NO. COA11-34
NORTH CAROLINA COURT OF APPEALS

Filed: 4 October 2011

IN THE MATTER OF THE
FORECLOSURE OF A DEED OF
TRUST EXECUTED BY STONECREST
PARTNERS, LLC, RECORDED IN
BOOK 2630, PAGES 143-154
ON JUNE 22 2007, IN THE
BRUNSWICK COUNTY REGISTRY,
BY JERRY A. MANNEN, JR.,
APPOINTED SUBSTITUTE TRUSTEE
BY INSTRUMENT RECORDED IN BOOK
3022,PAGES 946-947, IN THE
BRUNSWICK COUNTY REGISTRY

Brunswick County
No. 10 SP 333

Appeal by Respondent from order entered 27 July 2010 by Judge Ola M. Lewis in Brunswick County Superior Court. Heard in the Court of Appeals 10 May 2011.

Shipman & Wright, LLP, by Matthew W. Buckmiller, for Respondent-Appellant.

Williams Mullen, by Julia Wicker Lee and Camden R. Webb, for Petitioner-Appellee.

BEASLEY, Judge.

Respondent Stonecrest Partners, LLC (Stonecrest) appeals an order authorizing Jerry A. Mannen, Jr., as Substitute Trustee, to proceed with foreclosure of certain real property pursuant to the power sale terms of a deed of trust held by The Bank of

Hampton Roads, as successor-in-interest to Gateway Bank & Trust Co. (collectively, Bank or Gateway). We affirm.

On 4 March 2010, the Substitute Trustee filed a "Notice of Hearing on Foreclosure of Deed of Trust" with the Brunswick County Clerk of Superior Court, seeking to foreclose on a security interest described in a deed of trust executed by Stonecrest in favor of Gateway, recorded on 22 June 2007 in Book 2630, Pages 143-154 in the Brunswick County Registry (Deed of Trust). The notice indicated that the action was commenced at the Bank's behest, based on Stonecrest's nonpayment of amounts due under a promissory note secured by the Deed of Trust.

In early June 2007, Gateway issued an 18-month commitment (Commitment Letter) to loan Stonecrest up to $8.7 million to acquire approximately 200 acres of land in Shallotte, North Carolina and develop Phase I of the tract (Loan). The Commitment Letter set forth the terms and conditions which must be met before the Bank would disburse any funds under the Loan. Paragraph 20 thereof, captioned "Conditions Precedent," provided: "The obligations of Bank to close the Loan . . . are expressly made subject to the satisfaction of all of the conditions, terms, and provisions of this Commitment in a manner satisfactory to Bank and its counsel." One term involved a requirement that other lenders also issue commitment letters (referred to as "take-out" letters) promising to loan a total of

$6.2 million to three specified construction companies once certain infrastructure was in place. It was anticipated that these entities would purchase individual tracts developed in Phase I and build the subdivision. Thereby, the construction loans made to these builders would effectively "take out" $6.2 million of the Bank's $8.7 million interim Loan.

Stonecrest signed the Commitment Letter and, on 21 June 2007, executed and delivered to the Bank a Promissory Note in the principal amount of $8,700,000.00 (Note). The Loan, which closed that same day, was structured as a line of credit against which Stonecrest could draw up to the principal amount, subject to the Bank's right to decline an advancement request for certain reasons. Stonecrest immediately drew down $4,052,345.61 for the land acquisition, and the Bank wired the funds accordingly. Between this initial disbursement and 22 December 2008, the original maturity date, the Bank authorized further draw requests—totaling nearly $1.2 million—to begin development of the subdivision's infrastructure. The Note was modified, renewed, and extended on three later occasions pursuant to "Change in Terms" Agreements dated 21 December 2008, 21 June 2009, and 30 June 2009. These agreements collectively reduced the principal amount of the Loan and extended the maturity date to 21 November 2009. The reasons, as proffered by the Bank, for the reduction in principal involved: the loss of the take-out

commitments from other banks, which were the primary source of Loan repayment; and the effect of the economic recession on real estate market conditions in Brunswick County.

As of 21 November 2009, Stonecrest failed to pay the outstanding principal and interest due and payable in full under the Note. The Bank declared the debt to be in default and initiated this foreclosure proceeding on 4 March 2010. On 25 March 2010, Stonecrest and the Loan's guarantors filed suit against the Bank in Brunswick County, alleging breach of contract under the Commitment Letter and negligence in handling the Loan. The Bank removed the action to the Eastern District of North Carolina, and that action is currently pending in federal court. Following a hearing in this matter on 21 April 2010, the Brunswick County Clerk of Superior Court entered an order allowing the substitute trustee to proceed with foreclosure. On 26 April 2010, Stonecrest appealed to superior court for *de novo* review of the clerk's order.

The only issue before the superior court was the validity of the debt, as the parties entered into pre-trial stipulations that the remaining findings required for the authorization of a foreclosure were not in dispute. In addition to the other requisite findings under N.C. Gen. Stat. § 45-21.16, the trial court found that the Note is a valid debt and entered an order allowing foreclosure on 27 July 2010. Stonecrest appeals and

argues that the trial court committed error by authorizing the foreclosure when there was not a valid debt. We disagree.

Our review of a trial court's order is limited to "whether competent evidence exists to support the trial court's findings of fact and whether the conclusions reached were proper in light of the findings." *In re Foreclosure of Azalea Garden Bd. & Care, Inc.*, 140 N.C. App. 45, 50, 535 S.E.2d 388, 392 (2000). The superior court, upon appeal from the clerk's order permitting or disallowing a foreclosure pursuant to a power of sale, conducts a *de novo* hearing to determine the same issues that the clerk must resolve. *See In re Foreclosure of Goforth Properties, Inc.*, 334 N.C. 369, 374, 432 S.E.2d 855, 858 (1993). These include whether there exists: (i) a valid debt of which the party seeking to foreclose is the holder; (ii) default; (iii) the right to foreclose under the instrument; and (iv) proper notice. N.C. Gen. Stat. § 45-21.16(d) (2009). At the relevant time, the statute also required a determination that the underlying mortgage debt is not a home loan. *Id.*

As to the first statutory requirement, we have stated:

> In order to find that there is sufficient evidence that the party seeking to foreclose is the holder of a valid debt . . . the following two questions must be answered in the affirmative: (1) "is there sufficient competent evidence of a valid debt?"; and (2) "is there sufficient competent evidence that [the party seeking to foreclose is] the holder[ ] of the notes [that evidence that debt]?"

In re Adams, __ N.C. App. __, __, 693 S.E.2d 705, 709 (2010) (citations omitted). Stonecrest does not challenge the trial court's determination that the Bank is the current holder of the Note. The only issue before us, rather, is whether the trial court's finding that the Note evidences a valid debt was based on competent evidence.

With respect to the validity of the debt, the trial court made a finding of fact that:

> 7. Stonecrest executed and delivered to [the Bank] a Promissory Note dated June 21, 2007, to evidence [the Loan] in the original face amount of $8,700,000.00 and as renewed, modified, extended and/or reinstated by those certain Change in Terms Agreements dated December 21, 2008, June 21, 2009, and June 30, 2009 (collectively the "Note").

The court also found that "[t]he Note is a valid debt" and that "[a] balance is owed on the Note," where there is "outstanding principal and accrued and unpaid interest and other amounts owed on the Note." Based on its findings of fact, including "that the Note is a valid indebtedness of Stonecrest," the trial court concluded that the substitute trustee was authorized to proceed with the power of sale foreclosure under the Deed of Trust.

Unless there is probative evidence to the contrary, the "introduction of a promissory note along with evidence of execution and delivery . . . will support the finding of a valid debt in a proceeding to foreclose under a power of sale." *In Re*

Cooke, 37 N.C. App. 575, 579, 246 S.E.2d 801, 804 (1978). Where the Note and Deed of Trust were properly admitted and Stonecrest does not challenge Finding of Fact 7, "there is ample evidence to support the court's findings that [Stonecrest] had executed a deed of trust, [and] that the deed of trust secured a valid debt evidenced by a note payable to [the Bank]." *In re Foreclosure of Deed of Trust (Helms)*, 55 N.C. App. 68, 71, 284 S.E.2d 553, 555 (1981). Stonecrest argues, however, that other evidence does contradict this finding and bases its contention that there was no valid debt on four theories: (i) failure of conditions precedent to the formation of the note; (ii) lack of consideration; (iii) fraud; and (iv) mutual mistake.

Conditions Precedent

Stonecrest argues that it was never bound by the Note because it never came into legal effect due to the Bank's alleged failure to secure take-out letters from the three other lending institutions specified in the Commitment Letter.

"A condition precedent is an event which must occur before a contractual right arises, such as the right to immediate performance." *Goforth*, 334 N.C. at 375, 432 S.E.2d at 859. While the non-occurrence thereof may prevent the promisee from acquiring a certain right under the contract, a breach of a condition subjects the promisee to no liability. *Id.* While contractual provisions "will not be construed as conditions

precedent in the absence of language plainly requiring such construction," *id.* at 375-76, 432 S.E.2d at 859 (internal quotation marks and citation omitted), the Commitment Letter in this case clearly states that the Bank's obligation to close the Loan is "expressly made subject to the satisfaction of all of the conditions, terms and provisions of this Commitment." Thus, we may assume that the requirement of $6.2 million in commitments from other lenders to the construction companies specified was a condition precedent to the *Bank's* obligation to *close the loan*. However, a condition precedent may be waived by the party to whom the obligation was due. *See Gore v. Myrtle/Mueller*, 362 N.C. 27, 38 653 S.E.2d 400, 408 (2007). Thus, a condition precedent contained in a contract must have either been met or excused by the beneficiary party before a right to enforce its contractual duty can accrue.

Here, the plain language of the parties' agreement reveals that the terms of the Commitment Letter, including the take-out letter requirement, were expressly made for the Bank's benefit. The Bank was therefore entitled to waive the condition precedent at issue and close the loan without having received the signed take-out letters or obtaining knowledge that the same had been issued. Moreover, this condition was explicitly tied only to the Bank's duty to *close the loan* and had no bearing on Stonecrest's obligation to repay the debt once the Bank

performed on its lending obligation. Thus, even if the take-out letters did not exist, any non-occurrence of this condition precedent is not a legal defense to the formation of a valid debt where the related obligation was performed anyway. In any event, there was competent evidence that the requisite take-out letters were obtained or, at least, that there were in existence commitments from other lenders deemed acceptable by the Bank.

Where nothing in the agreements between the parties gave Stonecrest a contractual right to approve or disapprove of the adequacy of those commitments, any shortcomings or deviations between these take-outs as issued and the requirements stated in the Commitment Letter were likewise subject to waiver. Thus, the Bank could elect not only to excuse the performance of the condition in its entirety but also to enforce the condition more flexibly. Whether the Bank's satisfaction with the level of certainty provided by these take-outs was imprudent or even negligent is a different question that does not render the debt invalid based on the non-occurrence of a condition precedent that was integrated into the agreement for the Bank's own benefit.[1] Accordingly, we overrule Stonecrest's argument that the Bank's alleged failure to secure take-out letters under

[1] To the extent that Stonecrest contends it was a co-beneficiary of this condition precedent—an interpretation that a plain reading of the Commitment Letter does not endorse—and that it proceeded with the Loan closing in reliance on the Bank's allegedly false representations as to the status or content of the take-out letters, we briefly address these equitable claims below.

these circumstances was a condition precedent to the formation of the Note, without which there could be no valid debt.

Consideration

In a related argument, Stonecrest also contends that there was no valid debt because the Bank's failure to secure executed take-out letters resulted in a failure of consideration.

This Court has held that "a valid debt does not exist [when there is] a failure of consideration in the contractual transaction which gave rise to the execution of the deed of trust and the underlying promissory note." *In re Foreclosure of Aal-Anubiaimhotepokorohamz*, 123 N.C. App. 133, 136, 472 S.E.2d 369, 371 (1996). While "[a] mere promise, without more, is unenforceable[,] . . . consideration is present when there is some benefit or advantage to the promissor or loss or detriment to the promissee." *In Re Foreclosure of Owen*, 62 N.C. App. 506, 509, 303 S.E.2d 351, 353 (1983).

Initially, we note that securing the take-out letters was a condition precedent to the Bank's extension of the Loan to Stonecrest and was not crafted as a contracted-for benefit to either party. Thus, the failure to secure these take-out commitment letters does not implicate whether the debt actually extended under the Note was valid, and it appears that the lack of consideration theory is incompatible with the argument Stonecrest is attempting to make. It is undisputed, however,

that the Bank disbursed $4,052,345.61 to Stonecrest at closing to pay for the land acquisition and development of the subdivision's infrastructure. Additional draw requests through December 2008 were made and accepted by the Bank, totaling more than $1.2 million in further advances to Stonecrest. The Bank had thus loaned Stonecrest over $5.2 million of the $8.7 million credit line when, by a Change in Terms Agreement dated 21 December 2008, the Bank agreed to extend the Loan, which would have otherwise matured and become fully payable the next day, despite being under no contractual obligation to do so. In exchange for the Bank's extension of the Loan repayment date, the principal was reduced to the then-outstanding balance of $5,261,697, which effectively rendered the line of credit fully drawn. *See id.* ("It has also been held that consideration exists when the promissee, in exchange for the promise, does anything he is not legally bound to do, or refrains from doing anything he has a right to do, whether there is any actual loss to him as a benefit to the promissor."). Furthermore, the Note's plain language excused the Bank from advancing any funds under the Loan if it has a good-faith belief that it is insecure, a circumstance which is supported by the evidence.

The Bank thus performed its obligations under the contract, at least partially if not in full, and Stonecrest accepted the full extent of such performance. Subsequent events that

resulted in an extension of credit in a lesser amount than that originally contemplated does not negate that substantial value had been conferred on Stonecrest with the Bank's expectation of repayment. Therefore, we reject Stonecrest's argument that the fact that the Bank did not disburse the full amount needed for the infrastructure, the completion of which the take-outs hinged upon, invalidated the debt already incurred based on a retroactive failure of consideration. Moreover, the cases cited by Stonecrest are inapposite. While our decisions *In re Aal-Anubiaimhotepokorohamz*, 123 N.C. App. at 136, 472 S.E.2d at 371, and *In re Foreclosure of Kitchens*, 113 N.C. App. 175, 177, 437 S.E.2d 511, 512 (1993), support the proposition that a failure of consideration is a basis for finding there is no valid debt under N.C. Gen. Stat. § 45-21.16(d), the borrowers in those cases received absolutely no consideration to support the note and deed of trust. Stonecrest's argument is thus overruled.

Fraud and Mutual Mistake

While Stonecrest argues on appeal that the debt was invalid as a result of the Bank's alleged fraudulent misrepresentation or the parties' mutual mistake regarding the status of the take-out letters, it does not appear that these were articulated before the trial court. As such, these issues are not properly before this Court. *See State v. Holliman*, 155 N.C. App. 120, 123, 573 S.E.2d 682, 685 (2002) ("Our Supreme Court has long

held that where a theory argued on appeal was not raised before the trial court, the law does not permit parties to swap horses between courts in order to get a better mount in the appellate courts." (internal quotation marks omitted)). Moreover, these are also equitable defenses to foreclosure and therefore not proper for consideration under N.C. Gen. Stat. § 45-21.16(d).

Where it is limited to making the statutorily specified findings, the superior court, "[o]n a *de novo* appeal . . . in a section 45-21.16 foreclosure proceeding, . . . must 'declin[e] to address [any party's] argument for equitable relief, as such an action would [] exceed[] the superior court's permissible scope of review[.]'" *Mosler v. Druid Hills Land Co.*, 199 N.C. App. 293, 296, 681 S.E.2d 456, 458 (2009) (quoting *Espinosa v. Martin*, 135 N.C. App. 305, 311, 520 S.E.2d 108, 112 (1999)). Thus, while

> [e]vidence of legal defenses that tend to negate any of the four findings made under G.S. section 45-21.16 may be raised and considered at the hearing before the clerk or on an appeal therefrom[,] . . . equitable defenses to foreclosure may not be raised in a hearing or appeal pursuant to G.S. section 45-21.16 but must be raised in an action to enjoin the foreclosure pursuant to G.S. section 45-21.34.

In re Foreclosure of Godwin, 121 N.C. App. 703, 705, 468 S.E.2d 811, 812 (1996). N.C. Gen. Stat. § 45–21.34 provides the means for any party with a legal or equitable interest in the subject property to seek an injunction against a foreclosure sale and

raise equitable grounds thereunder. *See* N.C. Gen. Stat. § 45-21.34 (2009); *see also In re Watts*, 38 N.C. App. 90, 94, 247 S.E.2d 427, 429 (1978) ("The proper method for invoking equitable jurisdiction to enjoin a foreclosure sale is by bringing an action in the Superior Court pursuant to G.S. 45-21.34."). As evidence of fraud, misrepresentation, and mutual mistake do not tend to rebut the findings of fact required by N.C. Gen. Stat. § 45-21.16, Stonecrest's claims are equitable in nature and should have been raised in a proceeding to enjoin the foreclosure sale. *See DuBose v. Gastonia Mutual Savings and Loan*, 55 N.C. App. 574, 578, 286 S.E.2d 617, 620 (1982) ("[O]ur courts have the power to restrain the exercise of the power of sale under a mortgage or a deed of trust where a sale thereunder would work an injustice to the rights of [those] interested in the property [if] there should be some *equitable element involved, as fraud, mistake, or the like*." (emphasis added and internal quotation marks omitted)).

Accordingly, Stonecrest's arguments as to fraud and mutual mistake are not properly before this Court and we do not address them. We conclude that the trial court's finding of a valid debt was supported by competent evidence and affirm its order allowing the substitute trustee to proceed with foreclosure.

Affirmed.

Judges MCGEE and STROUD concur.

Report per Rule 30(e).