

**VIRGINIA:**

*In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Thursday the 16th day of June, 2016.*

Newport News Shipbuilding Employees'  
Credit Union, d/b/a Bayport Credit Union,

Appellant,

against

Record No. 150678  
Circuit Court No. CL12-421

Lloyd Busch, et al.,

Appellees.

Upon an appeal from a judgment rendered by the Circuit Court of Gloucester County.

Upon consideration of the record, briefs, and argument of counsel, the Court is of opinion that there is reversible error in the judgment of the circuit court.

Lloyd E. Busch owned a parcel of real property situated in Gloucester County, which he conveyed by deed of trust to Millard C. White, trustee, for the benefit of Newport News Shipbuilding Employees' Credit Union ("Bayport") to secure a note in the principal amount of \$120,000.00, plus interest. Steven L. Brown and John F. Sawyer were subsequently appointed substitute trustees under the deed of trust.

The deed of trust required Bayport to send Busch a pre-acceleration notice providing at least 30 days to cure any default prior to accelerating the amount due under the note. On February 2, 2012, Bayport sent Busch a pre-acceleration notice informing him that he was in default for non-payment of the note and demanding payment not later than March 2, 2012 to cure the default. Bayport concedes that the notice did not provide 30 days to cure the default as required by the deed of trust.

In May 2012, Brown notified Busch that he was in default, that the balance due under the note had been accelerated, and that the parcel would be sold at a foreclosure auction if he did not pay in full before the date of the auction. Brown and Sawyer thereafter sold the parcel to Bayport at auction and conveyed the parcel to it by trustees' deed. Bayport thereafter filed a

summons for unlawful detainer. The general district court awarded Bayport possession and Busch filed a de novo appeal in the circuit court.

The appeal was tried to a jury on October 21, 2014. At the conclusion of Bayport's case, Busch moved to strike the evidence arguing that the pre-acceleration notice failed to fulfill the requirement of the deed of trust. The court ruled that Bayport had not substantially complied with the pre-acceleration notice requirement. It therefore granted Busch's motion to strike and advised Bayport to begin the foreclosure proceeding anew.

On November 13, 2014, Bayport filed a consolidated motion to reconsider and motion for judgment as a matter of law arguing, for the first time, that the general district court lacked jurisdiction to try title in an unlawful detainer proceeding and that the circuit court's jurisdiction in the de novo appeal was limited to the jurisdiction of the general district court. Bayport argued that the validity of the foreclosure proceeding therefore was not relevant because Bayport had facially valid title in the form of the trustees' deed.

The circuit court entered its final order dismissing the summons for unlawful detainer on February 9, 2015. Bayport filed a timely notice of appeal on March 2, 2015. The circuit court denied Bayport's consolidated motion by a putative order dated April 29, 2015. Bayport appeals.

All the arguments Bayport makes in its assignments of error were raised for the first time in the consolidated motion it filed on November 13, 2014. While the circuit court did not enter its final order until February 9, 2015, it did not address Bayport's motion then. The court first addressed Bayport's motion on April 29, 2015.

Under Rule 1:1, a circuit court loses jurisdiction over a case 21 days after the entry of its final judgment.

The running of the twenty-one day time period prescribed by Rule 1:1 may be interrupted only by the entry, within the twenty-one day time period, of an order modifying, vacating, or suspending the final judgment order. Neither the filing of post-trial or post-judgment motions, nor the trial court's taking such motions under consideration, nor the pendency of such motions on the twenty-first day after final judgment, is sufficient to toll or extend the running of the twenty-one day time period of Rule 1:1.

Super Fresh Food Mkts. of Va. v. Ruffin, 263 Va. 555, 560, 561 S.E.2d 734, 737 (2002). Any action by a court after the 21-day period elapses is void for want of jurisdiction. Id. at 563, 561 S.E.2d at 736.

In this case, the circuit court entered no order modifying, vacating, or suspending its February 9, 2015 final order. Accordingly, its jurisdiction lapsed on March 2, 2015, 58 days before April 29, 2015. Its decision that day on Bayport’s motion is a nullity.

A motion to reconsider is insufficient to preserve an argument for appeal “when the record fails to reflect that the trial court had the opportunity to rule upon that motion.” Brandon v. Cox, 284 Va. 251, 255-56, 736 S.E.2d 695, 697 (2012). The burden is on the appellant to establish such a record. Id. at 256 n.2, 736 S.E.2d at 697 n.2. Because the circuit court in this case lost jurisdiction before giving any indication on the record that it was aware of Bayport’s motion, “there is no evidence in the record that the trial court had the opportunity to rule upon the argument that [Bayport] presents on appeal.” Id. at 256, 736 S.E.2d at 697. Consequently, “it cannot be said that the case can be heard in this Court upon the same record upon which it was heard in the trial court and, therefore, the purpose of Rule 5:25 is defeated. Thus, we must hold that [Bayport] has waived [its] argument by failing to preserve it.” Id.

Nevertheless, in one of its assignments of error, Bayport asserts that the circuit court lacked subject matter jurisdiction to try title in a de novo appeal of an unlawful detainer proceeding taken from the general district court. A court’s lack of subject matter jurisdiction may be raised at any time, even for the first time on appeal. Virginian-Pilot Media Cos., LLC v. Dow Jones & Co., 280 Va. 464, 468, 698 S.E.2d 900, 902 (2010).

The subject matter jurisdiction of the circuit court, when exercising its de novo appellate jurisdiction in an appeal taken from a court not of record, is derived from and limited to the subject matter jurisdiction of the court from which that appeal was taken. Addison v. Salyer, 185 Va. 644, 651-52, 40 S.E.2d 260, 264 (1946). The Court articulated the rule for determining whether the general district court has subject matter jurisdiction over an unlawful detainer action commenced there in Parrish v. Federal National Mortgage Association, \_\_\_ Va. \_\_\_, \_\_\_ S.E.2d \_\_\_ (this day decided).

Applying the Parrish rule to the facts of this case, the Court determines that Busch “allege[d] facts sufficient to place the validity of the trustee’s deed in doubt.” Id. at \_\_\_, \_\_\_

S.E.2d at \_\_\_\_\_. He alleged that the deed of trust required a pre-acceleration notice providing at least 30 days to cure any default as a condition precedent to acceleration of the debt and foreclosure. He alleged that the requirement was not substantially complied with.<sup>1</sup> The Court may infer from his allegations that Bayport was aware of the defect because it was both the foreclosure purchaser and the lender that allegedly failed to fulfill the condition precedent.

The Court therefore holds that Busch “raised a bona fide question of title in the unlawful detainer proceeding, thereby divesting the general district court of subject matter jurisdiction.” *Id.* at \_\_\_\_, \_\_\_ S.E.2d at \_\_\_\_\_. Accordingly, neither the general district court nor the circuit court (exercising its de novo appellate jurisdiction) had subject matter jurisdiction to try the unlawful detainer action, which should have been dismissed without prejudice.

For these reasons, the Court vacates the judgment of the circuit court and dismisses the summons for unlawful detainer, thereby restoring the parties to their status quo ante the commencement of the unlawful detainer proceeding.

This order shall be certified to the Circuit Court of Gloucester County.

Justice Goodwyn took no part in the consideration of this case.

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JUSTICE McCLANAHAN, concurring in part and dissenting in part.

I agree with the majority that Bayport waived the argument it makes on appeal. However, I disagree that the general district court and circuit court lacked subject matter jurisdiction for the reasons stated in my opinion in Parrish v. Federal National Mortgage Association, \_\_\_ Va. \_\_\_\_, \_\_\_ S.E.2d \_\_\_\_ (this day decided) (McClanahan, J., concurring in part and dissenting in part). Therefore, I would not vacate the judgment of the circuit court.

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JUSTICE POWELL, concurring in part and dissenting in part.

I agree with the majority that Bayport failed to preserve the non-jurisdictional arguments that it raises on appeal and, therefore, it has waived those arguments under Rule 5:25. However, as I explained in my opinion in Parrish v. Federal National Mortgage Association, \_\_\_ Va. \_\_\_\_,

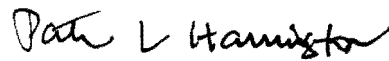
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\* Bayport did not assign error to the circuit court’s ruling that it had not substantially complied with the pre-acceleration notice requirement.

\_\_\_ S.E.2d \_\_\_ (this day decided) (Powell, J., concurring in part and dissenting in part), nothing in our case law supports the majority's holding that a general district court loses subject matter jurisdiction over an unlawful detainer case when the defendant raises a bona fide question of title. Thus, in my opinion, the general district and the circuit court had subject matter jurisdiction over this matter. Therefore, having determined that Bayport waived its remaining arguments, I would affirm the decision of the circuit court.

A Copy,

Teste:

A handwritten signature in black ink, appearing to read "Pat L. Hamister". The signature is written in a cursive, slightly slanted style.

Clerk