UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 2058

September Term, 2007

NEW TOWNE PROPERTIES, LLC

V.

WOODROW BOYD, ET AL.

Krauser, C.J.,
Matricciani,
Berger, Stuart R.,
(Specially Assigned),

JJ.

Opinion by Matricciani

Filed: October 17, 2008

3C070001856

This case arises from a real estate transaction between appellants, New Towne Properties, LLC (New Towne), and appellees, Woodrow and Cheryl Boyd. Appellant filed an action for declaratory relief in the Circuit Court for Baltimore County, asking the court to nullify the "Notice of Revocation of Power of Attorney and Rescission and Cancellation of Foreclosure Consultant Contract and Foreclosure Reconveyance Deed," and to quiet title in the Plaintiff to the property known as 3 Glenwest Court. Subsequently, motions for summary judgment were filed by both parties. Applying The Protection for Home Owners in Foreclosure Act (PHIFA), Md. Code (1974, 2003 Repl. Vol., 2007 Supp.), § 7-301 *et seq.* of the Real Property Article ("R.P."), the court granted the appellee's motion for summary judgment.

QUESTIONS PRESENTED

The appellant presented two questions that we have slightly reworded:

1. Did the trial court err in applying The Protection of Home Owners in Foreclosure Act to the facts of this case?

> A. Did the trial court err in finding that Robert Hurd functioned as a foreclosure consultant?
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> B. Did the trial court err in finding that Robert Hurd violated the PHIFA indirectly through his business, New Towne?
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> C. Did the trial court err in finding that the rescission of the conveyance was timely?

2. Did the trial court err in granting a declaration for Woodrow and Cheryl Boyd that rescinded the deed executed by the Boyds conveying real property to New Towne and reciting that the Boyds were the owners of 3 Glenwest Court?

FACTS AND PROCEEDINGS

On or about March 26, 2006, a foreclosure action was docketed against appellees. The property at issue is located at 3 Glenwest Court in Baltimore, Maryland. After receiving the foreclosure notice, appellees received a solicitation from Robert Hurd of Royal Financial Services, Inc. (Royal Financial)[1] that represented he could refinance their defaulted loan. The appellees called Mr. Hurd and met with him on or about April 17, 2006. At the meeting, Mr. Hurd took appellees' application to refinance their mortgage. On or about April 19, 2006, hours before the scheduled foreclosure sale, Mr. Hurd returned to the appellees' home and said that he could not refinance the home. Instead, he offered to enter into a lease-back arrangement with the appellees through his company, the appellant. He said this would save their home from foreclosure. Believing this was their only option, appellees agreed. Once appellees had agreed to the lease-back agreement, Mr. Hurd, on behalf of appellant, provided appellees with many forms. Mr. Hurd, however, did not provide appellees with copies of all the forms they signed and he did not provide complete copies of the documents they received. On April 20, 2006, the appellees participated in a real estate settlement conducted by Resource Real Estate. Appellant and Mr. Hurd selected the settlement company. Appellees never received a Notice of Rescission as required by R.P. §7-306(c)(2) from either Mr. Hurd, the appellant, or any other party or agent on their behalf. Subsequently, appellees

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[1]According to appellees, Mr. Hurd acted through several different affiliates, including New Towne and Royal Financial.

rescinded the foreclosure reconveyance of their home on or about January 8, 2007 and recorded the rescission in the land records for Baltimore County.

On February 16, 2007 appellant filed a complaint for declaratory judgment and to quiet title. Appellees filed an answer on March 2, 2007. On April 19, 2007, appellant filed a motion for summary judgment and appellees responded on May 8, 2007. On May 15, 2007, appellees filed a motion for summary judgment. Appellant responded to appellees' motion on June 7, 2007. The circuit court considered the cross motions for summary judgment on August 3, 2007, and on August 30, 2007 entered an order denying appellant's motion for summary judgment and granting appellees' motion for summary judgment. On September 10, 2007, appellant filed a timely motion to alter or amend the judgment and appellees responded on September 26, 2007. On October 15, 2007, the court denied appellant's motion to alter or amend the judgment. Appellant filed a timely notice of appeal on October 30, 2007.

STANDARD OF REVIEW

"The question of whether a trial court's grant of summary judgment was proper is a question of law subject to *de novo* review on appeal. In reviewing a grant of summary judgment under Md. Rule 2-501, we independently review the record to determine whether the parties properly generated a dispute of material fact." *Haas v. Lockheed Martin Corporation*, 396 Md. 469, 479 (2007). If the parties do not raise a dispute of material fact, we must determine if the moving party is entitled to judgment as a matter of law. *Id.* We

review the record in the light most favorable to the nonmoving party and construe any reasonable inferences that can be drawn from the facts against the moving party. *Id.*

DISCUSSION

I.

In support of appellant's argument that the trial court erred in applying PHIFA, appellant presents three arguments. First, appellant contends that the finding that Mr. Hurd was a foreclosure consultant was clearly erroneous. Second, appellant contends that the court's finding that Mr. Hurd violated PHIFA indirectly through New Towne was in error. Third, appellant contends the finding that appellees' reconveyance rescission was timely was clearly erroneous. The clearly erroneous standard is not the appropriate standard for appellate review. *Heat & Power Corporation, et al. v. Air Products & Chemicals, Inc.*, 320 Md. 584, 591 (1990). As stated above, appellate review of motions for summary judgment is restricted to review of whether the trial court was legally correct. *Id.* Accordingly, we will address appellant's contentions under the correct standard of review.

Appellant contends that the trial court erred in finding that Mr. Hurd was a foreclosure consultant as defined by PHIFA.[2] In response, appellees stated that appellant's conduct, through its managing member, Mr. Hurd, established it as a foreclosure consultant.

Under PHIFA, a foreclosure consultant is defined as a person who:

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[2]We have rephrased the appellant's question to conform with the correct appellate standard of review.

> (1) Solicits or contacts a homeowner in writing, in person, or through any electronic or telecommunications medium and directly or indirectly makes a representation or offer to perform any service that the person represents will:
>
> > (i) Stop, enjoin, delay, void, set aside, annul, stay, or postpone a foreclosure sale;
> >
> > * * *
> >
> > (iii) Assist the homeowner to exercise a right of reinstatement provided in the loan documents or to refinance a loan that is in foreclosure and for which notice of foreclosure proceedings has been published;
> >
> > * * *
> >
> > (vi) Assist the homeowner to obtain a loan or advance of funds;
> >
> > * * *
> >
> > (viii) Save the homeowner's residence from foreclosure;
> >
> > * * *
> >
> > (x) Arrange for the homeowner to become a lessee or renter entitled to continue to reside in the homeowner's residence.
> >
> > * * *
>
> R.P. §7-301(b)(1)(i), (iii), (vi), (viii), (x)

The uncontested facts concerning Mr. Hurd's interactions with the appellees clearly bring him within the statutory definition of a foreclosure consultant. In her affidavit, Mrs. Boyd stated that Mr. Hurd offered to enter into a lease-back arrangement with the appellees through the appellant company. Mrs. Boyd further averred that Mr. Hurd said the lease-back arrangement would save the appellee's home from foreclosure. This action represents an "in person" solicitation by Mr. Hurd where he directly represented to the appellees that he could arrange a lease-back contract. These facts alone are sufficient to qualify Mr. Hurd as a foreclosure consultant under PHIFA.

In response, appellant claimed that Mr. Hurd was acting on behalf of Royal Finance,

a mortgage lender, and thus exempt from PHIFA. Under PHIFA, certain categories of people are excluded from the law. R.P. §7-302(a) in pertinent part explains: "Except as provided in subsection (b) of this section, this subtitle does not apply to: (7) A person licensed as a mortgage broker or mortgage lender under Title 11, Subtitle 5 of the Financial Institutions Article while acting under the authority of that license."

The appellant's contention that Mr. Hurd was acting on behalf of a mortgage lender, however, was completely unsupported by any documents or other evidence submitted to the court. Maryland Rule 2-501 states that in order to be considered by the trial court on a motion for summary judgment, the response must:

> (1) identify with particularity each material fact as to which it is contended that there is a genuine dispute and (2) as to each such fact, identify and attach the relevant portion of the specific document, discovery response, transcript of testimony (by page and line), or other statement under oath that demonstrates the dispute. A response asserting the existence of a material fact or controverting any fact contained in the record shall be supported by an affidavit or other written statement under oath.

Md. Rule 2-501(b).

Thus, under the record presented on the cross motions for summary judgment the court was correct in finding Mr. Hurd to have acted on behalf of New Towne as a foreclosure consultant, as that term is defined in PHIFA.

Next, appellant poses the question of whether the trial court erred in finding that Mr. Hurd, through his role as managing member of New Towne, violated PHIFA by indirectly acquiring an interest in appellees' property. Under PHIFA, a foreclosure consultant may not:

> (5) Acquire any interest, directly or indirectly, or by means of a subsidiary, affiliate, or corporation in which the foreclosure consultant or a member of the foreclosure consultant's immediate family is a primary stockholder, in a residence in foreclosure from a homeowner with whom the foreclosure consultant has contracted.

R.P. § 7-307(5). As a result of Mr. Hurd's status as a foreclosure consultant, he was not permitted to acquire an interest in the appellees' foreclosure property either directly or indirectly through a business entity. Appellant acquired an interest in the appellees' property when, as stated in Mr. Hurd's affidavit, it purchased the appellees' property. As managing member of appellant company, Mr. Hurd acquired an interest in the appellees' foreclosed property. The trial court did not err in finding that Mr. Hurd acquired an interest in the appellees' property in violation of PHIFA.

Finally, appellant contends the trial court erred in finding that under PHIFA, the appellees' rescission of the reconveyance was timely. In response, appellees stated they had the absolute right to rescind the foreclosure reconveyance at any time because appellants had not provided the statutorily required notices under PHIFA.

Three sections of PHIFA outline the required notices and rights of rescission. First, under PHIFA, a foreclosure consultant must provide a homeowner with a foreclosure consulting contract. R.P. §7-306(a)(1). The contract must include several provisions including a provision entitled: "Notice Required by Maryland Law" and a provision entitled: "Notice of Rescission." R.P. §7-306(a)(5), (c)(1). Second, under PHIFA a homeowner has the right to: "[r]escind a foreclosure reconveyance at any time before midnight of the 3rd

business day after any conveyance or transfer in any manner of legal or equitable title to a residence in foreclosure." R.P. §7-305(a)(2). Third, under PHIFA, "[t]he time during which the homeowner may rescind the contract does not begin to run until the foreclosure consultant has complied with this section." R.P. §7-306(e).[3]

Here, the undisputed facts establish that appellant never provided appellee with the statutorily required paperwork. Thus, the three-day window appellees had in which to file a rescission had not started to run. *See Johnson v. Wheeler*, 492 F.Supp.2d 492, 508 (D.Md. 2007)(stating that PHIFA "expressly established that the 3-day period for rescission does not begin to run until notice is properly given under the Act."). Thus, we conclude the trial court did not err in finding that appellee's rescission of the reconveyance was timely.[4]

II.

Appellant contends that the trial court erred in granting a declaration for the appellees and denying a declaration in their favor. They contend that Mr. Hurd should have been

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[3] Indeed, the preamble to the legislation provides:

> FOR the purpose of specifying the form and contents of certain contracts and documents; *providing that a homeowner has the right to rescind certain contracts and transactions within a certain time. . .*

S.B. 761 2005 Leg., 420th Sess. (Md. 2005) (emphasis added).

[4]The appellant also contends that, even if the rescission was timely, the appellees failed to comply fully with PHIFA because they did not repay funds within 60 days. While repayment of funds is required by the statute, the statute also clearly states that, "the right to rescind may not be conditioned on the repayment of any funds." R.P. §7-305(f) Thus, despite the appellees admitted failure to repay funds, their rescission is still timely and valid.

joined in the action and that his absence is fatal to the entry of the declaratory judgment. In response, appellees contend that Mr. Hurd knew of the matter before the trial court, had opportunities to join, and served as New Towne's only witness. As a result, Mr, Hurd had his "day in court."

Under Md. Code (1973, 2006 Repl. Vol.) § 3-405 (a)(1) of the Courts and Judicial Proceedings Article ("C.P.") if declaratory relief is sought, a person who has or claims any interest which would be affected by the declaration, shall be made a party." Further, Maryland Rule 2-211 provides, in relevant part:

> (a) Persons to be joined. Except as otherwise provided by law, a person who is subject to service of process shall be joined as a party in the action if in the person's absence
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> (1) complete relief cannot be accorded among those already parties, or
>
> (2) disposition of the action may impair or impede the person's ability to protect a claimed interest relating to the subject of the action or may leave persons already parties subject to a substantial risk of incurring multiple or inconsistent obligations by reason of the person's claimed interest.
>
> The court shall order that the person be made a party if not joined as required by this section. If the person should join as a plaintiff but refuses to do so, the person shall be made either a defendant or, in a proper case, an involuntary plaintiff.

The failure to join a party can cause an appellate court to remand to allow the joinder of the necessary party. *Bodnar v. Brinsfield*, 60 Md. App. 524, 531 (1984). There are, however, exceptions when remand is unnecessary. *Id.*

In *Bodnar*, the court held that joinder of the alleged necessary parties in that case was

not required because they had had their "day in court." *Id.* The court stated that, "'persons who are directly interested in a suit and have knowledge of its pendency and refuse or neglect to appear and avail themselves of their rights are concluded by the proceedings as effectually as if they were named in the record.'" *Id.* (quoting *Williams v. Snebly*, 92 Md. 9, 48 A. 43, 48(1900)).

The case of *Snavely v. Berman*, 143 Md. 75 (1923), is instructive in determining when a person has had his "day in court." In *Snavley*, tenants leased a space for the purpose of "conducting a ladies' and gents' furnishing store." *Id.* at 75. The landlord covenanted that he would not lease another space in the immediate vicinity to a tenant who planned to conduct a similar business. During their lease, Laken, another tenant in the building, began to sell men's furnishings. *Id.* The original tenants sued the landlord to enjoin him from continuing the lease to Laken. Laken was not made a party to the suit, but he testified. The demurrer to the bill of complaint was filed alleging that Laken should have been joined as a defendant. The Court of Appeals held that, "while Laken was not formally made a defendant in the suit, he knew of its pendency and of its relation to his interests, and could have become a party if he had so desired. . ." *Id. See also City of Bowie v. Mie, Properties, Inc., et al.*, 398 Md. 657, 704 (2007) (recognizing the controlling principles to determine if a party has had his day in court as 1) the non-joined party's knowledge of the litigation affecting his interest and 2) his ability to join the litigation, but failure to do so).

Similarly, in this case, Mr. Hurd was a not joined as a party. Mr. Hurd however, was

fully aware of the pending proceedings involving New Towne and the Boyds. Mr. Hurd is the managing member of New Towne. He stated in his affidavit that he was "the managing member of New Towne Properties, LLC and knowledgeable of the business and affairs of the corporation." Mr. Hurd could have become a party if he had desired.

Further, this court has held that Maryland Rule 2-211 is forward looking and is not to be used to remedy an adverse ruling. *Caretti, Inc. v. Colonnade Limited Partnership*, 104 Md. App. 131, 143 (1995). There the court held that as a plaintiff the appellant had control of the suit and could have joined additional parties at the beginning. The appellant, however, does not have the ability to "negate an adverse ruling because of his own failure to join all indispensable parties." *Id.*

In this case, the appellant had control of the suit and could have joined additional parties. The appellant chose not to join additional parties. Following an adverse ruling, the appellant now contends that Mr. Hurd was an indispensable party and should have been joined. The offensive use of Maryland Rule 2-211 is not permitted.

Thus, we hold that the non-joinder of Mr. Hurd was not fatal to the trial court's declaratory judgment.

JUDGMENT AFFIRMED. COSTS TO BE PAID BY APPELLANT.