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NO. COA06-1243

NORTH CAROLINA COURT OF APPEALS

Filed: 7 August 2007

In the Matter of Foreclosure of a Deed of Trust Executed by Charles D. Woodard and Phyllis G. Woodard In the amount of $460,000.00 dated August 7, 1987, recorded in Book 1337, Page 668, Wilson County Registry; James R. Cummings, Sub. Tr.

Wilson County
No. 05 Sp 422

Court of Appeals

Appeal by petitioners from judgment and order entered 5 June 2006 by Judge Clifton W. Everett, Jr. in Wilson County Superior Court. Heard in the Court of Appeals 25 April 2007.

Slip Opinion

Harvell and Collins, P.A., by Wesley A. Collins, for petitioners-appellants.

Hinson & Rhyne, P.A., by John G. Rhyne and Walter L. Hinson, for respondents-appellees.

GEER, Judge.

Petitioners Anne P. Worthington and Dean W. Worthington appeal from a judgment of the superior court dismissing their foreclosure action. Petitioners had attempted to exercise a power of sale contained in a deed of trust executed by respondents Charles D. Woodard and Phyllis G. Woodard in favor of petitioners. On appeal, petitioners primarily argue that the trial court erred by concluding that respondents had not defaulted on a note secured by the deed of trust. Because the trial court's findings of fact are

supported by competent evidence and those findings, in turn, support the trial court's conclusion, we affirm.

Facts

Sometime before August 1987, W. Roy Poole agreed to build a building for respondents. In exchange, respondents executed a promissory note in August 1987 in the amount of $460,000.00. The note was payable to Poole's daughter, petitioner Anne P. Worthington, and grandson, petitioner Dean W. Worthington. The note was left with Poole at the law offices of his attorney, Thomas B. Griffin. Petitioners assert that they were unaware of the note's existence at the time of its execution.

Under the terms of the note, respondents were required to repay the principal, along with 12% annual interest, in 180 monthly installments of $5,525.00. The note was secured by a deed of trust on a parcel of real property in Wilson County owned by respondents. The deed of trust included a power of sale in the event of a default and, as with the note, the parties to the deed of trust were respondents and petitioners. Griffin was named as trustee.

In accordance with Poole's instructions, respondents made payments on the note from March 1988 until September 1998 by delivering personal checks, payable to Poole, to Poole's office where they were accepted and deposited. During this time, annual IRS Form 1096s were prepared for each petitioner reflecting receipt of interest from respondents' payments, and petitioners' tax returns also reported the interest as income. Petitioners testified they signed these returns without examining them.

Petitioners assert they first became aware of the note in 1998, during the course of a family "buyout," in which petitioners sold stock they owned in various family corporations to Poole and his son, Anne Worthington's brother, in exchange for various assets. A release signed by petitioners as part of the buyout indicated that Poole and his son were conveying to petitioners "[o]ne account receivable . . . secured by note and deed of trust from Charles D. Woodard in the amount of $139,454.64." The actual note and deed of trust, along with other materials, were delivered to Ms. Worthington in a large box following the buyout. Petitioners did not, however, examine either the note or deed of trust at that time.

In October 1998, Poole instructed respondents to make future monthly payments on the note by sending two checks to Poole's office — one payable to Anne Worthington and one payable to Dean Worthington, with each for half of the monthly amount. Later, respondents were told to send the checks directly to petitioners.

In March 2003, respondents made the 180th payment on the note and, accordingly, the checks to petitioners ceased. At that time, Anne Worthington took the box of documents she had received following the buyout to the office of her attorney, Wesley A. Collins. In the box, Collins discovered the original note, naming petitioners as the payees. In September 2005, petitioners removed Poole's attorney as trustee on the deed of trust and appointed a substitute trustee, attorney James R. Cummings.

Petitioners sent respondents a demand letter dated 12 October 2005, contending that the first payment on the note was actually made when respondents began paying petitioners in October 1998 rather than when respondents first paid Poole. The letter claimed that respondents were, therefore, "in default for failure to make proper payments pursuant to the terms of the Promissory Note." Petitioners stated that they were exercising their "rights of acceleration" under the note and that the payoff of principal and interest totaled $3,307,158.20 plus an average accrual of daily interest in the amount of $1,082.00.

On 3 November 2005, the substitute trustee filed a Notice of Hearing Prior to Foreclosure of Deed of Trust, notifying the Woodards that a foreclosure sale of the real property secured by the deed of trust was scheduled for 10 January 2006 and that they had a right to appear at a hearing on the foreclosure on 14 December 2005. On 16 December 2005, the Worthingtons also each filed a petition before the Clerk of Wilson County Superior Court seeking foreclosure. The clerk entered an order the same day, concluding that the "evidence of default did not meet the burden" and dismissing the petitions. Petitioners appealed to the superior court from the clerk's order.

The matter was heard de novo by the superior court on 27 March 2006. After conducting an evidentiary hearing, the trial court entered an order on 5 June 2006, finding that "[a]ll payments hav[e] been made pursuant to the . . . Promissory Note" and that "there now exists no amount payable under its terms." The trial

court concluded that, as a result, there was neither a valid debt nor a default under the terms of the note and dismissed petitioners' foreclosure proceeding. Petitioners have now appealed to this Court.

Discussion

"A deed of trust gives the note holder a contractual remedy for default, namely a right to foreclose under the instrument." *In re Foreclosure of Azalea Garden Bd. & Care, Inc.*, 140 N.C. App. 45, 51, 535 S.E.2d 388, 393 (2000). In a foreclosure action, the clerk of superior court holds a hearing to determine four issues: (1) the existence of a valid debt of which the party seeking foreclosure is the holder, (2) the existence of default, (3) the trustee's right to foreclose under the instrument, and (4) the sufficiency of notice of hearing to the record owners of the property. N.C. Gen. Stat. § 45-21.16(d) (2005). On appeal, the superior court conducts a de novo hearing addressing the same four issues. *In re Foreclosure of Goforth Props., Inc.*, 334 N.C. 369, 374, 432 S.E.2d 855, 858 (1993).

"The Clerk of Superior Court is limited to making the four findings of fact specified in [N.C. Gen. Stat. § 45-21.16(d)], and it follows that the Superior Court Judge is similarly limited in the hearing *de novo*." *In re Watts*, 38 N.C. App. 90, 94, 247 S.E.2d 427, 429 (1978). As the party seeking the foreclosure, petitioners bore the burden of proof on each of the four factual issues. *In re Foreclosure of Brown*, 156 N.C. App. 477, 489, 577 S.E.2d 398, 406 (2003). On appeal of the superior court's judgment, this Court

reviews only "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." *Azalea Garden Bd. & Care, Inc.*, 140 N.C. App. at 50, 535 S.E.2d at 392.

As reflected in both the clerk's order dismissing the petitions and the superior court order on appeal, the key issue in this case is whether petitioners met their burden of establishing that respondents were in default on the note. We find ample evidence to support the superior court's determination that petitioners did not do so.

"[A]n instrument is paid to the extent payment is made (i) by or on behalf of a party obliged to pay the instrument, and (ii) to a person entitled to enforce the instrument." N.C. Gen. Stat. § 25-3-602(a) (2005). To the extent of such a payment, there is no default, and the obligation of the party obliged to pay the instrument is discharged. *Id.*

In this case, the trial court found that all payments required under the note had been made, that no amount remained due, and that there was no default under the note. Petitioners do not dispute that respondents made 180 payments. They contend, however, that respondents made most of the payments to the wrong person and, therefore, respondents remain liable to petitioners. We disagree.

The trial court's findings reflect a determination that petitioners failed to meet their burden of establishing the debt had not been paid and, therefore, failed to show the existence of a default. *See Brown*, 156 N.C. App. at 489, 577 S.E.2d at 406

(noting foreclosing party bears burden of establishing all elements of right to foreclose, including default). *See also* N.C. Gen. Stat. § 25-3-602(a) ("To the extent of the payment, the obligation of the party obliged to pay the instrument is discharged . . . ."). The record contains sufficient evidence to support such a finding.

As the trial court found and the evidence established, the interest paid pursuant to the note was reported on petitioners' tax returns as well as other tax forms forwarded to the Internal Revenue Service. Ms. Worthington testified that she trusted the certified public accountant who prepared these tax returns and that he had continued to prepare her returns after the family buyout. Further, three of the Woodards' checks were endorsed on the reverse as for deposit to the accounts of Anne and/or Dean Worthington.

Petitioner Dean Worthington also acknowledged that his grandfather kept a ledger card system regarding the accounts of each family member and shareholder in the family business, which was composed of multiple corporations. The controller for the family business, a certified public accountant, explained that "these ledger cards [were] a running balance for the shareholders or the family members[.]"[1] According to the controller, the ledger cards recorded credits to each family member's account from payments received by the family business on that family member's behalf, as well as debits resulting from payments made for the

[1]While petitioners objected to some of this testimony, they have not pursued those objections on appeal and, therefore, that testimony may be considered in determining whether the trial court's decision is supported by the evidence.

benefit of the family member. In reviewing the Worthingtons' ledger cards, the controller identified deposits that came in from various sources, as well as debits or charges related to paying the Worthingtons' debts, such as pharmacy and utility bills and various taxes. The Worthingtons, in their own testimony, testified that tuition for Baylor and Harvard Universities and a beach house were paid for on their behalf by the family business.

The controller specifically testified that on the ledger card for Anne Worthington, there was an initial entry in the amount of $230,000.00 — half the amount due under the Woodards' note — constituting an account receivable owed to Anne Worthington from the Woodards. As of 12 May 1998, the ledger card reflected a balance due of $139,454.64. He confirmed that there was a similar ledger card for Dean Worthington. These ledger cards also reflected credits for amounts received from the Woodards over time.

Finally, when Dean Worthington was asked by his attorney on direct examination whether he received the benefit of the Woodard payments, he responded: "I just would have no way of knowing the answer to that." He could only say that the payments had not personally been delivered to him until after the family buyout. Anne Worthington testified that she knew "nothing" about her money until 1998 when the family buyout occurred.

In short, the record contains evidence that would permit the trial court to find that petitioners failed to prove that they did not in fact receive the funds from respondents' payments. Petitioners, however, point to this Court's opinion in *Summerlin v.*

Nat'l Serv. Indus., Inc., 72 N.C. App. 476, 325 S.E.2d 12 (1985), and argue that, under *Summerlin*, even if the Worthingtons received the benefit from all 180 payments, the debt was not discharged because the payments were not made directly to the Worthingtons until after the family buyout. We do not agree with petitioners' reading of *Summerlin*.

In *Summerlin*, the plaintiff terminated his employment, left his wife, and moved to another state. *Id.* at 477, 325 S.E.2d at 13. When his wife received a letter from the employer regarding the plaintiff's options in connection with a corporate pension plan and she could not locate her husband, she signed the form for him, electing a cash refund. *Id.* Once the refund check arrived, the wife endorsed the check with her husband's name, deposited it in their joint checking account, and used the proceeds to pay some of her husband's and the couple's liabilities. *Id.* The plaintiff subsequently sued his employer to recover the pension funds, but the trial court granted the employer a directed verdict. *Id.*

On appeal, this Court stated that "[t]he key issue becomes whether payment or satisfaction has been made to the 'holder' in the case *sub judice*, thus discharging the defendant's liability on the instrument and the underlying obligation." *Id.* at 478, 325 S.E.2d at 13.[2] The Court noted that "payment or satisfaction to an

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[2]The statutory provision relied upon in *Summerlin* has been amended and now provides that "[i]f tender of payment of an obligation to pay an instrument is made *to a person entitled to enforce the instrument*, the effect of tender is governed by principles of law applicable to tender of payment under a simple contract." N.C. Gen. Stat. § 25-3-603(a) (2005) (emphasis added). The focus is, therefore, no longer exclusively on the "holder" of

authorized agent of the 'holder' is sufficient to discharge the defendant's liability on the instrument and on the underlying obligation." *Id.* at 479, 325 S.E.2d at 14. The Court added: "Similarly, if the plaintiff ratified his wife's unauthorized endorsement or if he is precluded from denying it, defendant's liability on the check and on the underlying obligation is discharged." *Id.*

Contrary to petitioners' contention in this case, the Court did not hold that the *Summerlin* plaintiff was, in fact, entitled to recover the pension funds because they had not been paid to a holder. Instead, the Court concluded that the evidence created a factual dispute whether the plaintiff's wife had an agency relationship with her husband, making summary judgment or a directed verdict inappropriate for either party. *Id.* at 480, 325 S.E.2d at 14. The case was, therefore, remanded for trial. *Id.*, 325 S.E.2d at 15.

Petitioners primarily cite *Summerlin* as holding that receipt of the benefit of any payments is insufficient to constitute payment sufficient to discharge a debt. Although the Court in *Summerlin* mentioned, in its statement of facts, that some of the plaintiff's liabilities had been paid by the wife using the proceeds, the opinion does not actually include any holding along the lines argued by petitioners. Under petitioners' analysis, if a debtor paid amounts due to a third party, who in turn delivered the proceeds in full to the person entitled to payment, the debtor

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the instrument.

would still be liable on the debt. Nothing in *Summerlin* requires such a draconian result.

Applying the actual holding of *Summerlin* to the evidence in this case, it is undisputed that payments, prior to the family buyout, were all physically delivered to Roy Poole. The record contains ample evidence that, prior to the family buyout, Roy Poole was acting as the Worthingtons' agent for purposes of their financial affairs. Under *Summerlin*, payment to the Worthingtons' agent was sufficient to discharge the debt. *See also* 11 Am. Jur. 2d *Bills and Notes* § 402 (1997) ("[T]he payor of a note exposes himself or herself to double liability if he or she makes payment to someone other than the holder of the instrument, *unless the other person to whom payment is made is an agent of the owner of the note*." (emphasis added)).

Petitioners urge that the trial court's order cannot be upheld on agency principles because the trial court made no finding regarding agency. Although the trial court did not specifically find Poole's agency, the court made numerous findings pertaining to his acceptance of payments on petitioners' behalf, his general control over petitioners' finances, his decision to create the note on petitioners' behalf, his oversight of petitioners' tax returns, and his inclusion of interest income from the note on those returns. Indeed, the court specifically found that all payments made to Poole had been made "pursuant to" the terms of the note — a finding that makes no sense in the absence of a finding of agency. "[I]f a judgment is subject to two interpretations, the

court will adopt that one which makes it harmonize with the applicable law." *White v. Graham*, 72 N.C. App. 436, 441, 325 S.E.2d 497, 501 (1985). We believe that the findings sufficiently indicate the trial court incorporated agency principles within its decision.

There are two essential ingredients in the principal-agent relationship: (1) Authority, either express or implied, of the agent to act for the principal, and (2) the principal's right to control. *Phelps-Dickson Builders, L.L.C. v. Amerimann Partners*, 172 N.C. App. 427, 435, 617 S.E.2d 664, 669 (2005). "In the absence of an agreement to the contrary, the authority of an agent to collect or receive payment of a debt owing the principal will be implied if the collection or receipt of the payment is incidental to the agency transaction, usually accompanies it, or is a reasonably necessary means for effectuating the main authority conferred." 3 Am. Jur. 2d *Agency* § 133 (2002).

Here, the record is replete with evidence indicating that while Poole was in possession of the note, he functioned as the Worthingtons' agent for purposes of their financial affairs. Both Anne and Dean Worthington acknowledged that they ceded all responsibility for their finances to Poole. As Ms. Worthington testified, "My father was in charge." While the Worthingtons both suggested they had no choice, since they would otherwise have to forego the money the relationship afforded them, that is in fact a choice. Thus, the trial court could reasonably conclude that the Worthingtons implicitly agreed to allow Poole to act on their

behalf in financial matters and find not credible their claim that they never granted authority to Poole.

Petitioners also contend that no agency relationship existed because they had no control over Poole generally and, with respect to the Woodard note, could not control him because they did not know about the note. This argument, however, focuses on actual control. As our Supreme Court has ruled, the question is whether the principal has the "right to control" the agent. *Jones v. Lake Hickory R.V. Resort, Inc.*, 162 N.C. App. 618, 631, 592 S.E.2d 284, 293 (Bryant, J., dissenting), *rev'd per curiam for reasons in the dissent*, 359 N.C. 181, 606 S.E.2d 119 (2004). Petitioners do not dispute that they had the right to control their own finances. The fact that they chose not to do so does not vitiate the agency relationship.

Under *Summerlin*, if Poole was the Worthingtons' agent, then the Woodards were discharged from liability on the note by making payments to Poole. 72 N.C. App. at 479, 325 S.E.2d at 14 (holding that "payment or satisfaction to an authorized agent of the 'holder' is sufficient to discharge the defendant's liability on the instrument and on the underlying obligation"). We conclude that the record contains sufficient competent evidence to support the trial court's finding that when the Woodards made their payments under the note, they were entitled, prior to the buyout, to pay Poole. *Compare Phelps-Dickson Builders, L.L.C.*, 172 N.C. App. at 435-36, 617 S.E.2d at 669 (concluding sufficient evidence of agency relationship existed when purported agent exercised

"sweeping powers," including signing various documents and agreements, with the alleged principal's "knowledge and consent").

In short, given the evidence in the record indicating Poole's authority to accept payments on petitioners' behalf during his possession of the note and the additional failure of petitioners to be able to prove that they did not receive the benefit of respondents' payments, we find the trial court's conclusion that petitioners failed to meet their burden of establishing a default fully supported by the evidence. We, therefore, affirm. Because petitioners necessarily cannot recover without establishing respondents' default, N.C. Gen. Stat. § 45-21.16(d), we need not consider petitioners' additional arguments.

Affirmed.

Judges WYNN and ELMORE concur.

Report per Rule 30(e).