Circuit Court for Montgomery County
Case No. 455635V

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 2163

September Term, 2019

FIRST HORIZON HOME LOAN CORPORATION

v.

KEVIN P. JAY, ET AL.

Nazarian,
Leahy,
Wells,
JJ.

Opinion by Leahy, J.

Filed: January 10, 2022

This appeal of a default judgment entered by the Circuit Court for Montgomery County comes wrapped in a puzzling procedural history. In June 2013, appellee, Mr. John Jay received an offer to sell his home on Rockcrest Circle in Rockville, Maryland. Although he wished to accept the offer, Mr. Jay could not clear title to the property because of an outstanding home equity line of credit ("HELOC"). Mr. Jay's attempts to reach the lender, First Horizon Home Loan Corporation ("FHHLC"), were unsuccessful. FHHLC had apparently gone out of business without having re-assigned its interest in his property. Therefore, in October 2018, Mr. Jay filed a complaint in the circuit court to obtain a release of the lien. The complaint named as defendants FHHLC and the trustee of the deed of trust securing the HELOC, Mr. Larry Rice.

After neither FHHLC nor Mr. Rice responded to the complaint, Mr. Jay moved for orders of default against them. In his motion against FHHLC, Mr. Jay asserted that because the company was no longer in good standing and did not have a resident agent in Maryland, it was properly served when his private process server served the State Department of Assessments and Taxation ("SDAT"). In a separate motion, he stated that Mr. Rice had been served personally. The circuit court entered orders of default against FHHLC and Mr. Rice on January 7, 2019 and on February 6, 2019 respectively. After neither party responded to the orders of default, Mr. Jay moved for the entry of default judgments against the parties, which the circuit court granted in March 2019. The orders accompanying the court's decisions released the lien on Mr. Jay's property.

Four months later, in July 2019, appellant, First Tennessee Bank National Association ("FTBNA"), filed a motion to vacate the default judgment against FHHLC and a notice of *lis pendens*. FTBNA claimed it was the surviving entity of a 2007 merger between FHHLC and FTBNA. FTBNA asserted that FHHLC's interest in Mr. Jay's property was assigned to it as part of the merger, and the default judgment entered against FHHLC should be vacated because FTBNA was not properly served with process. On September 10, 2019 the circuit court, without holding a hearing or issuing a memorandum opinion, granted FTBNA's motion to vacate the default judgment and reinstated the lien on Mr. Jay's property.

Mr. Jay then moved for reconsideration. On December 3, 2019, the circuit court, again without holding a hearing or issuing a memorandum opinion, granted Mr. Jay's motion and released the lien and *lis pendens* on the property. FTBNA appeals and presents three questions for our review,[1] which we have rephrased and consolidated into one:

[1] The "Questions Presented" in FTBNA's brief are as follows:

A. "Whether the trial court erred when it denied the Motion to Vacate (and granted the Motion for Reconsideration) because the defaulted defendant was not properly served with process and did not learn about the lawsuit until after default judgment was entered.
B. Whether the trial court erred when it denied the Motion to Vacate (and granted the Motion for Reconsideration) because the defendant demonstrated that it acted in good faith and with diligence and that it had meritorious defense to the complaint.
C. Whether the trial court abused its discretion by not stating its rationale in denying the Motion to Vacate and granting the Motion for Reconsideration and by not holding hearing on the Motion to Vacate."

> Did the trial court err when it granted Mr. Jay's Motion for Reconsideration, without holding a hearing, despite FTBNA's allegations that it was not properly served with process?

On the factual record before this Court, we cannot determine if the circuit court erred in granting Mr. Jay's motion for reconsideration. Accordingly, we remand the case to the circuit court under Maryland Rule 8-604(d) so that the court may make factual findings as to whether FHHLC—or FTBNA as successor—was properly served with process and whether the court should exercise its revisory power under Maryland Rule 2-535(b).

For guidance on remand, we explain that several documents submitted by FTBNA qualify as self-authenticating under Maryland Rule 5-902, and that Mr. Jay is incorrect in his contention that service of process on the trustee, Mr. Rice, was binding on FHHLC and/or FTBNA (as successor), such that proper service of process on the trustee foreclosed the right of FHHLC and/or FTBNA to challenge the default judgment.

BACKGROUND

Mr. Jay became the fee simple owner of the real property located at 16 Rockcrest Circle, Rockville, Maryland, in September 2006. Later that year, he obtained a HELOC from FHHLC with a maximum principal amount of $105,000.00. FHHLC secured the HELOC with a Maryland Open-End Deed of Trust ("the Deed of Trust").[2] The Deed of Trust designated FHHLC as the beneficiary and listed the company's address as 4000

[2] An open-ended deed of trust is an instrument that allows a party to "borrow additional funds against the same property." *Open-End Mortgage*, Black's Law Dictionary (11th ed. 2019).

Horizon Way, Irving, Texas 75063. Mr. Larry Rice was appointed as trustee of the Deed of Trust, and his address was listed as 12150 Monument Dr., Suite 300, Fairfax, VA 22034.

Merger

In May 2007, FHHLC merged into FTBNA. The Agreement to Merge established that FHHLC was transferring "all [of its] rights, franchises, and interests . . . in and to every type of property (whether real, personal, or mixed)" to FTBNA,[3] and that FTBNA assumed all of FHHLC's "existing liabilities." Despite this transaction, FTBNA did not file a certificate of merger with the Maryland SDAT but did register the trade name "First Horizon Home Loans, A Division of First Tennessee Bank" with an updated address in Memphis, Tennessee.

[3] The pertinent paragraph of the Agreement to Merge states:

> Upon and as of the Effective Time of the Affiliative **Merger, the corporate existence of FHHLC and FTBNA shall . . . be merged into and continued in Survivor**. Upon and as of the Effective Time of the Affiliate Merger, all rights, franchises, and interests of FHHLC and FTBNA, respectively, in and to every type of property (whether real, personal, or mixed) and choses in action shall be transferred to, and vested in FTBNA by virtue of the Affiliate Merger becoming effective without any deed or other transfer, and FTBNA, without any order or other action on the part of any court or otherwise, shall hold and enjoy all rights of property, franchises and interests, including appointments, designations and nominations, and all other rights and interests as trustee, executor, administrator, registrar or transfer agent of stocks and bonds, guardian of estates, assignee, and receiver, and in every other fiduciary capacity, in the same manner and to the same extend as such rights, franchises, and interests were held or enjoyed by FHHLC or by the Survivor immediately before the Effective Time of the Affiliate Merger.

(Emphasis added).

Bankruptcy Petition

It was not until after FHHLC's merger with FTBNA that Mr. Jay filed for Voluntary Chapter 7 Bankruptcy in the United States Bankruptcy Court for the District of Maryland. FTBNA filed a proof of claim in the amount of $104,341.75 for money loaned on Mr. Jay's property, and the District of Maryland Claims Register listed FTBNA as a secured creditor in the proceeding. Thereafter, in September 2009, the bankruptcy court issued an order of discharge in favor of Mr. Jay which prohibited "any attempt to collect from the debtor a debt that has been discharged" but provided that "a creditor may have the right to enforce a valid lien, such as a mortgage or security interest, against the debtor's property after the bankruptcy, if that lien was not avoided or eliminated in the bankruptcy case."

Attempted Sale of the Property and Circuit Court Proceedings

In June 2018, Mr. Jay received an offer to sell his property. In an effort to provide clear title, Mr. Jay attempted to contact FHHLC without success. Mr. Jay concluded, as related in a later affidavit, that FHHLC appeared "to be out of business" and "no longer in good standing in Maryland." On October 4, 2018, Mr. Jay filed a three-count bill of complaint against FHHLC and Mr. Larry Rice (as trustee) in the Circuit Court for Montgomery County. Each count sought the release of the lien on Mr. Jay's property. Count I, entitled "Release of Lien- Discharge," alleged that the lien was discharged in Mr. Jay's previous bankruptcy proceeding under Maryland Rule 12-103. Count II, entitled "Release of Lien- Statute of Limitations," alleged that FHHLC was time-barred from bringing an action to collect on the HELOC because the property was "owner-occupied at

the time the [applicable] three-year statute of limitations ran for pursuing an action"; therefore, the Deed of Trust on the property should be released. Count III requested a declaratory judgment pursuant to Maryland Code (1973, 2013 Repl. Vol.), Courts and Judicial Proceedings Article ("CJP"), §§ 3-402 and 3-406 releasing the Deed of Trust and establishing that Mr. Jay owned the property "free and clear" of the lien.

After the clerk of the circuit court issued summonses, on October 9, 2018, a process server hand-delivered a copy of the complaint and summons issued for FHHLC to the "Window One Administrative Specialist" at the Maryland SDAT. In Mr. Jay's view, this method effectuated service of process on FHHLC because it was "no longer in good standing, no longer [had] a resident agent in Maryland and [was] apparently out of business." Mr. Rice, in his capacity as trustee, was served by hand delivery on November 26, 2018. The supplied writs of summons required that FHHLC and Mr. Rice "file a written response by pleading or motion in [the circuit court] to the attached complaint . . . within **60** days after service[.]"

After neither FHHLC nor Mr. Rice responded to the complaint, Mr. Jay filed motions for orders of default pursuant to Maryland Rule 2-613(b).[4] Mr. Jay filed his motion against FHHLC on December 27, 2018. In that motion, he asserted that FHHLC:

[4] Rule 2-613(b) provides:

> If the time for pleading has expired and a defendant has failed to plead as provided by these rules, the court, on written request of the plaintiff, shall enter an order of default. The request shall state the last known address of the defendant.

> is a former Kansas corporation with a principal place of business in Irving, Texas. [FHHLC] had been authorized to do business in Maryland but no longer is in good standing according to the [SDAT]. As [FHHLC] is no longer in good standing and, therefore, no longer has a resident agent, [Mr. Jay] served the [SDAT] pursuant to Md. Rule 2-124(o) on October 16, 2018. [Mr. Jay]'s private process server served the Window One Administrative Specialist, personally, at the [SDAT].

(Paragraph breaks omitted). He also listed FHHLC's last known address as 4000 Horizon Way, Irving, Texas 75063. Mr. Jay filed a similar motion against Mr. Rice on January 31, 2019. This motion asserted that Mr. Rice was personally served and that his last known address was on Foxclove Road in Oakton, Virginia. The circuit court entered an order of default against FHHLC on January 7, 2019 and against Mr. Rice on February 6, 2019. The orders noted that the matters were to be "referred to the Assignment Office to Schedule a hearing on the pending default judgment."

Entry of Default Judgments

On February 22, 2019 Mr. Jay filed a motion for entry of default judgments against FHHLC and Mr. Rice.[5] Mr. Jay argued that the court should enter judgment against both parties as neither had filed a motion to vacate within 30 days, as required under Maryland Rule 2-613(d).[6] He urged that entry of default judgments was appropriate as the underlying

[5] In the alternative, Mr. Jay requested that the court consolidate the two hearings in the event it determined that a hearing was necessary because, he claimed, the hearings would cover the same subject and require the same witness.

[6] At the time that Mr. Jay filed his motion for entry of default judgment, 30 days had not elapsed since the entry of Mr. Rice's order of default. *See* Md. Rule 2-613(d) ("The defendant may move to vacate the order of default within 30 days after its entry."). However, in the motion Mr. Jay clarified that he was not asking the court to enter a default judgment against Mr. Rice until the requisite 30 days had elapsed.

Deed of Trust was recorded among the land records of Montgomery County, and the clerk of the circuit court had mailed appropriate notice of the orders of default to FHHLC and Mr. Rice.

On March 4, 2019, the court entered a default judgment against FHHLC. The order released the lien on Mr. Jay's property and granted his request to consolidate the hearings on the default judgments.[7] Notice of the hearing date was mailed to FHHLC on March 6, 2019 and returned as undeliverable on March 13, 2019.

On March 12, 2019, Mr. Jay filed an additional motion for entry of default against Mr. Rice. This motion was filed more than 30 days after the order of default was entered against Mr. Rice, rendering it ripe for entry as a default judgment. The motion reiterated many of the same arguments in Mr. Jay's prior motion and asked the court to: (1) enter a default judgment against Mr. Rice; (2) cancel the scheduled default judgment hearing; (3) release the lien on Mr. Jay's property; and (4) grant other relief it deems just and proper. On March 25, 2019, the circuit court entered a default judgment against Mr. Rice. As requested, the order released the lien on Mr. Jay's property. Without explanation, the order also canceled the April 2019 hearing on the default judgments.

Default Judgment Against FHHLC Vacated

By June 2019 Mr. Jay's counsel was working to settle this matter with FTBNA's

[7] Despite the fact that the order entered a default judgment against FHHLC, the order stated that "the hearings on pending default judgments against First Horizon Home Loan Corporation and Larry Rice . . . are hereby consolidated and shall be set for April 4, 2019."

counsel.[8] Despite these communications, the parties did not reach an agreement and, on July 18, 2019, FTBNA filed a motion to vacate the default judgment. In addition to the motion to vacate, FTBNA filed a request for a notice of *lis pendens*, noting that it had filed the motion to vacate "to reinstate the validity of the lien *nunc pro tunc* to October 3, 2006."

In the motion to vacate, FTBNA argued that as a "successor by way of merger with [FHHLC]" it should have been served with process. Therefore, FTBNA averred, the default judgment entered against FHHLC was invalid because FTBNA was not served with process or informed about the lawsuit until after the default judgment was entered. FTBNA also asserted that its proof of claim in Mr. Jay's bankruptcy proceeding identified it as the holder of the HELOC. Thus, according to FTBNA, Mr. Jay "had actual and/or constructive knowledge before he filed the Complaint that [FTBNA] held the HELOC, was the beneficiary under the Deed of Trust, and was the true party in interest." Alternatively, FTBNA argued that Mr. Jay could have ascertained that it was the holder of the lien as it validly registered with SDAT the trade name "First Horizon Home Loans, a division of First Tennessee Bank National Association" following the merger.[9]

[8] After filing suit against FHHLC, Mr. Jay's counsel learned that FHHLC had merged with FTBNA. Coincidentally, counsel learned of the merger while representing Mr. Jay in a reformation action on a separate deed of trust. The financial institution that had acquired rights to the separate deed of trust was familiar with FHHLC's merger with FTBNA and informed counsel. Thereafter, in April 2019, Mr. Jay's counsel notified FTBNA's counsel of the pending litigation.

[9] FTBNA also argued that it acted in good faith, with diligence, and that it had a meritorious defense to the complaint. However, as discussed below, these considerations "do not apply to 'jurisdictional mistakes' that would render a default judgment void." *Peay*

(Continued)

In opposition, Mr. Jay argued that FTBNA's motion was "fundamentally flawed" and did not "present exceptional circumstances or irregularities sufficient to warrant" vacating the default judgment entered against FHHLC. As a threshold matter, Mr. Jay argued that FTBNA "appear[ed] to lack standing to move to vacate the default judgment" because it relied on "unauthenticated and inadmissible documents" to claim that it was the successor in interest to FHHLC. Mr. Jay also averred that he had properly served both Mr. Rice and FHHLC and that FTBNA had not offered any evidence to overcome the presumption that such service was valid. According to Mr. Jay, it was "[c]ritically fatal" that FTBNA did not move to vacate the default judgment entered against Mr. Rice. He asserted that because Maryland follows the title theory of mortgages, the Deed of Trust was recorded in Mr. Rice's name.[10] Therefore, he averred, because the circuit court properly entered a default judgment against Mr. Rice, FTBNA could not "secure the relief sought, as the [Deed of Trust], in the name of the legal title holder, ha[d] been properly released."

Mr. Jay further averred that, even if FTBNA is the successor entity of FHHLC, it "fails to even acknowledge the failure of [FHHLC] (or [FTBNA]) to properly update the corporate records for [FHHLC] with the Maryland [SDAT] or to file a simple assignment

v. Barnett, 236 Md. App. 306, 324 (2018). Therefore, we omit FTBNA's arguments on this point.

[10] Under the title theory of mortgages, "a mortgagee takes legal title to the mortgaged property subject to the mortgagor's equitable right of redemption." Marc B. Friedman, *Rentals Roulette: The Mortgagees's Rights to Rent Under Connecticut Law and ULSAI*, 24 Conn. L. Rev. 1093, 1094 (1992).

of the [Deed of Trust] to [FTBNA] in the Maryland Land Records." He posited that FTBNA did not explain how he could have discovered that FTBNA, and not FHHLC, was the proper party to serve. Therefore, Mr. Jay argued that the circuit court properly entered judgment against FHHLC and Mr. Rice pursuant to Maryland Rule 2-613(f) and that he was entitled to judgment as a matter of law.

On September 10, 2019, the circuit court, without holding a hearing or issuing a memorandum opinion, entered an order granting FTBNA's motion to vacate the default judgment. The court ruled that FTBNA was a "successor by way of merger" with FHHLC and ordered that the lien on Mr. Jay's property be reinstated "*nunc pro tunc* to October 12, 2006."

Default Judgment Against FHHLC Reinstated

On September 23, 2019, Mr. Jay filed a motion for reconsideration. He averred that the circuit court did not "receive or review" his opposition to FTBNA's motion to vacate as the court signed its order granting the motion one day after his opposition was filed. Mr. Jay incorporated all arguments made in his opposition and requested that the court reinstate the default judgment entered against FHHLC and strike the *lis pendens*.

In opposition to the motion to reconsider, FTBNA argued that Mr. Jay had not proffered "a valid legal basis to oppose vacating the improperly entered default judgment."[11] It was FTBNA's position that the circuit court was not required to hold a

[11] Prior to the filing of the motion to reconsider, FTBNA filed a motion to dismiss Mr. Jay's complaint.

hearing on the motion to vacate the default judgment because it was "not dispositive of this matter."

On December 3, 2019, again without holding a hearing or issuing a memorandum opinion, the circuit court granted Mr. Jay's motion for reconsideration. The order noted that FTBNA's motion to vacate the default judgment was denied and removed the *lis pendens* from Mr. Jay's property. FTBNA noted this timely appeal on December 30, 2019.

STANDARD OF REVIEW

We review a trial court's decision to alter or amend a default judgment under an abuse of discretion standard. *Peay v. Barnett*, 236 Md. App. 306, 315-16 (2018). However, "[t]he existence of a factual predicate of fraud, mistake, or irregularity, necessary to support vacating a judgment under Rule 2-535(b), is a question of law." *Wells v. Wells*, 168 Md. App. 382, 394 (2006). "Pure questions of law are reviewed de novo." *Montgomery Cnty. v. Jamsa*, 153 Md. App. 346, 352 (2003).

DISCUSSION

A. Parties' Contentions

FTBNA argues that the circuit court erred in granting Mr. Jay's motion for reconsideration because it was never properly served with process and did not learn about the action until after the default judgment was entered. FTBNA posits that a routine search of the SDAT filings would have revealed to Mr. Jay that FTBNA had validly registered the

trade name "First Horizon Home Loans, a Division of First Tennessee Bank National Association."

FTBNA contends that service of process on FHHLC via the Maryland SDAT was improper as a matter of law. This lack of service, argues FTBNA, constitutes an irregularity under Maryland Rule 2-535(b), which would be a "proper ground to strike a judgment."[12] Therefore, according to FTBNA, it "was a mistake for the [c]ourt to grant a default judgment and release FTBNA's lien against [Mr. Jay's property] because it was not served with notice of the Bill of Complaint—let alone served with service of process."

Mr. Jay responds by arguing that FTBNA lacks standing to request the court to vacate the default judgment because it relies entirely "upon unauthenticated and inadmissible documents" to claim that it is "the successor-in-interest to the prior lender." In Mr. Jay's view, "[a] bald claim of merger, without showing the acquisition of this Subject Deed, *in particular*, did not afford [FTBNA] standing in this case, let alone the basis to vacate the final judgment obtained below." Further, he asserts that FTBNA's argument is futile because Mr. Rice, as trustee, was properly served and a subsequent default judgment was properly entered against him, which FTBNA has not moved to vacate. Because Maryland follows the title theory of mortgages, Mr. Jay posits that Mr.

[12] We have previously held that in this context, an irregularity is "irregularity of process or procedure, and not an error, which in legal parlance, generally connotes a departure from the truth or accuracy of which a defendant had notice and could have challenged." *Thacker v. Hale*, 146 Md. App. 203, 219 (2002) (quoting *Weitz v. MacKenzie*, 273 Md. App. 628, 631 (1975)).

Rice held legal title to the subject property for the benefit of the lender. Thus, it is his position that a release of the lien as to the trustee releases the lien in its entirety.[13]

Finally, Mr. Jay argues that he properly served FHHLC and that such service is "presumed valid." He asserts that serving FHHLC via SDAT was proper under Maryland Rule 2-124(o). Mr. Jay argues that neither FHHLC nor FTBNA properly updated their Maryland SDAT records as neither entity "ever filed a statement of merger or even a name change." Further, he claims that neither FHHLC nor FTBNA provided an accurate address for their corporate headquarters or registered agents.

We are unable to ascertain the reasons underlying the circuit court's decisions to enter, vacate, and then reinstate a default judgment against FHHLC in this case. The circuit court did not articulate its reasoning in writing, and no hearings were held. Moreover, the circuit court did not make factual findings as to many of the issues relevant on appeal. Accordingly, we remand so that court may make the requisite factual determinations.

Before we review the issues that the circuit court needs to consider on remand, we address two legal arguments that Mr. Jay advances on appeal in defense of the circuit court's reinstatement of the default judgment against FHHLC. Assuming Mr. Jay will continue to press these legal arguments, we will dispose of them now to help streamline our discussion as well as the proceedings on remand. *See Qun Lin v. Cruz*, 247 Md. App.

[13] For these reasons, it is also Mr. Jay's position that the *lis pendens* against Mr. Jay's property was properly released.

606, 631 (2020) ("It is not the role of this Court to make the necessary factual findings, but we set forth some relevant principles of law to guide the circuit court on remand.").

B. Preliminary Considerations

1. Admissibility of Attachments

Mr. Jay avers that FTBNA failed to provide any admissible documents verifying that "it was the current lender of the [Deed of Trust]." Although Mr. Jay claims that certain documents before the circuit court were inadmissible because they were not authenticated, we conclude that at least some of those documents, including the Agreement of Merger and the Deed of Trust, qualify as self-authenticating under Maryland Rule 5-901.

Under Maryland Rule 5-901(a), authentication is achieved if there is "evidence sufficient to support a finding that the matter in question is what its proponent claims." It is the job of a court to determine whether evidence has been sufficiently authenticated prior to its admission. Md. Rule 5-104. The authentication determination is "context-specific." *Sublet v. State*, 442 Md. 632, 677-78 (2015). However, some documents are self-authenticating and therefore "require no testimony or extrinsic evidence . . . in order to be admitted." Md. Rule 5-902. Among the documents eligible for self-authentication are "certified copied of public records." *Id.* at (4) (emphasis omitted). A certified copy of a public record is defined as:

> A copy of an official record or report or entry therein, or of a document authorized by law to be recorded or filed and actually recorded in a public office . . . certified as correct by the custodian or other person authorized to make the certification, by certificate complying with this Rule or complying with any applicable statute or these rules.

Md. Rule 5-902(4). A document is also self-authenticating if it is "accompanied by a certificate of acknowledgement executed in the manner provided by law by a notary public[.]" Md. Rule 5-902(8).

Several documents submitted by FTBNA qualify as self-authenticating under Maryland Rule 5-902. Specifically, the Agreement to Merge attached to its motion bears a true and correct designation, qualifying it as a certified copy of a public record under Maryland Rule 5-902(4). The document was also notarized by a notary public, qualifying it as self-authenticating under Maryland Rule 5-902(8).

A copy of the Deed of Trust was also attached to FTBNA's motion to vacate. The copy is stamped as "filed" by the Office of the Clerk of the Court for Montgomery County, qualifying it as a self-authenticating public record under Maryland Rule 5-902(4). Additionally, the Deed of Trust was notarized, qualifying it as self-authenticating under Maryland Rule 5-902(8). The court could also take judicial notice that a proof of claim form was electronically filed by FTBNA in Mr. Jay's Chapter 7 bankruptcy case, No. 09-1960, on September 1, 2009.

The Agreement to Merge was sufficient to show that FHHLC merged with FTBNA, and the Deed of Trust was sufficient to show that FHHLC had loaned Mr. Jay money via a HELOC secured by the property located on Rockcrest Circle in Rockville. The Proof of Claim, in turn, shows that following the merger, FTBNA claimed as creditor under the Deed of Trust. We conclude that FTBNA attached admissible documentation sufficient to

support its argument that it had an interest in Mr. Jay's property as a successor-in-interest to FHHLC.

2. Default Judgment Against Mr. Rice

The parties do not dispute that Mr. Rice, as trustee, was properly served with process and that a default judgment was properly entered against him. However, Mr. Jay argues that a default judgment entered against Mr. Rice foreclosed the right of FHHLC or FTBNA (as successor) to challenge the default judgment entered by the circuit court against FHHLC. According to Mr. Jay, under the title theory of mortgages, a properly entered default judgment against Mr. Rice, as trustee, is binding as to FHHLC or FTBNA (as a successor).

"A deed of trust is a security instrument against real property, similar to a mortgage." *Chicago Title Ins. Co. v. Mary B.*, 190 Md. App. 305, 314 (2010). Deeds of trust transfer "legal title from a property owner to one or more trustees to be held for the benefit of a beneficiary." *Fagnani v. Fisher*, 418 Md. 371, 383 (2011) (quoting *Springhill Lake Inv. Ltd. P'ship v. Prince George's Cnty.*, 114 Md. App. 420, 428, *cert. denied*, 346 Md. 240 (1997)). Therefore, the parties to a deed of trust are "the grantor (debtor), the grantee (trustee), and the *cestui que trust* (creditor)." *Chicago Title Ins. Co.*, 190 Md. App. at 314 (citation omitted) (emphasis in original).

A deed of trust "transfers the estate of the debtor to the trustee" while "[t]he debtor retains an 'equity of redemption' or the right 'to reassert complete [] ownership of the land, upon payment of debt and any other charges rightly addressed under the terms of the lien

instrument.'" *Fagnani*, 418 Md. at 383 (quoting *Simard v. White*, 383 Md. 257, 272 n.12 (2004)). A deed of trust differs from other instruments, such as mortgages, in that "the lender or creditor has no right to take possession upon default, or to foreclose." *Chicago Title Ins. Co.*, 190 Md. App. at 314 (citation and emphasis omitted). Rather, a deed of trust gives the named trustee the "right to sell the real property to satisfy the debt for which the deed of trust was given as security." *Id*. (citation omitted). Under this power of sale, a trustee "not only represents the holder of the note secured by the deed of trust, but also the owners of the property, who would be entitled to any surplus remaining after the payment of expenses and the note secured by the deed of trust."[14] *Johnson v. Nadel*, 217 Md. App. 455, 468 (2014) (citation and emphasis omitted).

Default judgments are designed, in part, "to provide the plaintiff 'a means of relief against the delay and neglect of defendants.'" *Peay v. Barnett*, 236 Md. App. 306, 316 (2018) (quoting *Smith-Myers Corp. v. Sherill*, 209 Md. App. 494, 508 (2013)). A default judgment "constitutes an admission by the defaulting party of its liability for the causes of action set out in the complaint." *Pac. Mortg. & Inv. Grp., Ltd. v. Horn*, 100 Md. App. 311, 332 (1994). "[T]he Maryland Rules and caselaw contain a preference for a determination of claims on their merits; they do not favor imposition of the ultimate sanction absent clear

[14] Beyond the power of sale, the deed of trust may prescribe additional duties and responsibilities upon a trustee. *See Simard v. White*, 383 Md. 257, 288 (2004) ("The rights and duties of the *grantee* (trustee) [] depend on the terms and conditions of the deed.") (quoting Richard M. Venable, *The Law of Real Property and Leasehold Estates in Maryland* 253-55 (1892)).

support." *Holly Hall Publ'ns, Inc. v. Cnty. Banking & Trust Co.*, 147 Md. App. 251, 267, *cert. denied*, 371 Md. 614 (2002).

In *Holly Hall Publications, Inc. v. County Banking and Trust Co.*, the appellee filed a fraudulent conveyance action against the appellants. 147 Md. App. at 254-55. The appellants apparently were not served directly, but their counsel was served by mail. *Id.* at 255. However, the appellants and their counsel failed to file a responsive pleading by the time it was due. *Id.* After the pleading deadline had passed, the appellee filed a request for an order of default, which the court granted. *Id.* at 255. Appellants then filed a motion to strike the order of default arguing that the failure to file a responsive pleading occurred because "counsel prepared an answer and discovery and then inadvertently failed to file it with the court" and that there was a "substantial factual and legal basis for a defense to the plaintiffs claim." *Id.* at 256. After a hearing, the court denied the motion. *Id.* at 257. Thereafter, a default judgment was entered, and the trial court denied the appellants' motion to vacate the judgment. *Id.* at 257-58.

On appeal to this Court, the relevant question was whether it was equitable to vacate the order of default under Rule 2-613(e) on the grounds that the appellants' counsel "simply 'forgot'" to file a responsive pleading. *Id.* at 261. When considering this issue, we emphasized that "[i]n Maryland, a default judgment is not punitive in nature but is akin to an admission of liability." *Id.* at 261-62. We also noted that counsel for the appellants had agreed to accept service on behalf the appellants, there was no "continuing pattern of neglect" by the appellants, and there was no "suggestion of any harm caused to appellee as

a result of the untimely filing." *Id.* at 267. For those reasons, we held that "fail[ing] to vacate the order of default was punitive, and the court abused its discretion."[15] *Id.*

Here, Mr. Jay's argument regarding the default judgment against Mr. Rice has some notable similarities to the arguments discussed above that were made in *Holly Hall Publications*. In both cases, there is a fiduciary who holds duties toward the defendant. *Johnson v. Nadel*, 217 Md. App. 455, 469 (2014) ("[T]here is no dispute that a trustee on a deed of trust is a fiduciary for all parties."). And in both cases, the plaintiff contends that service on the fiduciary alone is sufficient to support a default judgment against the defendant.

Compared to the attorney-client relationship in *Holly Hall*, the relationship between Mr. Rice and FHHLC or FTBNA is much more limited. Only two of the twenty-three sections in the Deed of Trust even mention Mr. Rice as a trustee:

> **18. Acceleration; Remedies.** . . . If a default occurs, we will give you notice specifying: (a) the default; (b) the action required to cure the default; (c) a date not less than 30 days from the date the notice is given to you, by which the default must be cured; and (d) that failure to cure the default on or before the date specified in the notice may result in acceleration of the sums secured by this Deed of Trust and sale of the Property. . . . If the default is not cured on or before the date specified in the notice, we at our option may require immediate payment in full of all sums secured by this Deed of Trust without further demand and may invoke the power of sale and any other remedies

[15] Other jurisdictions have reached similar results, vacating default judgments caused solely through the inaction or mistake of a party's attorney. *See, e.g.*, *Augusta Fiberglass Coatings, Inc. v. Fodor Contracting Corp.*, 843 F.2d 808, 811 (4th Cir. 1988) ("When the party is blameless and the attorney is at fault, the former interests control and a default judgment should ordinarily be set aside."); *White v. Trantham*, 513 So. 2d 641, 642-43 (Ala. 1987) (vacating a default judgment entered when, through no fault of the defendant, defendant's counsel failed to appear at trial "due to mistake of counsel in calendaring the trial date").

> permitted by applicable law. We shall be entitled to collect all expenses incurred in pursuing the remedies provided in this paragraph [], including, but not limited to, reasonable attorneys' fees at trial and in any appeal and cost of title evidence.
>
> If we invoke the power of sale, we shall mail or cause the Trustee to mail a notice of sale to you in the manner prescribed by applicable law. The Trustee shall give notice of sale by public advertisement and by such other means as is required by applicable law for the time and in the manner prescribed by applicable law. The Trustee, without demand on you, shall sell the Property at public auction to the highest bidder at the time and place and under the terms designated in the notice of sale in one or more parcels and in any order the Trustee determines. The Trustee may postpone sale of all or any parcel of the Property by public announcement at the time and place of any previously scheduled sale and by notice to any other persons as required by applicable law. We or our designee may purchase the Property at any sale.
>
> The Trustee shall deliver to the purchase the Trustee's deed conveying the Property without any covenant or warranty, expressed or implied. The recitals in the Trustee's deed shall be prima facie evidence of the truth of the statements made therein. The Trustee shall apply the proceeds of the sale in the following order: (a) to all expenses of the sale . . .; (b) to all sums secured by this Deed of Trust; and (c) any excess to the person or persons legally entitled to it.
>
> * * *
>
> **20. Substitute Trustee.** We, at our option, may from time to time remove the Trustee and appoint a successor trustee to any Trustee appointed hereunder by an instrument recorded in the city or county in which this Deed of Trust is recorded.

These sections of the Deed of Trust assign Mr. Rice a narrow role: to facilitate the sale of the property in the event of a default on payments by Mr. Jay.

On the record before us, we conclude that service on Mr. Rice as a trustee is an insufficient basis to support a default judgment against FTBNA. Given the limited relationship between the trustee and FHHLC or FTBNA, it would make little sense to hold FTBNA accountable for Mr. Rice's inaction. Accordingly, we hold that the default

judgment entered against Mr. Rice did not foreclose FHHLC or FTBNA (as successor) from challenging the default judgment entered by the circuit court against FHHLC.[16, 17]

C. Default Judgments—The Two-Step Framework Under Maryland Rule 2-613

Maryland Rule 2-613, which sets forth the procedure for entering default judgments, provides, in relevant part:

> (b) **Orders of default.** If the time for pleading has expired and a defendant has failed to plead as provided by these rules, the court, on written request of

[16] Moreover, we observe that the default judgment entered against Mr. Rice was not entered as a result of Mr. Rice's *actions* defending against the suit, but rather because of Mr. Rice's *inaction* in failing to file a responsive pleading. We think this case is distinguishable from those cases in which courts bind beneficiaries to the *actions* of trustees taken in accordance with their trust instruments. *See e.g.*, *Richter v. Jerome*, 123 U.S. 233, 247 (1887) ("[T]he trust company began its suit for the foreclosure of its mortgage, and has sold under the decree in that suit all the interests . . . which it held in the land as trustee for the bondholders[.]") *Kerrison v. Stewart*, 93 U.S. 155, 161 (1876) (in construing a deed of trust to authorize a trustee to represent other creditors in a prior action, the Court held that the trustee was "not only invested with the legal title to the property, but that all parties relied upon his judgment and discretion for the protection of their respective interests").

[17] We also consider it significant that the Deed of Trust includes a section on methods of notice to the parties, and that this section contains no mention of the trustee. The Deed of Trust states:

> **13. Notices.** Unless otherwise required by law, any notice to you provided for in this Deed of Trust shall be delivered or mailed by first class mail to the Property address or any other address you designate by notice to us. Unless otherwise required by law, any notice to us [i.e., FHHLC] shall be given by first class mail to our address stated above or any other address we designate by notice to you.

If the parties intended to make service on the trustee effective as service on FHHLC (or FTBNA as successor), they could have said so in the Deed of Trust. But they did not do so; when presented with the opportunity to address the issue, the parties agreed only that notice to FHHLC "shall be given" to FHHLC directly.

> the plaintiff, shall enter an order of default. The request shall state the last known address of the defendant.
>
> (c) **Notice.** Promptly upon entry of an order of default, the clerk shall issue a notice informing the defendant that the order of default has been entered and that the defendant may move to vacate the order within 30 days of its entry. The notice shall be mailed to the defendant at the address stated in the request and to the defendant's attorney of record, if any. The court may provide for additional notice to the defendant.
>
> (d) **Motion by defendant.** The defendant may move to vacate the order of default within 30 days after its entry. The motion shall state the reasons for the failure to plead and the legal and factual basis for the defense of the claim.
>
> (e) **Disposition of motion.** If the court finds that there is a substantial and sufficient basis for an actual controversy as to the merits of the action and that it is equitable to excuse the failure to plead, the court shall vacate the order.
>
> (f) **Entry of judgment.** If a motion was not filed under section (d) of this Rule or was filed and denied, the court, upon request, may enter a judgment by default that includes a determination as to the liability and all relief sought, if it is satisfied (1) that it has jurisdiction to enter the judgment and (2) that the notice required by section (c) of this Rule was mailed. If, in order to enable the court to enter judgment, it is necessary to take an account or to determine the amount of damages or to establish the truth of any averment by evidence of to make an investigation of any matter, the court, may rely on affidavits, conduct hearings, or order references as appropriate and, if requested, shall preserve to the plaintiff the right to trial by jury.
>
> (g) **Finality.** A default judgment entered in compliance with this rule is not subject to the reversionary power under Rule 2-535(a) except as to the relief granted.

An explanatory note accompanying Rule 2-613 provides:

> This Rule provides a two-stage process for default judgments. The first stage involves a determination evidenced by an order, that the defendant is in fact in default. The defendant is given notice of this determination and an opportunity to have the order of default vacated. When seeking to vacate the order the defendant must convince the court that the defendant has a

> meritorious defense and that there is good cause to excuse the defendant's failure to plead.
>
> The second stage, the actual entry of judgment, takes place only after the order of default may no longer be vacated by the trial court. This will avoid the necessity for courts to undertake fact finding processes to produce an amount for the default judgment only to have the judgment vacated upon a showing that the defendant had good cause for failing to plead.

Franklin Credit Mgmt. Corp. v. Nefflen (Franklin Credit II), 436 Md. 300, 315 (2013) (quoting Minutes of the Standing Committee on Rules of Practice and Procedure, November 21, 1981, at 14-15).

Under the first step of this framework, after the time for pleading has expired, on written request of the plaintiff, a circuit court must enter an "**order** of default" which is "interlocutory in nature and can be revised by the court at any time up until the point a final judgment is entered." *Bliss v. Wiatrowski*, 125 Md. App. 258, 265, *cert. denied.*, 354 Md. 571 (1999) (emphasis in original) (citing Md. Rule 2-613(g); *Michaels v. Nemethvargo*, 82 Md. App. 294, 298-300 (1990)). After an order of default has been entered, Rule 2-613(d) provides that the "defendant may move to vacate the order within 30 days after its entry."

Thereafter, in step two, if a "motion to vacate has not been filed, or has been filed and denied, the court, upon request, 'may enter a judgment by default that includes a determination as to liability and all relief sought.'" *Wells*, 168 Md. App. at 393 (quoting Md. Rule 2-13(f)). The circuit court may enter a judgment by default if the court is satisfied "(1) that it has jurisdiction to enter the judgment and (2) that the notice required . . . was mailed." Md. Rule 2-613(f). Unlike an order of default, "[a] default judgment is a final judgment for which the court's revisory power is limited." *Franklin Credit Mgmt. Corp.*

v. Nefflen (*Franklin Credit I*), 208 Md. App. 712, 731-33 (2012), *aff'd*, *Franklin Credit II*, 436 Md. 300; *Peay*, 236 Md. App. at 318 ("The default judgment is the circuit court's final determination of both liability and damages."). Although a defendant can move to vacate an order of default under Maryland Rule 2-613(d), once the default judgment is entered "the defendant does not enjoy the same opportunity." *Franklin Credit I*, 208 Md. App. at 733 (quoting *Wells*, 168 Md. App. at 393).

Here, the circuit court properly followed the two-step procedure under Maryland Rule 2-613. An order of default was entered against FHHLC, in accordance with Maryland Rule 2-613(b), on January 7, 2019. On February 22, 2019, Mr. Jay filed a motion for entry of default judgments, in accordance with Maryland Rule 2-613(f), which the circuit court granted on March 4, 2019. Thus, we conclude that the circuit court properly followed the prescribed two-step process in entering a default judgment against FHHLC.

On September 10, 2019, however, the court vacated the default judgment after FTBNA filed a motion asserting that the corporation had not been served with process. Then the court reinstated the default judgment after Mr. Jay filed his response to FTBNA's motion. We assume that the circuit court vacated the default judgment entered on March 4, 2019 under Maryland Rule 2-535(b), and then reinstated the judgment in response to Mr. Jay's motion premised, in part, on his arguments that we have addressed above. We remand for the court to consider whether the judgment entered on March 4, 2019 and reinstated on December 3, 2019 should be revised under Maryland Rule 2-535(b) for "mistake."

D. The Circuit Court's Revisory Power Under Rule 2-535(b)

Generally, Maryland Rule 2-535(a) vests the circuit court with broad discretion to revise its judgments within 30 days after entry.[18] *Peay*, 236 Md. App. at 319. However, Maryland Rule 2-613(g) provides that "[a] default judgment entered in compliance with this Rule is not subject to the revisory power under Rule 2-535(a) except as to the relief granted." In *Bliss v. Wiatrowski*, this Court explained:

> An entry of default **judgment** is a final judgment and is subject to the general revisory power of the court only with respect to the relief granted; however, an **order** of default is interlocutory in nature and can be revised by the court at any time up until the point a final judgment is entered.

125 Md. App. 258, 265 (1999). *See also Wells*, 168 Md. App. at 393 ("[W]hen a default judgment is entered, the court retains the broad revisory power only 'as to the relief granted.'").

Despite the exclusion of default judgments from the trial courts' revisory power under Rule 2-535(a), the "narrow revisory power of the court under Rule 2-535(b) is unaffected by Rule 2-613(g)." *Wells*, 168 Md. App. at 394. Rule 2-535(b) states, "[o]n motion of any party filed at any time, the court may exercise revisory power and control

[18] Rule 2-535(a) provides:

> On motion of any party filed within 30 days after entry of judgment, the court may exercise revisory power and control over the judgment and, if the action was tried before the court, may take any action that it could have taken under Rule 2-534. A motion filed after the announcement or signing by the trial court of a judgment or the return of a verdict but before entry of the judgment on the docket shall be treated as filed on the same day as, but after, the entry on the docket.

over the judgment in case of fraud, mistake, or irregularity." Therefore, "[o]nce the circuit court enters its default judgment in compliance with Rule 2-613 . . . that judgment 'may be stricken or revised only upon a showing of fraud, mistake, or irregularity[.]'" *Peay*, 236 Md. App. at 320 (quoting *Dir. of Fin. Of Balt. City v. Harris*, 90 Md. App. 506, 511 (1992)).

The narrow revisory powers under Rule 2-535(b) are "an exception to the general rule." *Pelletier v. Burson*, 213 Md. App. 284, 290 (2013). Courts in this state "have narrowly defined and strictly applied the terms fraud, mistake, [and] irregularity, in order to ensure finality of judgments." *Thacker v. Hale*, 146 Md. App. 203, 217 (2002) (citation and quotations omitted). The moving party must prove fraud, mistake, or irregularity by "clear and convincing" evidence. *Id.*

Normally, if a court determines that there has been fraud, mistake, or irregularity in the obtention of a judgment, it must "proceed[] to address a second hurdle that a party seeking relief generally must cross if requesting revision under Rule 2-535(b)." *Peay*, 236 Md. App. at 323. This second hurdle requires that the moving party prove that it "exercised ordinary diligence and acted in good faith," *id*., and has "a meritorious defense to the complaint," *Dir. of Fin. of Balt. City*, 90 Md. App. at 514. However, these considerations "do not apply to 'jurisdictional mistakes' that would render a default judgment void." *Peay*, 236 Md. App. at 324. Jurisdictional mistakes are immune from these additional requirements because "[o]nce the circuit court determines that the issuing court exceeded either its *in personam* jurisdiction or its subject matter jurisdiction, the court must find the prior judgment invalid." *Id.* at 324-325.

"Mistake" under Rule 2-535(b) is limited to a "jurisdictional mistake." *Chapman v. Kamara*, 356 Md. 426, 436 (1999). "Juridically, jurisdiction refers to two quite distinct concepts: (i) the *power* of the court to render a valid decree, and (ii) the *propriety* of granting the relief sought." *Thacker*, 146 Md. App. at 224 (emphasis in original) (quoting *Moore v. McAllister*, 216 Md. 497, 507 (1958)). We have previously held that "[o]nly a lack of jurisdictional 'power' can justify relief from [an] enrolled judgment." *Id.*

Maryland courts have held that improper service of process, if not waived, constitutes a "mistake" under Rule 2-535(b). *Tandra S. v. Tyrone W.*, 336 Md. 303, 317 (1994), *superseded by statute on other grounds*, 1995 Md. Laws, ch. 248 (H.B. 337), *as recognized in Tyrone W. v. Danielle R.*, 129 Md. App. 260, 275-286 (1999)). In fact, the Court of Appeals has explained that "[t]he typical kind of mistake occurs when a judgment has been entered in the absence of valid service of process; hence, the court never obtains personal jurisdiction over a party." *Id.* at 317. Jurisdictional mistakes relating to service of process are "a proper ground to strike a judgment under Rule 2-535." *Pickett v. Noba, Inc.*, 114 Md. App. 552, 558 (1997) (citation omitted).

In *Peay v. Barnett*, we evaluated whether the failure to properly serve a "resident" under Rule 2-121(a) constituted a "mistake" under Rule 2-535(b).[19] 236 Md. App. at 322-

[19] Md. Rule 2-121(a) provides:

> Service of process may be made within this State or, when authorized by the law of this State, outside of this State (1) by delivering to the person to be served a copy of the summons, complaint, and all other papers filed with it; (2) if the person to be served is an individual, by leaving a copy of the (Continued)

323. There, because appellant never took any action to defend the case, the circuit court entered a default judgment. 236 Md. App. at 314. Six and a half years after the default was entered, appellant "took action for the first time in [the] case by filing a motion to set aside the judgment of default and requesting a hearing." *Id.* at 315. Appellant argued that the default judgment should be set aside as process was served on her sister, a non-resident of the dwelling, in violation of Rule 2-121(a). *Id.* at 322. In support of her motion to set aside the judgment, appellant filed "two affidavits indicating that [her sister] did not live with [her]" at the time of service. *Id.* Further, appellant "attached a copy of her lease at the time the process server attempted service, which listed her as the only lessee of the apartment." *Id.* at 322-23. Following a hearing, the circuit court found that appellant "was not properly served because the papers were served on [appellant's sister], who the court found was not a 'resident' under Rule 2-121(a) at the time of attempted service," but denied the motion after finding that appellant "had not diligently sought to set aside the judgment." *Id.* at 315, 323. On appeal, this Court agreed that appellant was not properly served: "Assuming [appellant] did not waive the right to raise the defense of lack of personal jurisdiction or insufficiency of service of process, *this defect would typically constitute the*

> summons, complaint, and all other papers filed with it at the individual's dwelling house or usual place of abode with a resident of suitable age and discretion; or (3) by mailing to the person to be served a copy of the summons, complaint, and all other papers filed with it by certified mail requesting: "Restricted Delivery—show to whom, date, address of delivery." Service by certified mail under this Rule is complete upon delivery. Service outside of the State may also be made in the manner prescribed by the court or prescribed by the foreign jurisdiction if reasonably calculated to give actual notice.

prototypical 'jurisdictional mistake' under Rule 2-535(b)." *Id.* at 323 (emphasis added). The *Peay* court then went on to clarify that "the equitable considerations of 'diligence and good faith' do not apply to 'jurisdictional mistakes' that would render a default judgment void." *Id.* at 324-25. As such, we reversed "the circuit court's decision to deny [appellant's] motion to set aside the judgment and remand[ed] for further proceedings and a determination on waiver of personal jurisdiction." *Id.* at 331.

Given that improper service of process "would typically constitute the prototypical 'jurisdictional mistake' under Rule 2-535(b)," we next outline the contours of service of process in Maryland. *Id.* at 323.

E. Service of Process

"It is well established that 'procedural due process requires that litigants must receive notice, and an opportunity to be heard.'" *Mayor of Balt. v. Prime Realty Assocs., LLC*, 468 Md. 606, 622 (2020) (quoting *Pickett v. Sears, Roebuck & Co.*, 365 Md. 67, 81 (2001)). To satisfy due process, the notice received "must be 'reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.'" *Id*. at 622-623 (quoting *Mullane v. Cent. Hanover Bank & Tr. Co.*, 339 U.S. 306, 314 (1950)). Because a "plaintiff often stands to benefit from failed attempts to notify the defendant(s)," *St. George Antiochian Christian Church v. Aggarwal*, 326 Md. 90, 96 (1992), the Supreme Court of the United States has emphasized that

> when notice is a person's due, process which is a mere gesture is not due process. The means employed must be such as one desirous of actually informing the absentee might reasonably adopt to accomplish it.

Mullane, 339 U.S. at 315. Whether service has been properly effectuated is "essentially a question of fact." *Wilson v. Md. Dep't of Env't*, 217 Md. App. 271, 286 (2014) (quoting *Harris v. Womack*, 75 Md. App. 580, 585 (1988)).

In Maryland, a properly formed corporation has the power to "[s]ue, be sued, complain, and defend in all courts[.]" Md. Code (1975, 2014 Repl. Vol.), Corporations and Associations Article ("CA"), § 2-103. To help effectuate this power, the Maryland Rules specifically dictate how parties may serve process on a corporation:

> Service is made upon a corporation, incorporated association, or joint stock company by serving its resident agent, president, secretary, or treasurer. If the corporation, incorporated association, or joint stock company has no resident agent or if a good faith attempt to serve the resident agent, president, secretary, or treasurer has failed, service may be made by serving the manager, any director, vice president, assistant secretary, assistant treasurer, or other person expressly or impliedly authorized to receive service of process.

Md. Rule 2-124(d). Additionally, when a corporation does not have a resident agent, or their resident agent is not accessible, process may be served on a corporation via "Substitute Service Upon State Department of Assessments and Taxation." Md. Rule 2-124(o). This method of service requires that a corporation: "(i) . . . has no resident agent; (ii) the resident agent is dead or is no longer at the address for service of process maintained with the State Department of Assessments and Taxation*;* or (iii) two good faith attempts on separate days to serve the resident agent have failed." Md. Rule 2-124(o).

Service of process becomes more complicated when a corporation ceases its corporate existence in Maryland. If a corporation doing business in Maryland wishes to consolidate, merge, or execute a share exchange, it must file the appropriate articles with SDAT. CA § 3-107. The articles of "consolidation, merger, or share exchange" must contain, among other things:

> (1) A statement that each party to the articles agrees to merge, to consolidate to form a new corporation, or to acquire stock or have its stock acquired in a share exchange, as the case may be;
> (2) The name and place of incorporation or organization of:
> (i) Each party to the articles; and
> (ii) The successor corporation in a consolidation, merger, or share exchange or the successor domestic partnership, limited partnership or limited liability company in a merger;
> (3) As to each foreign corporation:
> (i) The date of its incorporation;
> (ii) A statement whether it is incorporated under general law or by special act and, if incorporated by special act, the chapter number and year of passage; and
> (iii) If the corporation is registered or qualified to do business in this State, the date of its registration or qualification[.]

CA § 3-109(b). After the articles are filed, SDAT is required to "prepare certificates" memorializing the "consolidation, merger, or share exchange" that specify:

> (1) The name if each party to the articles;
> (2) The name of the successor and the location of its principal office in the State or, if it has none, its principal place of business; and
> (3) The time the articles are accepted for record by the Department.

CA § 3-111(a).

When a corporation consummates a "consolidation or merger," "[t]he separate existence of each corporation . . . except the successor, ceases." CA § 3-114(a)-(b). Therefore, the non-surviving entity loses its ability to "[s]ue, be sued, complain, and defend

in all courts[.]" CA § 2-103. If the articles of merger so provide, the successor "has the purposes and powers of each corporation party to the articles." CA § 3-114(d). Additionally, the successor entity

> is liable for all the debts and obligations of each nonsurviving corporation . . . . An existing claim, action, or proceeding pending by or against any nonsurviving corporation . . . may be prosecuted to judgment as if the consolidation or merger had not taken place, or, on motion of the successor or any party, the successor may be substituted as a party and the judgment against the nonsurviving corporation . . . constitutes a lien on the property of the successor.

CA § 3-114(f)(1). Several Maryland Rules establish a procedure for substituting a successor when a corporation has consolidated or merged. *See* Md. Rule 2-241 (circuit court substitution procedure); Md. Rule 3-241 (district court substitution procedure); Md. Rule 8-401 (appellate court substitution procedure).[20]

[20] Particularly relevant here, Maryland Rule 2-241 establishes, in relevant part:

> **(a) Substitution.** The proper person may be substituted for a party who:
> (1) dies, if the action survives,
> (2) becomes incompetent,
> (3) transfers an interest in the action, whether voluntarily or involuntarily,
> (4) if a corporation, dissolves, forfeits its charter, merges, or consolidates,
> (5) if a public officer, ceases to hold office, or
> (6) if a guardian, personal representative, receiver, or trustee, resigns, is removed, or dies.
>
> **(b) Procedure.** Any party to the action, any other person affected by the action, the successors or representatives of the party, or the court may file a notice in the action substituting the proper person as a party. The notice shall set forth the reasons for the substitution and, in the case of death, the decedent's representatives, domicile, and date and place of death if known.

(Continued)

Just as with a consolidation or merger, when a corporation forfeits its corporate charter, it loses the power to "[s]ue, be sued, complain, and defend in all courts[.]" CA § 2-103. However, when a corporation's charter has been forfeited, "until a court appoints a receiver, the directors of the corporation shall manage its assets for purposes of liquidation." CA § 3-515(a). In managing a corporation's assets, the corporate directors may, among other things, "*[s]ue or be sued in the name of the corporation*." CA § 3-515(c)(3) (emphasis added).

While the statues governing merged corporations differ from those governing corporations with forfeited charter, both have the same effect, namely, they allow claims against the former corporation to proceed. We addressed how a corporation with a forfeited charter could be served with process in *Scott v. Seek Lane Venture, Inc.*, 91 Md. App. 668 (1992). There, we evaluated how a litigant in an action to foreclose an equity right of redemption could serve process on a defunct corporation. *Id.* at 685-86. During its corporate existence, Seek Lane Venture was engaged in the development of real property. *Id.* at 673-74. As part of its business dealings, the corporation recorded several documents indicating that it "intended to convey ownership" of several subdivision common areas to a related homeowners association (the Association). *Id.* at 674-75. However, before this transfer took place, in October 1985, Seek Lane Venture "had its corporate charter forfeited by the State of Maryland for failure to file corporate personal property tax returns." *Id.* at

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The notice shall be served on all parties in accordance with Rule 1-321 and on the substituted party in the manner provided by Rule 2-121, unless the substituted party has previously submitted to the jurisdiction of the court.

673-74. Thereafter, in June 1986, Ms. Scott, appellant, purchased several parcels of Seek Lane Venture's property at a tax sale. *Id.* at 674. After the Association claimed an interest in one of the parcels that Ms. Scott had purchased, she filed a "Complaint to Foreclose the Right of Redemption." *Id.* at 676. Ms. Scott attempted service only by mailing notice to Seek Lane Venture's last known address, which was returned as undeliverable. *Id.* After the circuit court initially entered an order of foreclosure in favor of Ms. Scott, the Association petitioned the court set aside the enrolled final judgment as it claimed it was not properly served with process. *Id*. at 677.

Four months after the circuit court entered an order foreclosing Seek Lane Venture's right of redemption, it altered course after determining that Ms. Scott "did not provide proper service upon Seek Lane Venture, a defunct corporation, pursuant to the Maryland rules of procedure." *Id*. at 677. Therefore, the court "set aside and declared invalid the final order of foreclosure of the equity right of redemption as it pertained to Seek Lane Venture and/or any of its assignees [or] successors-in-interest[.]" *Id*. at 677-78. The circuit court also noted that, "at a future trial, the Association would have to prove its claim that it was a successor-in-interest or assignee of Seek Lane Venture." *Id*. at 678.

On appeal, we held that the circuit court "acted properly in setting aside the final order foreclosing the right of redemption as to Seek Lane Venture and/or its assignees [or] successors-in-interest," as at the time of service Seek Lane Venture ceased to "exist as a legal entity." *Id*. at 685-86. Because Seek Lane Venture's charter had been revoked, under Maryland's Corporate Survivor Statute, CA 3-515, only its "director-trustees" could "sue

or be sued in the name of the defunct corporation." *Id.* at 687. Given that the names and addresses of the director trustees were "reasonably ascertainable," we held that Ms. Scott "failed to give notice of the foreclosure proceeding to the director-trustees" by simply mailing process to Seek Lane Venture's last known address. *Id.* at 687-88.

On the record before us, it appears that service of process on FHHLC via substituted service on SDAT, after the entity had merged into FTBNA, was ineffective. Similar to *Scott*, where we held that mailing process to a defunct corporation's last known address was ineffective, here, service was ineffective as FHHLC had merged into FTBNA prior to the date of service. The merger occurred in February 2007, eleven years prior to the filing of Mr. Jay's complaint. The agreement to merge is clear that "FTBNA shall be the surviving entity of the Affiliate Merger." Upon execution of the merger "all rights, franchises, and interests of FHHLC and FTBNA, respectively, in and to every type of property (whether real, personal, or mixed) . . . shall be transferred to, and vested in FTBNA[.]" Additionally, under the agreement to merge FTBNA became "liable for all then existing liabilities for FHHLC." Therefore, as of February 2007, FHHLC's separate corporate existence ceased. Because FHHLC lost its power to "[s]ue, be sued, complain, and defend in all courts" as of the effective date of the merger, CA § 2-103, substituted service on the former corporation via SDAT, more than ten years later, was ineffective.

Assuming that Mr. Jay did not properly serve FHHLC or FTBNA, we remand to the circuit court to make findings as to whether FTBNA, as the surviving entity of the merger with FHHLC, waived the right to object to the circuit court's exercise of personal

jurisdiction over it. "When a defendant raises improper service of process as grounds to revise a default judgment as a 'mistake' under Rule 2-535(b), the circuit court must determine, if applicable, whether the judgment is nonetheless valid by virtue of the defendant's waiver of lack of personal jurisdiction." *Peay*, 236 Md. App. at 327. If the defense of "personal jurisdiction and/or insufficient service of process" has been waived, "Rule 2-535 has no application." *Chapman*, 356 Md. at 438 n.6. Thus, once a circuit court has determined that process was improperly served, it should next "consider[] whether the circuit court obtained jurisdiction as a result of . . . waiver of the right to object to the to the court's lack of personal jurisdiction, rather than applying the 'diligence and good faith' test." *Peay*, 236 Md. App. at 328.

In *Peay*, we adopted the two-part test articulated in *U.S. ex rel. Combustion Sys. Sales, Inc., v. E. Metal Prods. & Fabricators, Inc.* (*Combustion Systems*), 112 F.R.D. 685, 688 (M.D.N.C. 1986), for determining whether there has been a "waiver by implication" of the court's *in personam* jurisdiction. 236 Md. App. at 330. The first prong of the test requires a circuit court to determine whether "the plaintiff made a good faith effort to serve under the rules governing service of process." *Id.* at 330. In making this determination,

> the court should examine "the type and extent of defect in service and the notice received by the defendant." [*Combustion Systems*, 112 F.R.D. at 688]. Clearly, where the defendant never received any notice of the proceedings prior to judgment, the circuit court should find that the judgment was void. Additionally, where defects are ascertainable on the face of the return of service, or where the plaintiff has knowledge of the defect and does nothing to correct it, the plaintiff cannot be said to have made a good faith effort to serve the defendant.

Id.

The second prong of the test examines whether the defendant had "actual knowledge of the commencement of the action and his [or her] duty to defend." *Id.* (quoting *Combustion Systems*, 112 F.R.D. at 689). As explained in *Combustion Systems* and reiterated in *Peay*,

> This notice requires more than vague, general knowledge that a lawsuit will be or has been filed. Defendant must have knowledge that an action has in fact been commenced and sufficient notice so that it can be inferred that he [or she] knows of [the] duty to defend against the action." [*Combustion Systems*, 112 F.R.D. at 689]. However, "where the defective service may likely confuse the defendant as to the need to respond, even actual notice will not be sufficient" to fulfill this second requirement. *Id.*

Peay, 236 Md. App. at 330. We determined that these considerations "are consistent with and reinforce our Courts' application of equitable estoppel where the defendant's delay and 'conduct, misrepresentation or silence,' . . . have caused a prejudicial and detrimental change to the position of the plaintiff." *Id.* at 331 (citations omitted).

The fact-bound questions of whether Mr. Jay properly served FHHLC and whether FTBNA waived its right to object to personal jurisdiction were not addressed by the circuit court. Although it appears that Mr. Jay did not properly serve FHHLC, some of FTBNA's actions "may not be without significance to a waiver determination," *id.* at 327, as it failed to obtain a certificate of merger, as required by CA §§ 3-107 and 3-111. Therefore, we remand pursuant to Maryland Rule 8-604(d) to the circuit court to make factual findings on the actions taken by Mr. Jay and FTBNA to facilitate effective service of process and to then apply those findings to the two-step waiver test outlined in *Peay*. On remand the circuit court may conduct further proceedings and take additional evidence. *See Cane v.*

EZ Rentals, 450 Md. 597, 617 (2016) (remanding the case under Maryland Rule 8-604(d) and allowing additional evidence).

Should the circuit court find Mr. Jay did not act in "good faith" when serving FHHLC via substituted service on SDAT, it should revise the default judgment entered against FHHLC as a "mistake" under Maryland Rule 2-535(b), as the court never obtained the jurisdictional power to enter a default judgment against the surviving corporation, FTBNA.[21] *Chapman*, 356 Md. at 436-38. Conversely, if the court finds that Mr. Jay did act in "good faith," the court should proceed to the second prong of the *Peay* waiver test and determine whether FTBNA waived its right to challenge personal jurisdiction because it had "actual knowledge of the commencement of" Mr. Jay's action. *Peay*, 236 Md. App. at 330 (quoting *Combustion Systems*, 112 F.R.D. at 689). If Mr. Jay acted in "good faith" to serve FTBNA, but FTBNA did not have actual knowledge of the commencement of the suit, the court should revise the default judgment entered against FHHLC as a "mistake"

[21] Initially, the circuit court should determine whether Mr. Jay made a "good faith effort" to serve FTBNA. In examining this issue, the circuit court may consider that FTBNA did not properly file articles of merger with SDAT but did register the trade name "First Horizon Home Loans, a Division of First Tennessee Bank" four months after the effective date of the merger. Although we observe that a trade name is not a substitute for properly filing articles of merger, CA § 1-406(a) requires that "[a]ny person engaged in any mercantile, trading, or manufacturing business as an agent or doing business or trading under any designation, title, or name other than the person's own name, prior to commencing operation of the business, shall file with the Department a certificate[.]"

Additionally, the court may consider that FTBNA was listed as a secured creditor in Mr. Jay's 2009 bankruptcy proceeding. The document from the District of Maryland Claims Registrar, a copy of which is in the record, confirming FTBNA's interest in Mr. Jay's proceeding is publicly available on the Federal Court's "Public Access to Court Electronic Records (PACER)" service.

under Maryland Rule 2-535(b). However, if Mr. Jay acted in "good faith" and FTBNA had actual knowledge that Mr. Jay had commenced a suit against FHHLC, the court may decide not to exercise its revisory power under Maryland Rule 2-535(b).

CASE REMANDED, WITHOUT AFFIRMANCE OR REVERSAL, TO THE CIRCUIT COURT FOR MONTGOMERY COUNTY FOR FURTHER PROCEEDINGS CONSISTENT WITH THIS OPINION; COSTS TO ABIDE THE RESULT.