Circuit Court for Prince George's County
Case No. CAEF18-04357

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 3470

September Term, 2018

1501 SOUTHERN, LLC

v.

JOHN E. DRISCOLL, III, ET AL.

Kehoe,
Beachley,
Shaw Geter
JJ.

Opinion by Shaw Geter, J.

Filed: July 23, 2020

This is an appeal from an order of the Circuit Court for Prince George's County that ratified a foreclosure sale of a commercial property in Oxon Hill, Maryland. Appellant, 1501 Southern, LLC ("1501"), the party in default, filed a Motion to Vacate the Court's Order, which the court denied. Appellant then filed a Motion to Alter or Amend the Order denying the Motion to Vacate, which the court also denied. This appeal followed.

Appellant presents three questions for our review:

1. Whether the trial court erred in denying appellant's Motion to Vacate Order Ratifying Foreclosure Sale on the basis that appellant had constructive notice of the foreclosure sale?

2. Whether a void judgment precludes a purchaser from obtaining the status as bona fide purchaser?

3. Whether the mortgagee that buys a property back at foreclosure is free to resell the property to a bona fide purchaser?

We hold the court did not abuse its discretion in denying appellant's motion to vacate the ratification order and thus, decline to answer Questions Two and Three. For the reasons set forth below, we affirm.[1]

BACKGROUND

In July of 2015, appellant entered into a contract with S.F.C. to purchase property located in Oxon Hill, Maryland for $4,250,000.00. Appellant executed a Purchase Money First Deed of Trust and promissory note in favor of S.F.C., which were recorded. The loan

[1] On July 19, 2019, appellees filed a motion to dismiss appellant's appeal, stating it was untimely and moot. We hold the appeal was noted timely and assuming, without deciding, the appeal is moot, we exercise our discretion under Maryland Rule 8-602(c)(8) to decide the merits.

was to be paid in full by June 10, 2016. Khalib Babiker Mohamed Eltayeb signed the Deed of Trust as the "Managing Member and Trustee" of 1501. The Deed included a notice provision that service for any actions undertaken as a result of the transaction would be sufficient if done by personal service to the addresses provided in the document. Appellant provided its corporate address as 402 Southern Avenue, SE, Washington, D.C.

On July 19, 2016, appellee sent a letter advising appellant that it was in default and, if the default was not cured, S.F.C. would exercise its right to accelerate the loan. Appellees obtained a judgment against appellant in 2016, which was subsequently appealed and affirmed by this Court. Appellees then filed a foreclosure action in the Circuit Court for Prince George's County on February 22, 2018. Service was effectuated on February 24, 2018, by delivering a copy of the Order to Docket to Andre Johnson, described as "housemate of Khalib Babiker Mohamed Eltayeb, Member for 1501 Southern L.L.C. at the address of 4020 Southern Avenue SE, Washington, DC 20020." The Order to Docket was also posted on the property and mailed directly to the property. The mail was returned, however, because the property had no mailbox. Appellant did not respond or file any motions during the pendency of the foreclosure case.

On April 11, 2018, appellant was mailed notices of the foreclosure sale, through regular first-class postage and certified mail at the corporate address and the property address. The certified mail was returned as undeliverable; however, the first-class mail was not returned. Mail sent to the property was returned as there was still no mailbox there. Notice of the sale was published in the Washington Post for three consecutive weeks. On

May 10, 2019, the property was sold to S.F.C. at a foreclosure sale.[2] S.F.C., on May 29, 2019, entered into a contract to sell the property to a third party, A Determined Seed I, LLC. The foreclosure sale was ratified by Order on July 24, 2018. The deed was recorded on August 17, 2019, and the Auditor's report was filed 13 days later.

On September 13, 2019, appellant filed a motion to vacate, arguing lack of due process because it had not been served and given the opportunity to be heard. The motion was denied by the court on December 10, 2019, as "Defendant had constructive notice of the sale." Appellant then filed a motion to alter or amend on December 26, 2019. The motion was denied on February 6, 2020, and this appeal was noted on February 26, 2020.

STANDARD OF REVIEW

"It is well settled that a trial judge who encounters a matter that falls within the realm of judicial discretion must exercise his or her discretion in ruling on the matter. A proper exercise of discretion involves consideration of the particular circumstances of each case." *101 Geneva, LLC v. Wynn*, 435 Md. 233, 241 (2013) (internal citations and quotation marks omitted). "Moreover, the vacatur of a foreclosure sale . . . is a judicial decision affecting the rights and interests of litigants, and, as such, it is generally within the discretion of trial judges to rule on the matter." *Id.* at 242 (internal citations and quotation marks omitted). We reverse the denial of a motion to revise a final judgment only where "no reasonable person would take the view adopted by the [trial] court, or when the court

[2] The foreclosure sale purchaser was S.F.C. Properties, LLC, an affiliate of S.F.C.

acts without reference to any guiding rules or principles." *Powell v. Breslin*, 430 Md. 52, 62 (2013) (internal quotation marks and citation omitted).

DISCUSSION

I. The trial court did not abuse its discretion in denying appellant's Motion to Vacate the Order Ratifying the Foreclosure Sale.

Maryland Rule 2-535(b) provides, "[o]n motion of any party filed at any time, the court may exercise revisory power and control over the judgment in case 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." *Thacker v. Hale*, 146 Md. App. 203, 217 (2002) (internal quotation marks omitted). Irregularity has been defined as "'a failure to follow required procedure or process.'" *Powell v. Breslin*, 430 Md. 52, 72 (2013) (quoting *Early v. Early*, 338 Md. 639, 653 (1995)). To prevail on a motion under Rule 2-535(b), "the existence of fraud, mistake, or irregularity by clear and convincing evidence" must be demonstrated by the movant. *Davis v. Attorney Gen.*, 187 Md. App. 110, 123–24 (2009) (internal quotation marks and citation omitted). For the court to vacate a judgment the movant "must establish that he or she acted in good faith and with ordinary diligence, and that he has a meritorious cause of action or defense." *Id.* at 124.

Foreclosure actions are *in rem* proceedings that allow for the disposal of property by the mortgagee upon the default of the borrower. See *G.E. Capital Mortg. Servs., Inc. v.*

Levenson, 338 Md. 227, 245 (1995). "Title 14 of the Maryland Rules of Procedure,[3] entitled 'Sales of Property,' sets forth the practice and procedure for foreclosures." *Zorzit v. 915 W. 36th St., LLC*, 197 Md. App. 91, 98 (2011). "Foreclosure proceedings are initiated by the filing of a document describing "the debt owed, the rights of the party seeking to foreclose and notice to the debtor. Md. Rule 14-207." *Pulliam v. Dyck-O'Neal, Inc.*, 243 Md. App. 134, 143 (2019).

Appellant argues the trial court erred in not finding the order ratifying the foreclosure sale was void because neither the Order to Docket nor the Order Ratifying the Sale was properly served. According to appellant, proper service following the filing of the Order to Docket required compliance with Md. Rule 2-124(h) which states,

> Service is made upon a limited liability company by serving its resident agent. If the limited liability company has no resident agent or if a good faith attempt to serve the resident agent has failed, service may be made upon any member or other person expressly or impliedly authorized to receive service of process.

Appellant contends "there is no evidence in the record to suggest, much less show that Andre Johnson or Andre Letren was expressly or impliedly authorized to receive service of process." Appellant argues the circuit court should have conducted an evidentiary hearing to determine whether appellant received notice.

In our view, the Title 14 Rules constitute the entirety of Maryland's foreclosure processes and do not provide the same notice requirements as are necessary for *in*

[3] The portions of the Title 14 statute mentioned in this opinion have been amended by the 2020 Maryland Court Order 0035 (C.O. 0035) and the amendments will go into effect August 1, 2020.

personam proceedings. Appellant cites *Rogers v. Hanley*, 21 Md. App. 383 (1974) to support its position. However, that case involved a breach of contract and fraud claim that resulted in a default judgment with an award of damages against a corporation. *Id.* at 385. *In rem* proceedings are equitable matters and quite distinct. The Title 14 Rules, unlike the Title 2 Rules, do not mandate that a company's resident agent or person expressly or impliedly authorized to receive service be served in such cases.

Appellant also argues service did not comply with Rule 14-209. In a footnote, appellant acknowledges that the property in question is a commercial property and then states, ". . . Rule 14-211, which applies to both residential and commercial property refers to Rule 14-209 for service . . . In turn, Rule 14-209 references § 7-105.1(h)(1)."

We do not agree with this analysis. Maryland Rule 14-209, which refers to § 7-105.1(h) of the Real Property Article controls how notice is to be provided when a residential property foreclosure action is initiated. Section 7-105.1(h) outlines notice requirements prior to the foreclosure sale of residential property, stating that service includes providing a "copy of the order to docket or complaint to foreclose . . . and all other papers filed with it in the form and sequence prescribed by regulation . . . on the mortgagor or grantor by personal delivery of the papers to the mortgagee or grantor." Md. Code Ann., Real Prop. § 7-105.1(h).

There is no language in either section that references commercial property. Rule 14-209 states: "[w]hen an action to foreclose a lien on residential property is filed, the plaintiff shall serve on the borrower and the record owner a copy of all papers filed to

commence the action" and "service shall be by personal delivery of the papers or by leaving the papers with a resident of suitable age and discretion at the dwelling house or usual place of abode of each person served." Instead, Rule 14-211, which outlines the procedures for motions to stay and dismiss provides: "(B) Other Property . . . A motion to stay and dismiss by a person not entitled to service under Rule 14-209 shall be filed within 15 days after the moving party first became aware of the action." MD R PROP SALES Rule 14-211(a)(2)(b). As we see it, the term "Other Property" includes commercial property and thus, service under 14-209, or by reference, § 7-105.1(h)(1), was not required. Notwithstanding, appellees did personally deliver the order to docket and accompanying papers to appellant's corporate address and left them with a person who identified himself as a housemate of the "managing member and trustee" and was of suitable age and discretion.

Appellant also contends that appellee did not properly serve notice of the foreclosure sale because the certified mail sent to its corporate address was returned marked "Address Unknown." Appellant further argues appellees should have, at the very least, in good faith and with diligence, sought an alternative means for delivery of a copy of the Notices of Sale. Appellant offers no statutory authority for this assertion. Appellees, on the other hand, argue service was proper.

Maryland Rule 14-210 establishes the requirements for notice prior to a foreclosure sale. Rule 14-210, unlike Rule 14-209, makes no delineation between residential and commercial property, and states that prior to "an action to foreclose a lien . . . notice of the

time, place, and terms of the sale [shall be published] in a newspaper of general circulation in the county in which the action is pending . . . . [for] at least once a week for three successive weeks." MD R PROP SALES Rule 14-210(a). Before the sale "notice of the time, place, and terms of sale" must be sent "by certified mail and by first-class mail to the [] borrower" at least 30 days prior to the sale. MD R PROP SALES Rule 14-210(b). "Mortgagors with defenses to the foreclosure may raise them within fifteen days of the last of various procedural milestones. Md. Rule 14-211(a)." *Pulliam*, 243 Md. App. at 144.

Here, court records reflect that notices of the sale were mailed by first-class postage and certified mail to the two designated addresses. The certified mail was returned, but the first-class mail that was sent to the corporate address was not returned. Appellees also published notice of the sale in the Washington Post for the required three weeks. As a result, we find the court did not abuse its discretion in ruling that service had been accomplished by "constructive notice." There was, in fact, no personal service, but none was required by the Rules.

A common thread in both processes and also important to our resolution of the issue of service of the order to docket and the foreclosure sale, is the fact that the parties here agreed, in the Deed of Trust, that "notice" could be given if delivered by personal service to the addresses designated in the document or effective three days after mailing from a U.S. post office. The Deed of Trust states:

> 23. NOTICES. Any notice, demand consent, approval, request or other communication or document to be provided hereunder or under any applicable law pertaining hereto to a party hereto shall be in writing and duly given if delivered to (a) the Grantor (at its address on the Lender's records),

> and (b) the Lender (at the address on page one and separately to the Lender's officer responsible for the Grantor's relationship with the Lender) or the Holder (if not the Lender) (at the address designated in writing by the Holder to the Grantor, if any). Such notice or demand shall be deemed sufficiently given for all purposes when delivered (i) by personal service and shall be deemed effective when delivered, or (ii) by mail or courier and shall be deemed effective three (3) business days after deposit in an official depository maintained by the United States Post office for the collection of mail or one (1) business day after delivery to a nationally recognized overnight courier service (e.g. Federal Express). Notice by e-mail is not valid notice under this or any other agreement between the Grantor and the Holder.

As previously stated, appellant provided 4020 Southern Avenue, SE, Washington D.C. as its corporate address. The order to docket was delivered by personal service to that address. The notice of foreclosure sale was mailed to that same address. We note the parties contracted and agreed to these terms of service and appellant did not change the address listed in the Deed of Trust. In accordance with that agreement, appellees properly effectuated service for both foreclosure processes.

Appellant, nevertheless, argues it was denied due process because there was no personal service. Appellant argues that "had the same circumstances—certified mail returned marked "Address Unknown—in this case been present in *Griffith* [sic], the Court of Appeals would not have found the trustees service of the Notice of Sale to be adequate."

To be sure, notice is a defined requirement under Maryland foreclosure laws. In *Griffin v. Bierson*, the Court of Appeals examined the question of whether Maryland's foreclosure notice requirements afforded the parties due process and held that due process requires, "notice 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." 403 Md. 186, 196 (2008). In holding the statutory scheme was not unconstitutional, the Court noted that due process does not require personal service in mortgage foreclosure cases. *Id.* at 210. We observe that in *Griffin* as in the present case, Griffin authorized service by mail in the deed of trust and knew that she was in arrears in her payments. *Id.* at 203. The Court of Appeals ultimately held, citing *Mullane v. Cent. Hanover Bank & Tr. Co.*, 339 U.S. 306, 316, 70 S. Ct. 652, 658 (1950):

> The Maryland foreclosure scheme requires that the Trustees send notice by both certified and first-class mail, two efficient and inexpensive means of communication that we conclude are calculated reasonably to inform interested parties of the pending foreclosure action. In balancing the interest of the parties, the General Assembly has looked to economy, efficiency, and minimal involvement of the judiciary. We cannot say that that judgment was unreasonable.

Id. at 212 (internal citations and quotation marks omitted).

In sum, we find no abuse of discretion by the court in denying appellant's motion to vacate, either because of lack of compliance with the foreclosure statutes or as a denial of due process. Nor was the court required to hold a hearing or to detail its thought process. In viewing the totality of the circumstances, appellant failed to establish an irregularity sufficient for the court's determination that it should exercise its revisory power. **"**To be reversed '[t]he decision under consideration has to be well removed from any center mark imagined by the reviewing court and beyond the fringe of what that court deems minimally acceptable.'" *Aventis Pasteur, Inc. v. Skevofilax*, 396 Md. 405, 418–19 (2007) (quoting *Wilson v. John Crane, Inc.*, 385 Md. 185, 867 A.2d 1077 (2005)). The court's decision here was well within the "center mark."

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