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NO. COA06-825

NORTH CAROLINA COURT OF APPEALS

Filed: 17 April 2007

ROBERT GLENN JOHNSON, JR.,
Plaintiff,

v.

Wilkes County
No. 05 CVS 356

LEE Q. MCMILLAN,
Defendant.

Appeal by Defendant from judgment entered 19 October 2005 by Judge Michael E. Helms in Wilkes County Superior Court. Heard in the Court of Appeals 8 February 2007.

Vannoy, Colvard, Triplett & Vannoy, P.L.L.C., by H.C. Colvard, Jr., and Daniel S. Johnson, for Plaintiff-Appellee.

Jordan and Jordan Law Offices, PLLC, by Tracie M. Jordan, for Defendant-Appellant.

STEPHENS, Judge.

On 16 December 1999, Defendant executed a promissory note for the sum of \$200,000.00 (the "Note") in favor of Branch Banking and Trust Company ("BB&T"). The Note stated that it was granted by Defendant in connection with a deed of trust executed by Thomas B. Burch dated 16 December 1999 (the "Deed of Trust"). Mr. Burch's signature does not appear on the Note. The Deed of Trust, executed by Mr. Burch and recorded in the Wilkes County Register of Deeds Office that same day, "secure[d] the payment of the Debt" evidenced by the Note. The security contained in the Deed of Trust was a

tract of land owned by Mr. Burch. By general warranty deed recorded 20 March 2002 (the "Deed"), Mr. Burch conveyed the property that was subject to the Deed of Trust to Plaintiff. The Deed indicated that the conveyance was "specifically subject" to the Deed of Trust.

On or about 9 August 2004, Defendant fully paid BB&T the balance due under the Note. On 24 January 2005, BB&T executed a document which assigned to Defendant "all of its right, title and interest in and to" the Note and the Deed of Trust. This document was recorded in the Wilkes County Register of Deeds Office on 24 February 2005.

By Complaint filed 10 March 2005, Plaintiff sought a declaratory judgment that the indebtedness evidenced by the Note had been cancelled and that, therefore, the Deed of Trust was void and of no force and effect. Plaintiff also sought an order cancelling the Deed of Trust from the public land records of Wilkes County. In his Answer filed 10 June 2005, Defendant alleged that he had signed the Note as an accommodation party to Mr. Burch and that he had only paid off the Note when Mr. Burch failed to make payments to BB&T. Defendant further alleged that, due to BB&T's assignment, Plaintiff was responsible to Defendant for amounts paid by Defendant under the Note. Defendant sought a declaratory judgment that the Deed of Trust represented a valid lien on Plaintiff's property and that Defendant should be allowed to foreclose on the property unless the Note was paid in full by Plaintiff.

On 26 August 2005, Plaintiff filed a Motion for Summary Judgment. Defendant submitted a seventeen-page Memorandum in Opposition to Plaintiff's Motion for Summary Judgment. Following a hearing, on 19 October 2005, the trial court entered an order granting summary judgment in favor of Plaintiff, declaring the Deed of Trust to be void and of no force and effect, and ordering the Register of Deeds of Wilkes County to "cancel from the public land records of Wilkes County" the Deed of Trust. Defendant timely filed Notice of Appeal on 14 November 2005 from the order granting summary judgment.

On 19 January 2006, Plaintiff moved to dismiss the appeal on grounds that Defendant had not timely served a proposed record on appeal, the parties had not settled a proposed record on appeal by agreement, and Defendant had not obtained an order extending the time to prepare and serve the proposed record on appeal. Plaintiff also moved to correct the order granting summary judgment because Defendant's last name had been incorrectly spelled.

On 15 February 2006, Defendant filed an Answer to Motion to Dismiss the Appeal and Answer to Correct Order of Summary Judgment. In this filing, Defendant acknowledged his failure to timely serve a proposed record on appeal, but alleged that this failure was due to counsel's serious health problems as detailed in attached affidavits. Defendant requested a fifteen-day extension of time within which to serve the proposed record. Defendant also contended that the granting of Plaintiff's Motion to Correct Order

would give Defendant an additional thirty-five days within which to serve the proposed record.

A hearing on the Motion to Dismiss the Appeal was held 23 February 2006. By order filed 6 March 2006, the trial court denied Defendant's request to extend the time within which to serve the proposed record on appeal, granted Plaintiff's motion to correct the spelling of Defendant's last name in the summary judgment order, and dismissed Defendant's appeal. On 8 March 2006, Defendant filed a Notice of Appeal excepting to the order dismissing the appeal. On 14 March 2006, the 19 October 2005 summary judgment order was recorded in the Wilkes County Register of Deeds Office, thereby cancelling the Deed of Trust.

On 30 March 2006, Defendant petitioned this Court for a writ of certiorari. The petition was granted 26 April 2006 for the purpose of reviewing the 19 October 2005 order. Defendant then withdrew his appeal from the trial court's 6 March 2006 order. In his brief and by motion filed 11 August 2006, Plaintiff argues that the appeal currently before this Court should be dismissed as moot. For the following reasons, we agree with Plaintiff.

MOOT

We set forth a detailed factual and procedural history of this case primarily to show what did not happen: Defendant never sought or obtained a stay of execution from the trial court, or a stay of execution or writ of supersedeas from this Court, of the trial court's order granting summary judgment.

Generally, "no execution shall issue upon a judgment nor shall proceedings be taken for its enforcement until the expiration of the time provided in the controlling statute or rule of appellate procedure for giving notice of appeal[.]" N.C. Gen. Stat. § 1A-1, Rule 62(a) (2005). "When an appeal is taken, the appellant may obtain a stay of execution . . . by proceeding in accordance with and subject to the conditions of G.S. 1-289, G.S. 1-290, G.S. 1-291, G.S. 1-292, G.S. 1-293, G.S. 1-294, and G.S. 1-295." N.C. Gen. Stat. § 1A-1, Rule 62(d) (2005). "[S]tay of execution or enforcement thereof pending disposition of the appeal must ordinarily first be sought by the deposit of security with the clerk of the superior court . . . or by application to the trial court for a stay order" N.C. R. App. P. 8(a). "After a stay order or entry has been denied or vacated by a trial court," or in "extraordinary circumstances" otherwise, *id.*, an appellant may apply "to the appropriate appellate court for a writ of supersedeas to stay the execution or enforcement of any . . . order[.]" N.C. R. App. P. 23(a)(1).

Because Defendant obtained neither a stay of execution from the trial court pursuant to Rule 62 of the North Carolina Rules of Civil Procedure, nor a stay or a writ of supersedeas from this Court pursuant to Rules 8 and 23 of the North Carolina Rules of Appellate Procedure, the recording of the order cancelling the deed of trust on 14 March 2006 renders the questions raised by Defendant moot. See *In re Burgess*, 57 N.C. App. 268, 291 S.E.2d 323 (1982). Defendant's appeal is, therefore, dismissed.

DISMISSED.

Judges MCGEE and GEER concur.

Report per Rule 30(e).