Circuit Court for Prince George's County
Case No. CAE09-23115

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 2247

September Term, 2016

ANDRE L. PERRY

v.

JOHN S. BURSON, ET AL.

Eyler, Deborah S.,
Berger,
Leahy,

JJ.

Opinion by Eyler, Deborah S., J.

Filed: December 26, 2017

Andre Perry, the appellant, challenges an order of the Circuit Court for Prince George's County denying his motion to vacate a deficiency judgment and writ of garnishment entered against him. Perry presents four questions for review, which we have consolidated and rephrased:[1]

I. Did the circuit court err by denying his motion to vacate the deficiency judgment?

II. Did the circuit court err by denying his motion to vacate the writ of garnishment?

[1] Perry's questions are:

1. In light of Maryland Rule 14-216, which provides that a deficiency judgment may be requested "[a]t any time within three years after the final ratification of the auditor's report," was Appellee's request for a deficiency judgment too late because it was filed on September 3, 2013, more than three years after the Circuit Court finally ratified the auditor's report on August 30, 2010?
2. Did the Circuit Court err in entering and later failing to vacate a deficiency decree requested after the three-year period allowed under Maryland Rule 14-216 had already expired?
3. Did the Circuit Court err in refusing to quash service on Appellant of Appellee's motion for a deficiency decree on September 3, 2013, when Appellee simply mailed a copy of the motion to an unverified address for Appellant, rather than serve him pursuant to Maryland Rule 2-121 as required by Rule 14-216, particularly after Appellees' predecessor in interest waived seeking a deficiency decree as part of the foreclosure action?
4. Did the Circuit Court err in denying Appellant's motion for a return of all wages garnished from him on the basis of a time-barred deficiency judgment?

We hold in response to the first question that Perry's motion to vacate the deficiency judgment was properly denied. Accordingly, we need not consider the second question, as it presupposes error in denying the motion to vacate the deficiency judgment.

FACTS AND PROCEEDINGS

On December 29, 2005, Perry obtained a loan from Bank of America, N.A., to purchase residential real property located in Brandywine, Maryland ("the Property"). He executed an adjustable rate note ("Note") promising to pay $296,000 plus interest to Bank of America, N.A., or "anyone who takes th[e] Note by transfer." The Note was secured by a deed of trust ("Deed of Trust") encumbering the Property.

In 2008, Perry defaulted on the Note. Bank of America, N.A., appointed the substitute trustees,[2] the appellees, and on August 3, 2009, they filed an Order to Docket. On August 19, 2009, an affidavit of service was filed showing that Perry was personally served with the Order to Docket on August 14, 2009.

On October 16, 2009, the Property sold at auction for $192,488. On June 2, 2010, the circuit court entered an order ratifying the foreclosure sale. The case was referred to an auditor who issued a report stating that, after accounting for the proceeds from the sale of the Property, a deficiency of $143,987.47 remained. On August 30, 2010, the circuit court issued an order ratifying the auditor's report. That order was entered on the docket on September 7, 2010.

[2] The substitute trustees were John Burson, William Savage, Gregory Britto, Jason Murphy, Kristine Brown, and Erik Yoder.

The Note was assigned to Dyck-O'Neal, Inc. ("D-O") in 2012. On September 3, 2013, in the foreclosure case, D-O filed a motion for deficiency judgment against Perry. A copy of the motion was sent to Perry by first class mail, at 4510 Lords Landing Road, Apt. 302, Upper Marlboro, Maryland 20772. Perry did not file a response to the motion. On September 17, 2013, the court entered judgment in favor of D-O against Perry in the amount of $143,987.47, plus pre-judgment interest of $9,652.56 and prospective interest of $8.88 per day until the judgment was satisfied.

On December 11, 2015, D-O sought a writ of garnishment of Perry's wages. The court issued the writ on January 11, 2016, and Perry's wages have been garnished since then.

On May 26, 2016, Perry filed a motion to vacate the September 17, 2013 deficiency judgment and the January 11, 2016 wage garnishment for lack of personal jurisdiction. This was Perry's first appearance in the matter despite having been personally served on August 14, 2009. On July 20, 2016, the court entered an order denying his motion. Perry noted a timely appeal.

On September 20, 2016, while his appeal was pending, Perry filed another motion to vacate the deficiency judgment and writ of garnishment. He argued that D-O's motion for deficiency judgment was filed too late, under Rule 14-216(b), which provides that a motion for deficiency judgment must be filed within three years after the final ratification of the auditor's report, and therefore the deficiency judgment was "void *ab initio*." He also argued that D-O's predecessor in interest had waived its, and therefore D-O's, right

to request a deficiency judgment without filing a separate action.[3] In one sentence, without any argument, Perry mentioned that the deficiency judgment had been "mistakenly entered" and referenced Rule 3-535(b)—apparently a mis-citing of Rule 2-535(b)—that gives the court revisory power, at any time, over judgments in case of fraud, mistake, or irregularity.

D-O filed an opposition to Perry's motion, asserting that it properly had moved for a deficiency judgment because it filed its motion within three years after the court *entered* its order ratifying the auditor's report. D-O also argued that its right to seek a deficiency judgment had not been waived. Finally, D-O asserted that the court could not vacate the deficiency judgment under Rule 2-535(b) because Perry had not shown fraud, mistake, or irregularity.

Perry filed a reply, stating that the deficiency judgment was issued by "mistake," or was an "irregularity," because the judgment was not requested in the requisite three years.

In a memorandum opinion and order entered on December 8, 2016, the court denied Perry's second motion to vacate. Observing that Perry had "failed to provide th[e] Court with any legal grounds or meritorious reasons that might persuade it to grant the

[3] After the sale of the Property at foreclosure but before the sale was ratified, the substitute trustees had filed a "praecipe" stating: "The Clerk will please note that at this time the Noteholder will not seek a deficiency decree. Your Substitute Trustees will waive their right to seek the deficiency judgment in this foreclosure case; the right to seek a deficiency judgment at law is reserved."

motion[,]" the court stated that "pursuant to the version of Md. Rule 2-601(b) in effect at the time said judgment was entered [2013], the proper date of the judgment was the date of entry rather than the date on which the judgment was signed." Therefore, "the ratification of the auditor's report was entered on September 7, 2010," and the motion for deficiency judgment was timely filed.

On December 14, 2016, Perry filed a notice of dismissal of his appeal from the order denying his first motion to vacate. He then filed another timely notice of appeal, from the order denying his second motion to vacate.

DISCUSSION

We review a trial court's denial of a motion to vacate under Rule 2-535(b) for abuse of discretion. *Das v. Das*, 133 Md. App. 1, 15 (2000) (citing *Wormwood v. Batching Sys., Inc.*, 124 Md. App. 695, 700 (1999)). "The abuse of discretion standard makes generous allowances for the trial court's reasoning." *Id.* Nevertheless, courts "do not have discretion to apply inappropriate legal standards, even when making decisions that are regarded as discretionary in nature." *Wilson-X v. Dep't of Human Res.*, 403 Md. 667, 675 (2008). On any decision on a question of law, we apply a non-deferential standard of review. *Ehrlich v. Perez*, 394 Md. 691, 708 (2006) (citing *Matthews v. Maryland- Nat'l Capital Park & Planning Comm'n*, 368 Md. 71, 92 (2002)).

Perry contends the circuit court erred in three ways by denying his second motion to vacate. First, he maintains that D-O did not file its request for a deficiency judgment in the time prescribed by Rule 14-216(b). Specifically, D-O moved for the deficiency

judgment more than three years after the court signed its order ratifying the auditor's report. Second, Perry argues that he was not properly served because, under the terms of a "praecipe" filed by the substitute trustees, D-O was required to initiate a new action to pursue a deficiency judgment, and that would require personal service of the motion on him. Finally, Perry asserts that the motion for deficiency judgment was not served on him in accordance with Rules 2-121 and 14-216(b). D-O disagrees with each of these arguments and further maintains that Perry did not make any showing of fraud, mistake, or irregularity that would permit the court to vacate the deficiency judgment under Rule 2-535(b).

Rule 2-535 governs the revisory power of a circuit court. Generally, the court has broad revisory power over judgments within the first 30 days after they are entered. Md. Rule 2-535(a). Beyond that time, except in instances of newly discovered evidence or clerical mistakes, neither of which apply here, the court's revisory power is strictly limited: it "may exercise revisory power and control over [a] judgment in case of fraud, mistake, or irregularity." Md. Rule 2-535(b). The court's revisory power includes the power to vacate judgments. *See, e.g., Fleisher v. Fleisher Co.*, 60 Md. App. 565 (1984). When a party seeks to vacate a judgment under Rule 2-535(b), "[t]he existence of fraud, mistake, or irregularity must be shown by clear and convincing evidence." *Pelletier v. Burson*, 213 Md. App. 284, 290 (2013) (internal quotations omitted).

Perry's second motion to vacate the deficiency judgment and the garnishment order was filed on September 20, 2016, more than three years after the deficiency

judgment was entered, and more than six months after the garnishment order was entered. Thus, the court's power to revise clearly was controlled, and constrained, by Rule 2-535(b). Before this Court, however, Perry offers no argument that he made a showing of fraud, mistake, or irregularity.

"'Maryland courts have narrowly defined and strictly applied the terms fraud, mistake, [and] irregularity, in order to ensure finality of judgments.'" *Id.* (quoting *Thacker v. Hale*, 146 Md. App. 203, 217 (2002)). Mistake is limited "to jurisdictional error, such as where the court lacks the power to enter judgment." *Green v. Ford Motor Credit Co.*, 152 Md. App. 32, 51–52 (2003) (citing *Claibourne v. Willis*, 347 Md. 684, 692 (1997)). In this case, Perry made no showing below that the court lacked subject matter jurisdiction. His only argument was that D-O filed its motion for deficiency judgment beyond the timeframe required by Rule 14-216(b). Limitations is not a jurisdictional issue. *See Kumar v. Dhanda*, 198 Md. App. 337, 350 (2011) ("Limitations is an affirmative defense that will be waived if not raised, and therefore is not jurisdictional." (citing *Brooks v. State*, 85 Md. App. 355, 364 (1991))). In his second motion, he did not challenge the court's personal jurisdiction over him, as he did in his first motion. Moreover, the affidavit of service in the record shows that Perry was personally served with the Order to Docket in August 2009. Accordingly, there was no jurisdictional mistake that could have given the court the power to revise the deficiency judgment or the order of garnishment under Rule 2-535(b).

In the context of Rule 2-535(b), irregularity "means 'a failure to follow required process or procedure.'" *Thacker*, 146 Md. App. at 219 (quoting *Early v. Early*, 338 Md. 639, 652 (1995)). "Irregularities warranting the exercise of revisory power most often involve a judgment that resulted from a failure of process or procedure by the clerk of a court, including, for example, failures to send notice[,] to mail notice to the proper address, and to provide for required publication." *Id.* at 219–20 (citing examples). "[T]he Court of Appeals consistently has rejected attempts to exercise revisory power over judgments that have been called into question on their merits, rather than on the basis of questionable procedural provenance." *Id.* at 220. Here, Perry is challenging the deficiency judgment on substantive grounds—*i.e.,* that it was void *ab initio* because the motion requesting it was untimely—not on any procedural ground.

There simply was no procedural error in this case that would constitute an irregularity. D-O mailed Perry a copy of the motion for deficiency judgment in accordance with the Maryland Rules that were in effect at the time. The 2013 version of Rule 14-216(b) provided that "[i]f the person against whom the judgment is sought is a party to the action, the motion shall be served in accordance with Rule 1-321. Otherwise, the motion shall be served in accordance with Rule 2-121[.]"[4] Because Perry was a party to the foreclosure action, D-O's motion was to be served in accordance with Rule 1-321, which stated "[s]ervice . . . upon a party shall be made by delivery of a copy [of the

[4] The current version of the Rule (2017), only allows for service in accordance with Rule 2-121, even if the person to be served is a party to the action.

pleading] or by mailing it . . . to the last known address." According to the certificate of service in the record, D-O mailed a copy of its motion for deficiency judgment on August 30, 2013, to Perry's Lords Landing address, where Perry later acknowledged (in his affidavit in support of his first motion to vacate) he was living at the time.

In sum, Perry did not offer the court any evidence of mistake or irregularity (or fraud) that would allow the court to vacate the deficiency judgment or the garnishment order.

Even though the court did not have any basis to grant Perry's motion to vacate under Rule 2-535(b), we nevertheless shall address the arguments Perry makes on appeal.

Perry's main argument is that the court improperly entered the deficiency judgment against him because D-O was too late in filing its motion for deficiency judgment under Rule 14-216(b). When the deficiency judgment was entered, Rule 14-216(b) provided:

> **Deficiency Judgment.** At any time within three years after the final ratification of the auditor's report, a secured party or any appropriate party in interest may file a motion for a deficiency judgment if the proceeds of the sale, after deducting all costs and expenses allowed by the court, are insufficient to satisfy the debt and accrued interest.

The court signed an order ratifying the auditor's report on August 30, 2010. That order was entered on September 7, 2010. D-O filed its motion for deficiency judgment on September 3, 2013—more than three years after the court *signed* the ratification order, but less than three years after the order was *entered*.

Perry maintains that under the plain language of Rule 14-216(b), an auditor's report is finally ratified when the court signs the order ratifying it. He reasons that this is so because there is no variation of the word "enter" in the rule. D-O maintains that Rule 14-216(b) must be read in conjunction with Rule 2-601(b), which provides that the date of a judgment is the date the clerk enters it on the docket. Accordingly, the auditor's report is not finally ratified until the order doing so is entered.

In 2013, Rule 2-601(b) stated:

> The clerk shall enter a judgment by making a record of it in writing on the file jacket, or on a docket within the file, or in a docket book, according to the practice of each court, and shall record the actual date of entry. *That date shall be the date of the judgment*.

(Emphasis added.) A judgment "means any order of court final in its nature entered pursuant to these [Maryland] rules." Md. Rule 1-202(o). This includes a court's order ratifying an auditor's report. *See Fetting v. Flanigan*, 185 Md. 499, 506 (1946) ("'An order finally ratifying and confirming an auditor's report and account is an order in the nature of a final decree from which an appeal will lie. *It is in every sense a judgment of the Court*; for although it may not constitute a part of the final judgment on the whole case, it is nevertheless always considered as a judgment conclusive of the matter to which it relates[.]'" (quoting Miller's Equity Procedure, § 552, p. 650)) (emphasis added).

In *Hobby v. Brown*, 222 Md. App. 1, 15 (2015), this Court held that an order granting a motion to dismiss a foreclosure proceeding did not take effect until the day it was entered on the docket (June 5, 2013), even though the court signed the order one month earlier (May 3, 2013). Accordingly, the foreclosure sale that occurred in the

interim (May 21, 2013) was not conducted illegally, even though the sale took place after the court signed an order dismissing the foreclosure proceeding. Relying on Rule 2-601(b), we explained that "a judgment is only effective after it has been signed *and* entered into the record for a particular case." *Id.* (emphasis in original). We reasoned "that until a court order is entered into the case record or docketed, the parties to the litigation have no knowledge of it or the date upon which it was signed." *Id.*

In this case, D-O timely filed its motion for deficiency judgment when it filed the motion within three years from the date of entry of the order ratifying the auditor's report. Before entry, the ratification of the report was not effective. Perry is correct that Rule 14-216(b) does not expressly say that the final ratification must be entered, but because an order of ratification is a judgment, we cannot ignore the plain language of Rule 2-601(b).

Finally, we turn to Perry's other argument—that D-O's predecessors in interest waived its right to pursue a deficiency judgment in the foreclosure action. Perry argues that according to the "praecipe" that was filed by the substitute trustees around the time of the foreclosure sale, D-O was precluded from seeking a deficiency judgment in the foreclosure action. Perry is mistaken. The "praecipe" states: "The Clerk will please note that *at this time* the Noteholder will not seek a deficiency decree. Your Substitute Trustees will waive their right to seek the deficiency judgment in this foreclosure case; *the right to seek a deficiency judgment at law is reserved*." (Emphasis added). Nothing

in the "praecipe" prevented a future noteholder from seeking a deficiency judgment in the foreclosure action.[5]

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

[5] Perry also argues that he was not properly served with D-O's motion for deficiency judgment under Rule 2-121, as required by Rule 14-216(b). He did not make this argument below, however, and therefore the issue is not preserved for review. Md. Rule 8-131. In any event, we note that Perry is mistakenly relying on the 2017 version of the Maryland Rules; he was properly served under the version of Rule 14-216(b) that existed at the time.