NO. COA01-773

NORTH CAROLINA COURT OF APPEALS

Filed: 4 June 2002

BRENTON D. ADAMS, Trustee
Of Brenton D. Adams
Retirement Plan,
Plaintiff,

v.

Wake County
No. 00-CVS-00021

BANK UNITED OF TEXAS F.S.B.,
H. TERRY HUTCHENS, M.A. MANSOUR,
and wife, TAGHRID D. MANSOUR,
ROBERT T. HEDRICK, and
WILLIAM M. GRIGGS,
Defendants.

Appeal by plaintiff from judgment entered 22 February 2001 by Judge Narley L. Cashwell in Wake County Superior Court. Heard in the Court of Appeals 27 March 2002.

Brenton Adams and Associates, by Brenton D. Adams, for plaintiff-appellant.

Morris, Schneider & Prior, L.L.C., by Angel R. Gordon, Lawrence S. Maitin, and Larry W. Johnson, for defendant-appellee Bank United of Texas, F.S.B.

Hutchens & Senter, by Rudolph G. Singleton, Jr., H. Terry Hutchens and Wendy H. Hughes, for defendant-appellee H. Terry Hutchens.

Robert T. Hedrick, for plaintiff-appellees M.A. Mansour and wife Taghrid D. Mansour, Robert T. Hedrick, and William M. Griggs.

BIGGS, Judge.

Brenton D. Adams, Trustee of Brenton D. Adams Retirement Plan (plaintiff), appeals from orders granting summary judgment to defendants, taxing costs to plaintiff, and denying plaintiff's motion for partial summary judgment. For the reasons that follow, we affirm the trial court.

In 1976, Richard Barr (Barr) purchased real property located at 3628 Edgemont Road, Wendell, North Carolina. He executed a Note on the property in the amount of $28,700, payable to Stockton, White and Company, and secured the indebtedness by executing a Deed of Trust. The Note and Deed of Trust later were conveyed to Bank United. Barr also executed a Warranty Deed conveying his interest in the property to both himself and his wife, Lynda Barr.

In 1998, after the Barrs failed to make their mortgage payments, Bank United employed attorney Terry Hutchens (Hutchens) to institute foreclosure proceedings. Hutchens had been appointed substitute trustee in the Deed of Trust in 1986 by Stockton, White and Company. He served the Barrs with notice of the foreclosure proceedings. After "discovering that [plaintiff] had an interest in the Property," Hutchens rescheduled the foreclosure sale in order to notify plaintiff. Plaintiff, in his complaint, claims that he, as Trustee of the Brenton D. Adams Retirement Plan, is the owner of the subject property; however, the Record does not disclose documents supporting his ownership.

The foreclosure sale was conducted on 15 July 1998. At the sale, Bank United was the highest bidder. Following the sale, fourteen upset bids were filed. The property was sold to the

highest bidder, M.A. Mansour (Mansour). A Trustee's Deed was thereafter executed on 19 October 1998, transferring the property to Mansour. Robert Hedrick (Hedrick) was listed as Trustee and Grantee under the Deed, and William Griggs (Griggs) as Beneficiary.

On 3 January, 2000, eighteen months after the foreclosure sale, plaintiff filed suit against Bank United, Hutchens, Mansour and wife, Taghrid D. Mansour (Mansours), Hedrick, and Griggs, seeking to have the foreclosure proceeding declared null and void, the Trustee's Deed and the Deed of Trust stricken, and to require the parties to execute a quitclaim deed of the property. Plaintiff also sought punitive damages, alleging that Bank United engaged in usury, and unfair and deceptive trade practices.

In January 2001, plaintiff and defendants respectively moved for summary judgment. On 22 February 2001, the trial court entered an order granting summary judgment in favor of Bank United and defendant Hutchens, and another order granting summary judgment in favor of the remaining defendants. The court also denied plaintiff's motion for partial summary judgment, and taxed costs to the plaintiff. From these orders, plaintiff appeals.

Summary judgment is proper when "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.G.S. § 1A-1, Rule 56(c) (2001). The record is reviewed in the light most favorable to the non-movant, and all

inferences will be drawn against the movant. *Caldwell v. Deese*, 288 N.C. 375, 218 S.E.2d 379 (1975). On appeal, this Court conducts a two part inquiry: (1) whether the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, establish that there are no genuine issues of material fact, and (2) whether, on the basis of the undisputed facts, any party is entitled to summary judgment as a matter of law. *Bradley v. Hidden Valley Transp. Inc.*, __ N.C. App. __, __, 557 S.E.2d 610, 612 (2001) (citations omitted).

I.

On appeal, plaintiff alleges that he never received actual or constructive notice of the foreclosure proceeding, and is therefore entitled to summary judgment as a matter of law, and further argues that the trial court erred in granting summary judgment to defendant. The record establishes that notice of service of foreclosure was effected as follows: (1) an announcement of foreclosure was mailed to plaintiff via first class mail; (2) an amended notice of hearing was mailed both to plaintiff's office address, and to the property address, by certified mail return receipt requested and also by first class mail; (3) notice was published in the Cary News, for the weeks of July 1, and July 8, 1998; (4) notice was posted on the property, with the Sheriff's return provided; and (5) notices of each of the fourteen upset bids received after the initial foreclosure sale were mailed both to plaintiff's office address and to the property address, all via first class mail.

In the present case, we conclude that at least three legal theories support upholding the trial court's grant of summary judgment in favor of defendants. First, plaintiff did not establish that he was entitled to notice of foreclosure. Notice requirements for foreclosure proceedings are set out in N.C.G.S. § 45-21.16 (2001), which mandates that notice be provided to (1) any party "whom the security interest instrument itself directs notice to be sent"; (2) any party "obligated to repay the indebtedness against whom the holder thereof intends to assert liability therefor"; and (3) each "record owner of the real estate . . . including any person owning a present or future interest in the real property, . . . [but not including] the trustee in a deed of trust or the owner or holder of a mortgage, deed of trust, judgment, mechanic's or materialman's lien, or other lien or security interest in the real property." N.C.G.S. § 45-21.16(b) (1) (2) (3) (2001).

In the case *sub judice*, the record contains no documentation that establishes plaintiff's ownership or other interest in the subject property. We conclude, therefore, that plaintiff did not demonstrate that he was entitled to notice. *Properties, Inc. v. Savings and Loan Assoc.*, 47 N.C. App. 675, 267 S.E.2d 693 (1980) (litigant who does not meet statutory criteria of N.C.G.S. § 45-21.16 not entitled to notice of foreclosure proceedings).

Secondly, assuming *arguendo* that plaintiff was entitled to notice, the record establishes that defendants sufficiently complied with the statutory requirements for service of notice of

foreclosure. N.C.G.S. § 45-21.16(a) provides in pertinent part that notice of foreclosure "shall be served and proof of service shall be made in any manner provided by the Rules of Civil Procedure for service of summons, including service by registered mail or certified mail, return receipt requested." N.C.G.S. § 1A-1, Rule 4 (2001) of the Rules of Civil Procedure governs "service of summons," and authorizes several methods of service, including "mailing a copy of the summons and of the complaint, registered or certified mail, return receipt requested, addressed to the party to be served, and delivering to the addressee." N.C.G.S. § 1A-1, Rule 4(j)(1)(c) (2001). Proof of service is addressed in N.C.G.S. § 1-75.10 (2001), which provides in part that proof of service by registered or certified mail may be effected as follows:

> (4) Service by Registered or Certified Mail. . . . by affidavit of the serving party averring:
> a. That a copy of the summons and complaint was deposited in the post office for mailing by registered or certified mail, return receipt requested;
> b. That it was in fact received as evidenced by the attached registry receipt *or other evidence satisfactory to the court* of delivery to the addressee; and
> c. That the genuine receipt or other evidence of delivery is attached. (emphasis added)

N.C.G.S. § 1-75.10(4) (2001).

In the instant case, the record indicates that plaintiff served several notices of foreclosure on defendant via registered or certified mail. The receipt for one of these notices of foreclosure, which was addressed to "Spouse of Brenton D. Adams" and sent to plaintiff's office address, was returned to Hutchens,

signed by plaintiff's long-time employee. Plaintiff later provided two other unsigned return receipt cards that were addressed to plaintiff.

The return of one or more receipts from registered or certified mail raises "a presumption that the person who received the mail" was authorized "to be served or to accept service of process[.]" N.C.G.S. § 1A-1, Rule 4(j2)(2) (2001). *See Steffey v. Mazza Construction Group,* 113 N.C. App. 538, 439 S.E.2d 241 (1994), (employee's signature on the return receipt, in conjunction with plaintiff's affidavit, raised presumption that employee was an agent of the party to be served, and sufficiently established service in the absence of adequate evidence to rebut the presumption), *disc. review improvidently allowed*, 336 N.C. 319, 445 S.E.2d 390 (1994), *disc. review denied*, 339 N.C. 734, 455 S.E.2d 155 (1995).

The presumption of valid notice of foreclosure is not subject to rebuttal merely by a party's own denial of receipt. *Sun Bank/South Florida v. Tracy*, 104 N.C. App. 608, 611, 410 S.E.2d 509, 512 (1991) (presumption of regular service may not be set aside "unless the evidence consists of more than a single contradictory affidavit . . . and is clear and unequivocal").

In the instant case, plaintiff does not deny the allegations that notice was sent to his correct office address, and that the signer of the return receipt was his employee. Rather, he contends that service to his business address, received by his employee, is nonetheless invalid, because it was addressed to "spouse of"

Brenton Adams. We disagree. In *Fender v. Deaton,* 130 N.C. App. 657, 503 S.E.2d 707 (1998), *disc. review denied*, 350 N.C. 94, 527 S.E.2d 666 (1999), defendant claimed that service was invalid because, although a receipt for certified mail was returned, (1) it was signed by defendant's wife, an employee, not the addressee; (2) the box marked "restricted delivery" was not checked; and (3) service was made on defendant's office address, not his residence. The trial court agreed, and held that service was inadequate. This Court reversed, holding that plaintiff's affidavit, together with the return receipt signed by an employee, raised a presumption of valid service. Our Supreme Court has stated that "[a] suit at law is not a children's game, but a serious effort on the part of adult human beings to administer justice; and the purpose of process is to bring parties into court." *Harris v. Maready*, 311 N.C. 536, 544, 319 S.E.2d 912, 917 (1984), *disc. review denied*, 320 N.C. 168, 358 S.E.2d 50 (1987).

The record in the case *sub judice* shows that Hutchens filed an affidavit attesting to his sending notice via certified mail, return receipt requested, and that a return receipt was provided bearing the signature of plaintiff's employee. We conclude that the inclusion of the words "spouse of" on the address card does not invalidate service. Moreover, plaintiff provided at least two other return receipts as part of discovery. We conclude further that the record demonstrates that defendants provided "other evidence satisfactory to the court" that plaintiff received the notice when mailed via registered or certified mail, return receipt

requested, sufficient to support the trial court's conclusion that there was no issue of fact regarding plaintiff's receipt of notice of foreclosure.

Thirdly, the trial court's grant of summary judgment is supported by N.C.G.S. § 1A-1, Rule 4(j1), which provides that a party "that cannot with due diligence be served . . . may be served by publication." Even assuming, *arguendo*, that plaintiff was entitled to notice and that the return receipts did not constitute sufficient proof of service, the evidence of defendant's repeated mailings by certified mail, return receipt requested, accompanied by mailing of notice by first class mail, is sufficient evidence of "due diligence," to warrant service by posting or publication.

This Court has held that the determination of what constitutes "due diligence" for purposes of permitting service by publication is to be evaluated on a case by case basis, and not by reference to mandatory checklist. *Emanuel v. Fellows*, 47 N.C. App. 340, 347, 267 S.E.2d 368, 372 (1980). In the instant case, it is not disputed that Hutchens made several attempts to serve plaintiff via certified mail. We conclude that if plaintiff did not receive notice in this manner, the mailings nonetheless constitute "due diligence," permitting service by either publication or posting. Hutchens employed both publication and posting to notify plaintiff.

For the reasons discussed above, we conclude that the trial court did not err in its grant of summary judgment for defendants on the issue of notice of the foreclosure proceedings.

II.

Plaintiff also argues that the record establishes a genuine issue of material fact regarding his allegations that Bank United engaged in usury, and in unfair and deceptive trade practices. This argument is without merit. Plaintiff's claim is based upon his assertion that Bank United wrote a letter in 1997, addressed to an unnamed person or party, which stated that a specific sum was then owed on the mortgage for the property. The alleged letter or affidavit of Bank United is not a part of the record. Upon foreclosure sale, Bank United received a certain amount, which plaintiff contends establishes a higher rate of interest than Bank United was entitled to, again on the basis of an alleged letter stating the amount of indebtedness as of 1997. Plaintiff has completely failed to support his claim of usury and unfair and deceptive trade practices, and the trial court did not err in its grant of summary judgment on this issue.

For the reasons discussed above, we conclude that the trial court did not err by entering summary judgment in favor of defendants. Accordingly, the trial court's orders are

Affirmed.

Judges WYNN and MCCULLOUGH concur.

Report per Rule 30(e).