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IN THE COURT OF APPEALS OF NORTH CAROLINA

2021-NCCOA-704

No. COA21-315

Filed 21 December 2021

Mecklenburg County, No. 19-CVS-13210

AMERICAN SOUTHWEST MORTGAGE CORP. and AMERICAN SOUTHWEST MORTGAGE FUNDING CORP., Plaintiffs,

v.

TERRANCE J. ARNOLD; NANCY E. ARNOLD; FIRST MORTGAGE COMPANY, LLC, d/b/a CUNNINGHAM & COMPANY; and JPMORGAN CHASE BANK, N.A., Defendants.

Appeal by Plaintiffs from order entered 3 February 2021 by Judge George C. Bell in Mecklenburg County Superior Court. Heard in the Court of Appeals 17 November 2021.

Alexander Ricks PLLC, by Louis G. Spencer, for Plaintiffs-Appellants.

Offit Kurman, P.A., by Zipporah Basile Edwards, for Defendants-Appellees.

GRIFFIN, Judge.

¶ 1

Plaintiffs, American Southwest Mortgage Corp. (“ASMC”) and American Southwest Mortgage Funding Corp. (“ASMFC”), appeal from an order denying their motion for summary judgment and granting the motions for summary judgment of Defendants, Terrance J. Arnold, Nancy E. Arnold, and JPMorgan Chase Bank, N.A.

("Chase"). Plaintiffs argue that they conclusively established to the trial court that First Mortgage Company, LLC d/b/a Cunningham & Company ("FMC") was not authorized to file the Satisfaction of Mortgage relating to the Arnolds' loan and that Defendants failed to meet their burden to establish that FMC was Plaintiffs' authorized agent. Our review reveals no genuine dispute that FMC was the loan servicer of the Arnolds' loan, and we conclude that Plaintiffs' own neglect enabled FMC's recording of the Satisfaction of Mortgage. We affirm the trial court's order.

I. Procedural History

¶ 2 Plaintiffs filed an action in Mecklenburg County Superior Court on 2 July 2019 against Mr. Arnold, Ms. Arnold, FMC, and NewRez LLC f/k/a New Penn Financial, LLC ("New Penn"). By consent order filed 8 October 2019, Chase was substituted for New Penn. The Arnolds and Chase filed counterclaims and crossclaims against Plaintiffs on 20 September 2019 and 28 October 2019, respectively. The trial court entered a default judgment against FMC for failure to respond to Plaintiffs' complaint.

¶ 3 The Arnolds and Chase filed a motion for summary judgment, together with supporting affidavits and exhibits, on 23 November 2020. The same day, Plaintiffs likewise filed a motion for summary judgment, together with supporting affidavits and exhibits.

¶ 4 On 3 February 2021, the trial court entered an order granting the Arnolds' and

Chase’s motion for summary judgment and denying Plaintiffs’ motion for summary judgment. The Arnolds and Chase dismissed without prejudice their remaining counterclaims and crossclaims against Plaintiffs. Plaintiffs timely appealed.

II. Factual Background

¶ 5 “Admittedly, there are many facts about which the parties disagree, however, none of these facts are material to our decision.” *Dull v. Mutual of Omaha Ins. Co.*, 85 N.C. App. 310, 314, 354 S.E.2d 752, 754 (1987). The Record tends to establish the following uncontested facts:

¶ 6 On or about 3 August 2000, ASMC and FMC entered into a loan agreement whereby ASMC operated as a warehouse lender to fund residential home loans originated by FMC. On or about 5 September 2013, ASMFC and FMC likewise entered into a loan agreement, in which ASMFC operated as a second warehouse lender to fund residential home loans originated by FMC. FMC used these lines of credit from ASMC and ASMFC to originate residential home loans.

¶ 7 On or about 14 November 2016, FMC made a construction and mortgage loan in the amount of \$385,837.00 (the “Arnold Loan”), evidenced by a promissory note (“Note”), to Mr. and Mrs. Arnold. The loan was secured by a deed of trust (“Original DOT”), which was duly recorded in the Mecklenburg County Register of Deeds.

¶ 8 The Note stated that

any notice that must be given to [the Arnolds] under this

Note will be given by delivering it or by mailing it by first class mail to [the Arnolds] at the Property Address above or at a different address if [the Arnolds] give the Note Holder a notice of [their] different address.

The Original DOT similarly provided that “[a]ny notice to [the Arnolds] in connection with this Security Instrument shall be deemed to have been given to [the Arnolds] when mailed by first class mail or when actually delivered to [the Arnolds’] notice address if sent by other means.”

¶ 9

The Original DOT specifically contemplated that

[t]he Note . . . can be sold one or more times without prior notice to [the Arnolds]. A sale might result in a change in the entity (known as the "Loan Servicer") that collects Periodic Payments due under the Note and this Security Instrument and performs other mortgage loan servicing obligations under the Note, this Security Instrument, and Applicable Law. . . . If there is a change of the Loan Servicer, [the Arnolds] will be given written notice of the change which will state the name and address of the new Loan Servicer, the address to which payments should be made and any other information RESPA requires in connection with a notice of transfer of servicing.

¶ 10

Subsequently, FMC entered into cross-collateralization agreements with Plaintiffs on or about 29 June 2017. Pursuant to these agreements, FMC assigned all rights and interests in certain loans, including the Arnold Loan, to Plaintiffs. The cross-collateralization agreements provided that “[e]ach borrower (on the Notes) will be notified that the Note has been assigned to ASMC [and to ASMFC] and that payments on the Note will be made directly to ASMC [and to ASMFC].” The

agreements did not specify which party(s) would provide this notice to the borrower.

¶ 11 Plaintiffs recorded the assignment of the Arnold Loan in the Mecklenburg County Register of Deeds. The assignment stated on its face:

ATTENTION – IMPORTANT INSTRUCTION ON HOW TO CONFIRM AMOUNTS REQUIRED TO PAY OFF THE MORTGAGE OBLIGATION RELATED TO THIS ASSIGNMENT:

Unless assignee has further transferred ownership of the mortgage related to this assignment, you must confirm payoff information directly with the office of the Controller, American Southwest Mortgage Corp. Toll Free 1-888-593-1003 or email to Accounting@amswmtg.com.

Plaintiffs do not claim that they provided any notice of the Arnold Loan assignment to the Arnolds, other than its recordation in the register of deeds.

¶ 12 On 28 June 2018, the Arnolds refinanced the Arnold Loan. The refinance was secured by a deed of trust, which was recorded in the Mecklenburg County Register of Deeds. Closing funds were sent to FMC to pay off the original loan. Ron McCord, purportedly on behalf of FMC, signed and recorded a satisfaction of mortgage for the Arnold Loan (“Satisfaction of Mortgage”) in the Mecklenburg County Register of Deeds. FMC was named as the beneficiary on the Satisfaction of Mortgage. Plaintiffs stated that no one informed them of the refinance.

¶ 13 Plaintiffs admitted on multiple occasions that FMC was the servicer of the Arnold Loan. Specifically, Plaintiffs stated that “Plaintiffs did not service the

[Arnold] Loan” and that “FMC was the servicer of the [Arnold] Loan from the date of execution of the Original Note through the Closing of the Refinance.” Plaintiffs “made numerous demands upon FMC to relinquish its loan servicing rights” and argued that “the servicing of the loan secured by the [Original DOT] was not transferred from FMC to [ASMC and ASMFC] as required by the Third Cross Collateralization Agreement.” Plaintiffs made these various statements in their answers to Defendants’ crossclaims and counterclaims; in their discovery responses to Defendants; in their exhibits supporting their motion for summary judgment; and in litigation against FMC and other parties in the Oklahoma County District Court.

¶ 14 ASMC filed lawsuits in the Oklahoma County District Court against Ron McCord, FMC, and other parties. On 27 March 2019 and 17 April 2019, the Oklahoma County District Court entered partial summary judgments in ASMC’s favor against Ron McCord and FMC. Among other findings, the court found that FMC was liable to ASMC under the cross-collateralization agreements. Nearly a year later, on 15 April 2020, ASMC moved to remove FMC’s liability for breaching the cross-collateralization agreements, in order to “seek damages in the North Carolina matter regarding the Cross-Collateralization Agreements and not seek damages regarding them in this case.” The Oklahoma County District Court entered judgments in ASMC’s favor against Ron McCord and FMC on 29 April 2020 and 7 May 2020. Pursuant to ASMC’s request, the judgments did not include damages for

FMC's alleged breach of the cross-collateralization agreements.

III. Analysis

A. Standard of Review

¶ 15 “The instant case presents cross-motions for summary judgment. . . . The standard of review for summary judgment is de novo.” *Forbis v. Neal*, 361 N.C. 519, 523-24, 649 S.E.2d 382, 385 (2007) (citation omitted).

¶ 16 Summary judgment shall be granted “if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law.” N.C. R. Civ. P. 56(c). “When considering a motion for summary judgment, the trial judge must view the presented evidence in a light most favorable to the nonmoving party. Moreover, the party moving for summary judgment bears the burden of establishing the lack of any triable issue.” *Dalton v. Camp*, 353 N.C. 647, 651, 548 S.E.2d 704, 707 (2001) (citations omitted). “If there is any question as to the weight of evidence, summary judgment should be denied.” *Marcus Bros. Textiles, Inc. v. Price Waterhouse, LLP*, 350 N.C. 214, 220, 513 S.E.2d 320, 325 (1999) (citation omitted).

¶ 17 As there is no genuine issue of any material fact in this case, the next question is “whether any party is entitled to a judgment as a matter of law.” *Kessing v. Nat'l Mortg. Corp.*, 278 N.C. 523, 535, 180 S.E.2d 823, 830 (1971).

B. FMC was Plaintiffs' Authorized Agent.

¶ 18 Plaintiffs argue that FMC was not authorized to file the Satisfaction of Mortgage relating to the Arnolds' loan, therefore entitling Plaintiffs to a first-priority lien encumbering the Arnold property. The Arnolds and Chase argue that FMC, as the servicer of the Arnold Loan, was authorized to receive its payoff and that the debt secured by the Original DOT was extinguished upon this payment. We agree with the Arnolds and Chase that the debt secured by the Original DOT was extinguished by payoff of the loan to FMC and that Plaintiffs are not entitled to a lien encumbering the Arnold property.

¶ 19 The Arnolds and Chase met their burden to prove that FMC was Plaintiffs' authorized agent. There was no genuine factual dispute that FMC was the servicer of the Arnold Loan at all times pertinent to this case. Plaintiffs admitted that FMC was the servicer of the Arnold Loan "from the date of execution of the Original Note through the Closing of the Refinance." As the servicer of the Arnold Loan, FMC was authorized to receive payments of the loan on behalf of Plaintiffs. *See* N.C. Gen. Stat. § 45-101(1) (2019) (defining "[a]ct as a mortgage servicer" to include "receiving any scheduled periodic payments from a borrower pursuant to the terms of any mortgage loan").

¶ 20 Plaintiffs argue that they did not authorize FMC to file the Satisfaction of Mortgage, and that therefore they are entitled to a priority lien encumbering the

Arnolds' property. Plaintiffs cite *Union Central Life Insurance Co. v. Cates*, 193 N.C. 456, 462, 137 S.E. 324, 327 (1927), for the proposition that “[t]he discharge of a perfected mortgage upon public record by the act of an unauthorized third party entitles the mortgagee to restoration of its status as a priority lienholder over an innocent purchaser for value.” *First Fin. Sav. Bank, Inc. v. Sledge*, 106 N.C. App. 87, 88, 415 S.E.2d 206, 207 (1992) (citing *Union Central*, 193 N.C. at 462, 137 S.E. at 327).

¶ 21 However, Plaintiffs omit an overarching caveat to this rule. The Supreme Court in *Union Central* went on to state that

[i]f, however, the owner of the mortgage is responsible for the mortgage being released of record, as when the entry of satisfaction is *made possible by his own neglect*, or misplaced confidence, or his own mistake, or where he is shown to have received actual satisfaction, or to have accepted the benefit of the transaction which resulted in the release, *he will not be permitted to establish his lien* to the detriment of one who has innocently dealt with the property in the belief that the mortgage was satisfied.

193 N.C. at 462, 137 S.E. at 327 (emphasis added) (citation and internal quotation mark omitted).

¶ 22 Assuming *arguendo* that FMC and Ron McCord were unauthorized third parties, Plaintiffs' own neglect would preclude a reinstatement of their lien priority on the Arnolds' property. Here, Plaintiffs were under a statutory duty to provide

written notice to the Arnolds that the Arnold Loan had changed ownership. *See* 15 U.S.C. § 1641(g) (2017) (requiring the new assignee of a mortgage to notify the borrower in writing within 30 days after the assignment). Plaintiffs failed to provide such notice. Plaintiffs' breach of this statutory duty contributed to the Arnolds sending payoff of the loan to FMC, which in turn enabled FMC to file the Satisfaction of Mortgage.

¶ 23 Plaintiffs cite *Household Realty Corp. v. Lambeth*, 188 N.C. App. 545, 549-50, 656 S.E.2d 336, 339-40 (2008), as authority for restoration of the Original DOT and reinstatement of Plaintiffs' priority lien, but the present case is factually distinguishable. In *Household Realty*, the mortgagee was not negligent in any way concerning a third party's unauthorized cancellation of a deed of trust. *See id.* at 552, 656 S.E.2d at 341 (reinstating the mortgagee's priority lien and reasoning that the mortgagee "was in no way negligent for the [unauthorized third party's] act"). Further, the cancellation in *Household Realty* was fraudulently entered by a third party who falsely represented that full payment of the underlying debt had been received. *Id.* at 547, 656 S.E.2d at 338.

¶ 24 Since the Arnolds had in fact paid off the Arnold Loan to an authorized agent of Plaintiffs, the debt secured by the Original DOT was extinguished. "[W]here a mortgage or deed of trust is given to secure a specific debt, payment of the debt extinguishes the power of sale and terminates the title of the mortgagee or trustee,

and all outstanding interests in the land revert immediately to the mortgagor by operation of law.” *Barbee v. Edwards*, 238 N.C. 215, 218-19, 77 S.E.2d 646, 649 (1953). Although FMC may have breached its duty to remit this payment to Plaintiffs, that question is outside the quiet title issue decided by summary judgment. The Arnolds were entitled to a judgment in their favor to quiet title, subject to Chase’s deed of trust.

¶ 25 Plaintiffs have not demonstrated that they are entitled to a lien encumbering the Arnolds’ property. The Arnolds and Chase have demonstrated entitlement to a quiet title judgment in the Arnolds’ favor.

IV. Conclusion

¶ 26 For the foregoing reasons, summary judgment in favor of Defendants Terrance J. Arnold, Nancy E. Arnold, and Chase was proper. We affirm the order of the trial court.

AFFIRMED.

Judges DIETZ and TYSON concur.

Report per Rule 30(e).