

An unpublished opinion of the North Carolina Court of Appeals does not constitute controlling legal authority. Citation is disfavored, but may be permitted in accordance with the provisions of Rule 30(e)(3) of the North Carolina Rules of Appellate Procedure.

IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA15-981

Filed: 5 April 2016

Iredell County, No. 14 CVS 1866

DAVID W. THOMPSON, Plaintiff,

v.

NATIONSTAR MORTGAGE; BANK OF AMERICA, N.A., SUCCESSOR BY MERGER TO BAC HOME LOANS SERVICING, LP AND CONTRWIDE HOME LOANS; HUTCHENS LAW FIRM FNA HUTCHENS SENTER KELLAM & PETIT, P.A.; SUBSTITUTE TRUSTEE SERVICES, INC.; HSBC BANK USA, N.A. AS TRUSTEE FOR THE SECURITIZED TRUST MERRILL LYNCH MORTGAGE INVESTORS TRUST SERIES 2006-A1; MERRILL LYNCH MORTGAGE LENDING, INC.; MERRILL LYNCH MORTGAGE INVESTORS, INC.; WELLS FARGO BANK, N.A.; MORTGAGE ELECTRONIC REGISTRATION SYSTEM, AKA "MERS" AND DOES 1 THROUGH 100, INCLUSIVE, Defendants.

Appeal by Plaintiff from orders entered 15 October 2014 and 1 December 2014 by Judges Tanya T. Wallace and Theodore S. Royster, Jr., in Iredell County Superior Court. Heard in the Court of Appeals 26 January 2016.

David W. Thompson, pro se.

McGuireWoods LLP, by A. Jordan Sykes, and Hutchens Law Firm LLP, by Lacey M. Moore, for Defendants-Appellees.

DILLON, Judge.

THOMPSON V. NATIONSTAR MORTGAGE

Opinion of the Court

David W. Thompson (“Plaintiff”) appeals from orders denying his motion to enjoin the sale of certain real property and dismissing his claims arising out of the foreclosure of that property. For the following reasons, we affirm.

I. Background

On 10 November 2005, Plaintiff executed a promissory note in the amount of \$588,000.00 to finance the purchase of the real property that is the subject of this appeal, securing the debt with a deed of trust. After Plaintiff stopped making regular monthly payments on the note in December of 2008, the substitute trustee under the deed of trust initiated a foreclosure proceeding in Iredell County Superior Court.

In 2012, the foreclosure proceeding came on for a hearing before the clerk of superior court. The clerk found that the party seeking foreclosure was the holder of a valid debt and had a right to foreclose on the property, and allowed the foreclosure to proceed. No appeal was taken from the clerk’s order; and in August of 2014, the substitute trustee conducted a foreclosure sale, where the party seeking foreclosure was the high bidder.

In September of 2014, Plaintiff initiated the present lawsuit by filing a complaint in Iredell County Superior Court alleging ten causes of action relating to his loan and the foreclosure sale of his former property. He also moved the court for injunctive relief that same day. His motion was initially granted; however, after a hearing on the matter, the court dissolved its earlier order granting the injunctive

THOMPSON V. NATIONSTAR MORTGAGE

Opinion of the Court

relief, concluding that its earlier order was entered after the time the rights of the parties to the foreclosure had become fixed. Plaintiff entered written notice of appeal from this order.

Defendants moved the trial court to dismiss Plaintiff's complaint. After a hearing on the matter, the trial court dismissed Plaintiff's complaint with prejudice. Plaintiff entered written notice of appeal from this order as well.

II. Analysis

On appeal, Plaintiff makes essentially five arguments. However, despite noticing appeal from the earlier order dissolving the preliminary injunction he had obtained, Plaintiff does not argue any error concerning this earlier order. Therefore, Plaintiff's challenge to this order is deemed abandoned. *See* N.C. R. App. P. 28(a).

Three of Plaintiff's five arguments on appeal are, in fact, Plaintiff's attempt to collaterally attack the prior foreclosure proceeding. We begin our analysis by addressing this collateral attack. We then turn to Plaintiff's two remaining arguments, addressing each in turn.

A. Collateral Attack

Plaintiff makes two arguments contesting whether the party seeking the foreclosure in the prior proceeding was either (1) the holder of a valid debt secured by the property or (2) had the right to foreclose under the deed of trust – issues already determined in that prior proceeding. Plaintiff also raises an additional

THOMPSON V. NATIONSTAR MORTGAGE

Opinion of the Court

argument related to scope of the prior foreclosure proceeding, contending that the clerk's findings exceeded the jurisdictional scope of the hearing. However, these arguments represent "a collateral attack on a foreclosure proceeding and judgment, which the law does not permit." *Douglas v. Pennamco, Inc.*, 75 N.C. App. 644, 646, 331 S.E.2d 298, 300 (1985). Accordingly, these arguments are overruled.

Under North Carolina law, "there are two methods of pursuing a foreclosure: foreclosure by judicial action and foreclosure by power of sale." *In re Draffen*, 222 N.C. App. 39, 43, 731 S.E.2d 435, 437 (2012). Whereas "[f]oreclosure by action requires formal judicial proceedings," foreclosure by power of sale merely "requires a hearing before the Clerk of Superior Court[.]" *Phil Mechanic Const. Co., Inc. v. Haywood*, 72 N.C. App. 318, 321-22, 325 S.E.2d 1, 3 (1985). While there is a right to a jury trial in a foreclosure by action, there is no such right in a foreclosure by power of sale. *United Carolina Bank v. Tucker*, 99 N.C. App. 95, 97-98, 392 S.E.2d 410, 411 (1990).

Our Supreme Court has held that Article 2A of Chapter 45 of the General Statutes governs the procedure for foreclosure by power of sale. *In re Goforth Props., Inc.*, 334 N.C. 369, 374, 432 S.E.2d 855, 858 (1993). Under N.C. Gen. Stat. § 45-21.16(d), the clerk of court must determine whether the party seeking foreclosure has proven six factors:

- (i.) The existence of a valid debt in which the party seeking to foreclose is the holder;

THOMPSON V. NATIONSTAR MORTGAGE

Opinion of the Court

- (ii.) The existence of a default;
- (iii.) The right to foreclose under the deed of trust;
- (iv.) Proper notice to the record owners of the property;
- (v.) If applicable, home loan compliance as set forth in N.C. Gen. Stat. § 45-21.16(d); and
- (vi.) The sale is not barred due to a party's military service.

N.C. Gen. Stat. § 45-21.16(d) (2012). The clerk's authority does not extend to any equitable defense, *see In re Helms*, 55 N.C. App. 68, 71, 284 S.E.2d 553, 555 (1981), even where the parties stipulate to his or her authority over the same, *see Mosler ex rel. Simon v. Druid Hills Land Co., Inc.*, 199 N.C. App. 293, 296, 681 S.E.2d 456, 458 (2009).

Furthermore, although “[t]he clerk's findings are appealable to the Superior Court within ten days for a hearing *de novo*, . . . [t]he judge has no equitable jurisdiction and cannot enjoin foreclosure upon any ground other than the ones stated in G.S. 45-21.16.” *Helms*, 55 N.C. App. at 71-72, 284 S.E.2d at 555 (internal marks and citation omitted) (emphasis in original). Indeed, while “equitable defenses to foreclosure may be raised in a separate action to enjoin the foreclosure prior to the time the rights of the parties become fixed,” *see Funderburk v. JPMorgan Chase Bank, N.A.*, ___ N.C. App. ___, ___, 775 S.E.2d 1, 6 (2015), “[t]he proper method for invoking equitable jurisdiction to enjoin a foreclosure sale is by bringing an action in

THOMPSON V. NATIONSTAR MORTGAGE

Opinion of the Court

the Superior Court pursuant to G.S. 45-21.34,” *see In re Watts*, 38 N.C. App. 90, 94, 247 S.E.2d 427, 429 (1978). Therefore, once the rights of the parties have become fixed and there is a final order on the issue of default, collateral estoppel bars claims based on issues the clerk has already decided in the previous foreclosure hearing, and “our analysis begins with the premise that [the] plaintiffs were in default and the foreclosures were proper.” *Funderburk*, ___ N.C. App. at ___, 775 S.E.2d at 5-6.

In the present case, before Plaintiff filed this lawsuit, the clerk of court entered an order in the prior foreclosure proceeding finding that HSBC Bank USA, N.A., was the holder of a valid debt secured by the property and that Substitute Trustee Services, Inc., was entitled to foreclose under the deed of trust. Plaintiff did not appeal to the superior court from the clerk’s order authorizing foreclosure, nor did he post any bond, as required under N.C. Gen. Stat. § 45-21.16(d1). A foreclosure sale was conducted, and HSBC Bank, USA, N.A., was the high bidder. No upset bids were filed during the ten-day period following the sale, and Plaintiff did not seek to enjoin the sale under N.C. Gen. Stat. § 45-21.34 before the rights of the parties became fixed at 5:01 p.m. on 2 September 2014.¹ Therefore, collateral estoppel bars all claims in the present appeal based on issues already decided by the clerk in the previous

¹Although Plaintiff did seek a temporary restraining order enjoining the foreclosure, he did so based on New York law rather than pursuant to N.C. Gen. Stat. § 45-21.34. Furthermore, the rights of the parties became fixed the very day Plaintiff sought this relief, mooting his request. *See, e.g., Goad v. Chase Home Fin., LLC*, 208 N.C. App. 259, 264, 704 S.E.2d 1, 4-5 (2010) (holding that the rights of the parties to a foreclosure sale become fixed when the upset period expires or the party obtains injunctive relief, whichever happens first).

THOMPSON V. NATIONSTAR MORTGAGE

Opinion of the Court

foreclosure proceeding, and “our analysis begins with the premise that [the] plaintiff[] [was] in default and the foreclosure[] [was] proper.” *Funderburk*, ___ N.C. App. at ___, 775 S.E.2d at 5-6. Accordingly, in the present appeal, as in *Funderburk*, with respect to these issues, collateral estoppel precludes Plaintiff’s success. *See id.*

B. Absence of Written Findings

Plaintiff makes a fourth argument, contending that the trial court erred in granting Defendants’ Rule 12(b)(6) motion to dismiss without making findings of fact in support of its ruling, citing Rule 52(a)(1) of the North Carolina Rules of Civil Procedure. *See, e.g.*, N.C. Gen. Stat. § 1A-1, Rule 52 (2014) (“In all actions tried upon the facts without a jury . . . , the court shall find the facts specially and state separately its conclusions of law thereon”). However, as our Supreme Court has held, the purpose of a motion to dismiss for failure to state a claim upon which relief can be granted is to test the legal sufficiency of a pleading, not the facts in support of it. *White v. White*, 296 N.C. 661, 667, 252 S.E.2d 698, 702 (1979). Therefore, the requirements of Rule 52 are inapplicable to summary dispositions under Rules 12 and 56, as the resolution by the trial court of contested evidentiary matters is not contemplated under either Rule. *G & S Bus. Servs., Inc. v. Fast Fare, Inc.*, 94 N.C. App. 483, 489-90, 380 S.E.2d 792, 796 (1989). Accordingly, this argument is overruled.

C. Joint Representation

THOMPSON V. NATIONSTAR MORTGAGE

Opinion of the Court

Plaintiff finally argues that Defendants' joint representation at various points in the prior foreclosure proceeding and in this action was error, citing the rule prohibiting concurrently conflicting representations. *See, e.g.*, Rev. R. Prof. Conduct N.C. St. B. 1.7(a) ("[A] lawyer shall not represent a client if the representation involves a concurrent conflict of interest."). However, while concurrently conflicting representations potentially implicate the Sixth Amendment jury trial rights of criminal defendants, *see State v. Thomas*, 187 N.C. App. 140, 143-44, 651 S.E.2d 924, 926-27 (2007), they cannot by themselves serve as the basis for civil liability, *see McGee v. Eubanks*, 77 N.C. App. 369, 374, 335 S.E.2d 178, 181-82 (1985).

Furthermore, assuming, *arguendo*, that the representations of Defendants were concurrently conflicting, these representations did not, by themselves, entitle Plaintiff to enforce the rule against concurrently conflicting representations. *See also* Rev. R. Prof. Conduct N.C. St. B. 0.2(7) ("The fact that a Rule is a just basis for . . . sanctioning a lawyer . . . does not imply that an antagonist in a collateral proceeding . . . has standing to seek enforcement of the Rule."). Indeed, it is unclear what confidences of Plaintiff – an adversary of both these supposedly adverse parties – he could have sought to prevent counsel for those parties from divulging during the dual representation. Therefore, assuming, *arguendo*, that the dual representation of Defendants constituted a prohibited concurrently conflicting representation, as Plaintiff alleges, we hold that the trial court did not err in failing to conclude that

THOMPSON V. NATIONSTAR MORTGAGE

Opinion of the Court

such a dual representation prevented it from ruling in favor of Defendants on their motions to dismiss. Accordingly, this argument is overruled.

III. Conclusion

For the reasons stated herein, the orders of the trial court are affirmed.

AFFIRMED.

Judges BRYANT and ZACHARY concur.

Report per Rule 30(e).