANT.