Bayview Loan Servicing, LLC v. Locklear et al Doc. 38

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA
SOUTHERN DIVISION
No. 7:15-CV-220-D

BAYVIEW LOAN SERVICING, LLC,

Plaintiff,

v.

CAROLYN LOCKLEAR, LENNIE LOCKLEAR a/k/a, LINNIE LOCKLEAR, MERITAGE MORTGAGE CORPORATION, LUMBEE GUARANTY BANK, THE UNITED STATES OF AMERICA acting through its agency THE INTERNAL REVENUE SERVICE, and THE NORTH CAROLINA DEPARTMENT OF REVENUE,

Defendants.

ORDER

On July 30, 2015, Bayview Loan Servicing, LLC ("Bayview" or "plaintiff") filed a complaint in Robeson County Superior Court against Carolyn Locklear, Lennie Locklear (collectively "the Locklears"), Lumbee Guaranty Bank ("Lumbee"), Meritage Mortgage Corporation ("MMC"), the United States through its agency the Internal Revenue Service ("the IRS"), and the North Carolina Department of Revenue [D.E. 1-1]. On October 7, 2015, the IRS removed the action to this court [D.E. 1] and answered [D.E. 3]. On July 5, 2016, the court entered default against the Locklears and MMC [D.E. 18].

On September 12, 2016, the IRS moved for summary judgment [D.E. 21] and filed a memorandum in support [D.E. 22] and a statement of material facts [D.E. 23, 24]. On September 22, 2016, Bayview voluntarily dismissed Lumbee [D.E.27]. On October 3, 2016, Bayview responded to the IRS's statement of material facts [D.E. 28, 30] and motion for summary judgment

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[D.E. 29]. On November 17, 2016, the IRS replied [D.E. 32] and supplemented its statement of material facts [D.E. 33, 34].

On May 31, 2017, Bayview moved for default judgment against the Locklears and MMC [D.E. 35] and filed a memorandum in support [D.E. 36]. On June 19, 2017, the IRS responded [D.E. 37]. As explained below, the court grants the IRS's motion for summary judgment and grants in part and denies in part Bayview's motion for default judgment.

I.

On December 12, 1995, the Locklears acquired by general warranty deed a parcel of land located at 508 Fodiesville Road in Shannon, North Carolina, which is in Robeson County ("the Fodiesville Road property"). Def.'s Stmt. Material Facts [D.E. 23] ¶ 1; Pl.'s Stmt. Material Facts [D.E. 28] ¶ 1. On December 10, 1997, Florence C. Wellons deeded to the Locklears a second parcel of land located in Shannon, North Carolina, about three miles northwest of the Fodiesville Road property ("the Shannon Heights property"). [D.E. 30] 41–42. On March 31, 1999, the Locklears executed a deed of trust in favor of MMC encumbering the Fodiesville Road property ("the Meritage Deed of Trust"). [D.E. 30] 31–38. On November 15, 2001, the Locklears borrowed $83,000.00 from ABN Amro Mortgage Group, Inc. ("ABN"), secured by a deed of trust recorded in Book 1211, Pages 565–72 of the Robeson County Register of Deeds ("the ABN Deed of Trust"). Def.'s Stmt. Material Facts ¶¶ 2–3; Pl.'s Stmt. Material Facts ¶¶ 2–3. The Locklears used the $83,000.00 loan secured by the ABN Deed of Trust to pay off the Meritage Deed of Trust. See Compl. [D.E. 1-1] ¶ 47; Answer [D.E. 3].

The ABN Deed of Trust described the property it encumbered as:

> A certain tract or parcel of land in Roberson [sic] County, in the State of North Carolina, described as follows

> Being all of Lot No Twelve (12) as shown on that certain map entitled "Shannon Heights, Section II," . . . recorded . . . in Book of Maps No Thirty-Three (33), at page Sixty-Six (66), Roberson [sic] County Registry, to which said map reference is hereby made for a more particular description of said property and the same is incorporated as a part hereof . . . .
>
> Property Address: (for informational purposes only)
> 508 Fodiesville Rd.
> Shannon, NC 28386

which currently has the address of 508 FODIESVILLE RD, SHANNON, North Carolina 28386 ("Property Address")[.]

[D.E. 24] 25. The map recorded with the Robeson County, N.C. Register of Deeds shows the Shannon Heights property. See Register of Deeds Office, Search Records, Robeson County, N.C. Register of Deeds, http://robeson.bislandrecords.com/ (accessed July 13, 2017) (search by "Book/Page"). The Locklears own both the Shannon Heights property and the Fodiesville Road property. Def.'s Stmt. Material Facts ¶ 7; Pl.'s Stmt. Material Facts ¶ 7. The ABN Deed of Trust contains no reference to the secured property's location beyond the reference to the map and the street addresses.

On August 14, 2006, ABN assigned the Locklears' loan to Mortgage Electronic Registration Systems, Inc. ("MERS"). Def.'s Stmt. Material Facts ¶ 10; Pl.'s Stmt. Material Facts ¶ 10. On July 1, 2008, the Locklears stopped making loan payments. Def.'s Stmt. Material Facts ¶ 11; Pl.'s Stmt. Material Facts ¶ 11. On July 27, 2009, the IRS recorded a Notice of Federal Tax Lien with the Robeson County Clerk of Superior Court against the Locklears, attaching both the Fodiesville Road property and the Shannon Heights property. Def.'s Stmt. Material Facts ¶¶ 12–13; Pl.'s Stmt. Material Facts ¶¶ 12–13. On June 7, 2011, the IRS recorded a second Notice of Federal Tax Lien with the Robeson County Clerk of Superior Court, attaching both properties. Def.'s Stmt. Material Facts ¶¶ 14–15; Pl.'s Stmt. Material Facts ¶¶ 14–15.

On June 8, 2012, MERS assigned the loan to JPMorgan Chase Bank, N.A. ("Chase"). Def.'s Stmt. Material Facts ¶ 17; Pl.'s Stmt. Material Facts ¶ 17. Chase performed title searches on both properties: the Shannon Heights property's title search showed the ABN Deed of Trust as encumbering that property, and the Fodiesville Road property's title search did not show the ABN Deed of Trust as encumbering that property. Def.'s Stmt. Material Facts ¶¶ 18–19; Pl.'s Stmt. Material Facts ¶¶ 18–19.

On September 6, 2014, Chase assigned the Locklears' loan to Bayview, which Bayview recorded on October 9, 2014. Def.'s Stmt. Material Facts ¶ 20; Pl.'s Stmt. Material Facts ¶ 20.

On July 30, 2015, Bayview filed this action in Robeson County Superior Court [D.E. 1-1]. On October 7, 2015, the IRS removed the action to this court [D.E. 1] and answered [D.E. 3]. On July 5, 2016, the court entered default against the Locklears and MMC [D.E. 18].

On September 12, 2016, the IRS moved for summary judgment [D.E. 21] and filed a memorandum in support [D.E. 22] and a statement of material facts [D.E. 23, 24]. On September 22, 2016, Bayview voluntarily dismissed Lumbee [D.E.27]. On October 3, 2016, Bayview responded to the IRS's statement of material facts [D.E. 28, 30] and motion for summary judgment [D.E. 29]. On November 17, 2016, the IRS replied [D.E. 32] and supplemented its statement of material facts [D.E. 33, 34].

On May 31, 2017, Bayview moved for default judgment against the Locklears and MMC [D.E. 35] and filed a memorandum in support [D.E. 36]. On June 19, 2017, the IRS responded [D.E. 37].

II.

In considering IRS's motion for summary judgment, the court views the evidence in the light most favorable to Bayview and applies well-established principles under Rule 56 of the Federal

Rules of Civil Procedure. See, e.g., Fed. R. Civ. P. 56; Scott v. Harris, 550 U.S. 372, 378 (2007); Celotex Corp. v. Catrett, 477 U.S. 317, 325–26 (1986); Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247–55 (1986); Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 585–87 (1986). Summary judgment is appropriate "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a); see Anderson, 477 U.S. at 247–48. The party seeking summary judgment must initially come forward and demonstrate an absence of a genuine issue of material fact or the absence of evidence to support the nonmoving party's case. See Celotex Corp., 477 U.S. at 325. Once the moving party has met its burden, the nonmoving party then must affirmatively demonstrate that there exists a genuine issue of material fact for trial. See Matsushita, 475 U.S. at 586–87.

"[T]here is no issue for trial unless there is sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party." Anderson, 477 U.S. at 249. Conjectural arguments will not suffice. See id. at 249–52; Beale v. Hardy, 769 F.2d 213, 214 (4th Cir. 1985) ("The nonmoving party . . . cannot create a genuine issue of material fact through mere speculation or the building of one inference upon another."). It is insufficient to show a "mere . . . scintilla of evidence in support of the [nonmoving party's] position . . . ; there must be evidence on which the [factfinder] could reasonably find for the [nonmoving party]." Anderson, 477 U.S. at 252.

Bayview's claims require this court to apply North Carolina law. In resolving any disputed issue of state law, the court must determine how the Supreme Court of North Carolina would rule. See Twin City Fire Ins. Co. v. Ben Arnold-Sunbelt Beverage Co., 433 F.3d 365, 369 (4th Cir. 2005). If the Supreme Court of North Carolina "has spoken neither directly nor indirectly on the particular issue before," this court must "predict how [it] would rule if presented with the issue." Id. (quotations omitted). In making that prediction, the court "may consider lower court opinions[,] .

. . treatises, and the practices of other states." Id. (quotation omitted).[1] When predicting an outcome under state law, a federal court "should not create or expand [a] [s]tate's public policy." Time Warner Entm't-Advance/Newhouse P'ship v. Carteret-Craven Elec. Membership Corp., 506 F.3d 304, 314 (4th Cir. 2007) (first alteration in original) (quotation omitted); see Wade v. Danek Med., Inc., 182 F.3d 281, 286 (4th Cir. 1999).

III.

Bayview asserts seven causes of action: reformation of the deed granting the Locklears the Fodiesville Road property to correct a spelling error (count one); reformation of the ABN Deed of Trust to "include the intended description" for the encumbered property as the Fodiesville Road property rather than the Shannon Heights property (count two); a request for a declaratory judgment that the deed granting the Locklears the Fodiesville Road property was valid despite the spelling error (count three); a request for a declaratory judgment that the ABN Deed of Trust was in priority lien position on the Fodiesville Road property (count four); a request for a declaratory judgment that Bayview subrogated to the rights of a prior lienholder (count five); a request to institute judicial foreclosure of the Fodiesville Road property (count six); and a claim for breach of contract against the Locklears (count seven). The IRS seeks summary judgment as to counts two, four, five, and six.

A.

Before discussing reformation, the court must analyze the ABN Deed of Trust. "In construing a deed description it is the function of the court to determine the true intent of the parties as embodied in the entire document." Inland Harbor Homeowners Ass'n, Inc. v. St. Josephs Marina, LLC, 219 N.C. App. 348, 351, 724 S.E.2d 92, 95 (2012); see Le Oceanfront, Inc. v. Lands End of

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[1] North Carolina does not have a mechanism for certifying questions of state law to its Supreme Court. See Town of Nags Head v. Toloczko, 728 F.3d 391, 397–98 (4th Cir. 2013).

Emerald Isle Ass'n, Inc. 238 N.C. App. 405, 410, 768 S.E.2d 15, 18 (2014); Bd. of Transp. v. Pelletier, 38 N.C. App. 533, 536–37, 248 S.E.2d 413, 415 (1978). If "[t]he language of the deed [is] clear and unequivocal, it must be given effect according to its terms." Le Oceanfront, Inc., 238 N.C. App. at 410, 768 S.E.2d at 18. A deed may incorporate a map or plat. See Wise v. Harrington Grove Cmty. Ass'n, Inc., 357 N.C. 396, 406, 584 S.E.2d 731, 739 (2003); Kelly v. King, 225 N.C. 709, 716, 36 S.E.2d 220, 224 (1945); Inland Harbor Homeowners Ass'n, Inc., 219 N.C. App. at 351–52, 724 S.E.2d at 95–96. If a deed properly identifies the property it encumbers, but also mistakenly references another property, the mistaken reference "shall not overrule that which is already rendered certain." In re Thompson, 799 S.E.2d 658, 662 (N.C. Ct. App. 2017) (quotation omitted); see Proctor v. Pool, 15 N.C. 370, 373 (1833).

North Carolina courts recognize two kinds of ambiguity: latent and patent. Patent ambiguity exists when the deed is ambiguous on its face and does not "refer to [anything] extrinsic by which [the property] might possibly be identified with certainty." Kidd v. Early, 289 N.C. 343, 353, 222 S.E.2d 392, 400 (1976); see In re Thompson, 799 S.E.2d at 662. Latent ambiguity exists when the text of the deed does not certainly identify the property in question, but that ambiguity may be resolved by reference to outside materials. See In re Thompson, 799 S.E.2d at 662.

To interpret a deed that contains conflicting references to the property encumbered, North Carolina courts accept specific descriptions over general descriptions. See Lewis v. Furr, 228 N.C. 89, 92–93, 44 S.E.2d 604, 606 (1947); N.C. Dep't of Transp. v. Herman, 788 S.E.2d 681, at *5 (N.C. Ct. App. 2016) (unpublished table decision). North Carolina courts also accept plat maps over metes-and-bounds descriptions, even if the parties subjectively intended to encumber the property listed in the metes-and-bounds descriptions. See Kelly, 225 N.C. at 716, 36 S.E.2d at 224; Peterson v. Polk-Sullivan, LLC, 206 N.C. App. 756, 759, 698 S.E.2d 514, 515–16 (2010).

In In re Meade, the Bankruptcy Court for the Eastern District of North Carolina interpreted deeds of trust that identified the encumbered property by reference to a plat map and a street address. In re Meade, No. 09–11148–8–JRL, 2011 WL 5909398, at *1 (Bankr. E.D.N.C. Jul. 29, 2011) (unpublished). The plat map reference and street address, however, referred to two different properties. Id. The bankruptcy court held that the plat map controlled over the street address for three reasons: first, "street addresses often change over time and are thus unreliable"; second, deeds usually do not use street addresses alone to define a subject property; and third, North Carolina prefers "a recorded plat over a reference to a prior deed or metes and bounds." Id. at *4–5.

Having considered the record and governing law, the court holds that the ABN Deed of Trust encumbers the Shannon Heights property. First, the ABN Deed of Trust is not ambiguous. It states the property encumbered by explicitly referencing and incorporating a plat map that shows the Shannon Heights property. By making this explicit reference and incorporation, the ABN Deed of Trust removed ambiguity as to the property encumbered. Second, although the ABN Deed of Trust references the Fodiesville Road property by its street address, that reference does not actually describe the encumbered property. Rather, the first mention of the Fodiesville Road address explicitly states that the Fodiesville Road address is not meant to control but is listed "for informational purposes only." The second reference occurs as a description of the current address of the property referenced in the map. Although that reference may provide some evidence of a mistake, nothing suggests that the reference to the Fodiesville Road address was meant to control over the plat map. Thus, the ABN Deed of Trust's references to the Fodiesville Road address cannot create ambiguity against the clear reference to the plat map as the description of the encumbered property. Moreover, even if the text of the ABN Deed of Trust indicated that the street addresses were intended to be used to identify the encumbered property, those street addresses would not

control to the extent they conflicted with the referenced plat map. The bankruptcy court's analysis in In re Meade is persuasive, and this court predicts that the Supreme Court of North Carolina would hold that, when a deed contains contradictory indications of the property in question, an incorporated plat map controls over a street address.

B.

The IRS argues that Bayview's claims for reformation, declaratory judgment, and equitable subrogation, are time-barred. A three-year statute of limitations applies to claims for reformation, equitable subrogation, and declaratory judgments. See Hice v. Hi-Mil, Inc., 301 N.C. 647, 654–55, 273 S.E.2d 268, 272–73 (1981) (reformation); Jamestown Mut. Ins. Co. v. Nationwide Mut. Ins. Co., 277 N.C. 216, 222, 176 S.E.2d 751, 756 (1970) (equitable subrogation); Lee v. Rhodes, 231 N.C. 602, 602, 58 S.E.2d 363, 363 (1950) (per curiam) (reformation); N.C. Farm Bureau Mut. Ins. Co. v. Hull, 795 S.E.2d 420, 425 (N.C. Ct. App. 2016) (equitable subrogation and declaratory judgment); Assurance Grp., Inc. v. Bare, 782 S.E.2d 581, at *3 (N.C. Ct. App. 2016) (unpublished table decision) (declaratory judgment claim related to contract); Morgan v. Cadieu, 720 S.E.2d 460, at *2 (N.C. Ct. App. 2011) (unpublished table decision) (reformation); N.C. Gen. Stat. § 1-52(9).

If a claim is based on a mutual mistake, the statute of limitations "begins to run from the discovery of the mistake or when it should have been discovered in the exercise of due diligence." Lee, 231 N.C. at 602, 58 S.E.2d at 363. "The assignee [of a contractual right] steps into the shoes of the assignor" for the purposes of a statute of limitations defense and takes the right subject to any defenses that then existed. Rose v. Vulcan Materials Co., 282 N.C. 643, 663–64, 194 S.E.2d 521, 535 (1973) (quotation omitted); see William Iselin & Co. v. Saunders, 231 N.C. 642, 646–47, 58 S.E.2d 614, 617 (1950).

A party should discover a mistake "where it was clear that there was both capacity and

opportunity to discover the mistake." Huss v. Huss, 31 N.C. App. 463, 468, 230 S.E.2d 159, 163 (1976). Whether a plaintiff did not discover a mistake because of a failure to exercise due diligence "is ordinarily [a question] for the jury." Wells Fargo Bank, N.A. v. Coleman, 239 N.C. App. 239, 244–45, 768 S.E.2d 604, 608–09 (2015). The statute of limitations does not necessarily begin to run when the deed is executed if a plaintiff fails to discover an error apparent on the face of a deed. Hice, 301 N.C. at 655, 273 S.E.2d at 272–73. "[W]hether failure to read a deed will bar relief depends on the facts and circumstances in each case," even if the party who failed to read the deed was a sophisticated entity. Wells Fargo Bank, N.A., 239 N.C. App. at 246, 768 S.E.2d at 609 (quotation omitted).

The alleged mistake underlying Bayview's claims is the erroneous listing of the address of the Fodiesville Road property on the ABN Deed of Trust. This alleged mistake appeared on the face of the ABN Deed of Trust, which explicitly incorporated the Shannon Heights plat map as its description of the encumbered property. Nonetheless, viewing the record in the light most favorable to Bayview, the IRS has failed to show that it is entitled to summary judgment based on the statute of limitations. See id., 768 S.E.2d at 609.

C.

As for Bayview's reformation claim, reformation is an equitable remedy in which a written instrument is rewritten or construed to effect the parties' intent when the instrument contains an error. See Marriott Fin. Servs., Inc. v. Capitol Funds, Inc., 288 N.C. 122, 139, 217 S.E.2d 551, 562 (1975); Light v. Equitable Life Assur. Soc. of the U.S., 56 N.C. App. 26, 32, 286 S.E.2d 868, 872 (1982). Reformation is available in three circumstances: "(1) mutual mistake of the parties; (2) mistake of one party induced by fraud of the other; and (3) mistake of the draftsman." Willis v. Willis, 365 N.C. 454, 722 S.E.2d 505, 507 (2012). North Carolina courts "jealously guard the

stability of real estate transactions and require clear and convincing proof to support the granting of [reformation] in cases involving executed conveyances of land." Marriott Fin. Servs., Inc., 288 N.C. at 139, 217 S.E.2d at 562. "[A]lthough a deed of trust securing a debt may serve the purpose and perform the function of a mortgage, the deed of trust is an absolute and indefeasible conveyance of the subject matter thereof for the purposes expressed." Am. Jur. 2d Mortgages § 121 (2017) (footnotes omitted); see Va.-Carolina Laundry Supply Corp. v. Scott, 267 N.C. 145, 153, 148 S.E.2d. 1, 5 (1966). Courts apply "a strong presumption in favor of the correctness of the instrument as written and executed .... This presumption is strictly applied when the terms of a deed are involved ...." Hice, 301 N.C. at 651, 273 S.E.2d at 270 (quotation omitted). Thus, Bayview must show clear and convincing evidence to support granting reformation of the ABN Deed of Trust.

Bayview offers only inconclusive indicia that the parties intended to encumber the Fodiesville Road property. The ABN Deed of Trust does reference both the Shannon Heights property and the Fodiesville Road property, but the inconsistency between the ABN Deed of Trust's reference to the plat map and the street address provides at most ambiguity as to which property the parties intended to encumber and does not provide clear and convincing evidence that the parties intended to encumber the Fodiesville Road property. Moreover, the only affirmative evidence suggesting which of the two properties the parties intended to encumber is the ABN Deed of Trust's statement that the street address was intended "for informational purposes only" and was not intended to identify the property. Even if the court considered the plat map and the street address as equally persuasive indicia of the parties' intent, that would create only uncertainty as to the parties' intent and would not satisfy Bayview's burden of clear and convincing proof to support reformation of the ABN Deed of Trust.

Next, Bayview notes that in 2015 the Locklears sold the Shannon Heights property but did

not use the consideration from that sale to pay off their outstanding debt on the ABN Deed of Trust. Bayview argues that this conduct shows the Locklears did not intend to encumber the Shannon Heights property with the ABN Deed of Trust.

The sale of the Shannon Heights property is in the record. The Locklears' failure to pay off the ABN Deed of Trust is not. Moreover, the Locklears stopped making payments on the loan secured by the ABN Deed of Trust in 2008; therefore, their failure to pay off the ABN Deed of Trust in 2015 does not constitute clear and convincing evidence concerning which property the Locklears intended to encumber in November 2001, when the Locklears executed the ABN Deed of Trust. Furthermore, the Locklears' failure to pay says nothing about ABN's intent and does not provide clear and convincing evidence of a mutual mistake. See Willis, 365 N.C. at 457, 722 S.E.2d at 507. Thus, the court grants summary judgment to the IRS on Bayview's reformation claim.

D.

Because the Deed of Trust encumbers only the Shannon Heights property, Bayview is not entitled to a declaration that the ABN Deed of Trust is a valid First Lien Deed of Trust on the Fodiesville Road property. Thus, the court grants summary judgment to the IRS on Bayview's declaratory judgment claim in count four.

As for Bayview's equitable-subrogation claim, Bayview does not oppose the IRS's motion for summary judgment as to equitable subrogation. Moreover, the court has reviewed the governing law and concludes that Bayview is not entitled to equitable subrogation as to the Fodiesville Road property when Bayview has no lien on that property whatsoever. See Jamestown Mut. Ins. Co. v. Nationwide Mut. Ins. Co., 277 N.C. 216, 221, 176 S.E.2d 751, 755 (1970); Bank of N.Y. Mellon v. Withers, 240 N.C. App. 300, 302, 771 S.E.2d 762, 764 (2015); Am. Gen. Fin. Servs., Inc. v. Barnes, 175 N.C. App. 406, 408, 623 S.E.2d 617, 619 (2006). Thus, the court grants summary judgment to

the IRS on Bayview's equitable-subrogation claim in count five.

As for Bayview's foreclosure claim, Bayview has no lien on the Fodiesville Road property. An element of judicial foreclosure is "a valid debt" encumbering the property to be foreclosed. In re Bass, 366 N.C. 464, 467, 738 S.E.2d 173, 175 (2013) (listing the elements of foreclosure in power-of-sale foreclosures); see United States v. Wise, No. 5:14-CV-844-FL, 2015 WL 5918027, at *5 (E.D.N.C. Oct. 9, 2015) (unpublished) ("[F]oreclosure by power of sale differs from judicial foreclosure only in procedure . . . ."); Lifestore Bank v. Mingo Tribal Preservation Trust, 235 N.C. App. 573, 582–83, 763 S.E.2d 6, 12–13 (2014). Thus, the court grants summary judgment to the IRS on Bayview's foreclosure claim in count six.

IV.

As for Bayview's motion for default judgment, Bayview seeks default judgment against the Locklears and MMC [D.E. 35]. On May 11, 2016, the Locklears were served with the complaint and summons. [D.E. 16-1] 2. On May 13, 2016, MMC was served with the complaint and summons. See [D.E. 16-2]. Neither the Locklears nor MMC answered the complaint or otherwise appeared in this case. On August 1, 2016, the court entered default against the Locklears and MMC [D.E. 19].

After entry of default, and upon application by the non-defaulting party, the court may enter a default judgment. See Fed. R. Civ. P. 55(b). In a case involving a claim other than a claim "for a sum certain or a sum that can be made certain by computation," a party seeking default judgment must apply to the court. Id. By defaulting, a defendant admits the complaint's well-pled factual allegations, but not conclusions of law. See Ryan v. Homecomings Fin. Network, 253 F.3d 778, 780 (4th Cir. 2011); Montblanc-Simpl Gmbh v. Montblancpensale.org, 297 F.R.D. 242, 245–46 (E.D. Va. 2014). Allegations as to the amount of damages, as opposed to liability, are ordinarily not accepted as true for the purposes of default judgment. See Pope v. United States, 323 U.S. 1, 22

(1944); NewGen, LLC v. Safe Cig, LLC, 840 F.3d 606, 617 (9th Cir. 2016); Merill Lynch Mortg. Corp. v. Narayan, 908 F.2d 246, 253 (7th Cir. 1990). Federal Rule of Civil Procedure 55(b)(2) permits, but does not require, a court to conduct an evidentiary hearing to determine the amount of damages. See Fed. R. Civ. P. 55(b)(2). A court may rely on affidavits or other documentary evidence to establish the amount of damages. See S.E.C. v. Smyth, 420 F.3d 1225, 1232 n.13 (11th Cir. 2005); KPS & Assocs. v. Designs by FMC, Inc., 318 F.3d 1, 21 (1st Cir. 2003); Southwood v. CCDN, LLC, No. 7:09-CV-81-F, No. 7:09-CV-183-F, 2016 WL 1389596, at *3 (E.D.N.C. Apr. 7, 2016) (unpublished); Adkins v. Teseo, 180 F. Supp. 2d 15, 17 (D.D.C. 2001).

The court grants Bayview's motion for default judgment as to the reformation claim in count one. The factual allegations in Bayview's complaint show that the deed conveying the Fodiesville Road property to the Locklears misspelled Lennie Locklear's name as "Linnie Locklear." Compl. ¶¶ 13–14. Thus, Bayview is entitled to reformation of the deed to reflect Lennie Locklear's correct name. Likewise, the court grants Bayview's motion for default judgment as to the request for a declaratory judgment in count three, seeking a declaration that the deed conveying the Fodiesville Road property to the Locklears was valid despite that spelling error. The court also grants Bayview's motion for default judgment as to the contract claim in count seven, because the factual allegations in Bayview's complaint show that the Locklears owed Bayview monthly payments of $631.10 but stopped making those payments after July 1, 2008. See id. ¶¶ 55, 59–61. The amount of damages for the Locklears' breach of contract are established by the Deed of Trust's acceleration clause and the affidavit listing the indebtedness as $131,389.71. See id. ¶ 58; [D.E. 35-1].

As for counts two, four, five, and six, Bayview is not entitled to default judgment for the same reasons the IRS is entitled to summary judgment. Although the court's decision on summary judgment considered the record as a whole in the light most favorable to Bayview, the court's

decision ultimately rested on the clear language of the ABN Deed of Trust and the absence of external circumstances that show clear and convincing evidence supporting reformation. Limiting itself to Bayview's complaint, the court reaches the same conclusion as to the Locklears and MMC. The Deed of Trust's language is the same, regardless of what information the court considers. Moreover, the complaint does not contain any factual allegations that would demonstrate Bayview's entitlement to reformation of the ABN Deed of Trust or a declaration that the Locklears own the Fodiesville Road property subject to Bayview's lien in first priority position, or that Bayview is entitled to equitable subrogation or judicial foreclosure.

V.

In sum, the court GRANTS the IRS's motion for summary judgment [D.E. 21] and GRANTS in part and DENIES in part Bayview's motion for default judgment [D.E. 35].

SO ORDERED. This 18 day of July 2017.

JAMES C. DEVER III
Chief United States District Judge