NO. COA07-1068

NORTH CAROLINA COURT OF APPEALS

Filed: 20 May 2008

BANK ONE, N.A.
Plaintiff

v.

Iredell County
No. 02 CVS 0602

MICHAEL J. FRIEDMAN AND
SONIA FRIEDMAN,
Defendants

On writ of certiorari by defendants to review the order entered 29 March 2004 by Judge Lindsay R. Davis, Jr. in Iredell County Superior Court. Heard in the Court of Appeals 19 February 2008.

Morris, Schneider, Prior, Johnson & Friedman, L.L.C., by David O'Quinn, for plaintiff-appellee.

Hanzel & Newkirk, by Robert B. Newkirk, III, for defendants-appellants.

CALABRIA, Judge.

Michael J. Friedman ("Mr. Friedman") and Sonia Friedman ("Mrs. Friedman") (collectively, "defendants") filed a petition for writ of certiorari seeking this Court's review of the trial court's order granting summary judgment in favor of Bank One, N.A. ("plaintiff"). We invoke our discretion to grant certiorari and affirm.

On 18 December 1997, Mr. Friedman executed and delivered to WMC Mortgage Corporation ("WMC Mortgage") an adjustable rate promissory note ("the note") in the principal amount of $420,000.00 at an initial annual interest rate of twelve percent. Mrs. Friedman did not sign the note. The note provided that Mr. Friedman would repay the principal and interest in consecutive monthly installments, with an initial monthly payment in the amount of $4,320.18. Also on 18 December 1997, defendants secured the indebtedness under the note by executing a deed of trust that conveyed a security interest in the real property located at 150 Lake Pine Road, Mooresville, North Carolina ("the property") to WMC Mortgage.

Subsequently, both the note and deed of trust were transferred to plaintiff. On or about 2 November 1999, when Homecomings became the servicing agent for Mr. Friedman's loan, the loan payments were eleven months in arrears. Mr. Friedman continued to make payments, however, the monthly payments were inconsistent. As a result of Mr. Friedman's failure to pay according to the terms of the note, the loan was in default. As a consequence of the default, plaintiff accelerated maturity, declared the entire unpaid balance immediately due and payable, and initiated foreclosure proceedings against the property.

On 17 October 2001, Homecomings sent a letter to Mr. Friedman indicating foreclosure proceedings would begin pursuant to N.C. Gen. Stat. § 45-21.16(c) unless he paid $516,103.65, the total amount of principal and interest due under the note as of the date

of the letter. On 12 November 2001, plaintiff's counsel sent a letter to Mr. Friedman indicating the total amount in arrears that Mr. Friedman had to pay for his loan to be paid in full. Specifically, the letter stated that Mr. Friedman must tender the total amount of $426,314.28 by 30 November 2001 and directed Mr. Friedman to send the payment to Morris, Schneider & Prior, L.L.C. ("MSP"), the law firm representing plaintiff. The letter reflected the loan's unpaid interest that accumulated through 30 November 2001, totaled an amount equal to $7,443.96.

On 10 December 2001, defendants sent a check ("the check") in the amount of $431,314.28 to MSP. The check was drawn on the trust account of defendants' attorney. The reference section of the attorney's cover letter indicated it was a "Mortgage Payoff Letter" and that the enclosed check in the amount of $431,314.28 represented "payment in full of the following Deed of Trust/Mortgage in deed book 1055 at page 1780." MSP received and accepted the check.

On 11 March 2002, plaintiff filed a "complaint for recovery on promissory note and for declaratory judgment." The complaint alleged, *inter alia*, that the check tendered by defendants to MSP was insufficient to satisfy Mr. Friedman's loan obligation to plaintiff. The complaint also asserted there was a clerical error in the letter sent to Mr. Friedman in November 2001 regarding the $7,443.96 interest that accumulated through 30 November 2001. The complaint included the correct amount of interest that accumulated through 30 November 2001 as an amount equal to $107,443.96.

On 26 September 2003, plaintiff filed a motion for summary judgment in Iredell County Superior Court. On 29 March 2004, the Honorable Lindsay R. Davis, Jr. entered an order granting plaintiff's motion. From the court's order, defendants appeal.

Although defendants timely filed their notice of appeal to this Court, they did not timely file the settled record on appeal. On 31 August 2007, defendants filed a motion with this Court to extend the time to file the settled record on appeal. This Court denied defendants' motion. Since this Court denied defendants' motion to extend the time to file the settled record on appeal, the record on appeal was untimely filed, and the appeal dismissed. However, defendants also filed an alternative petition for writ of certiorari. We exercise our discretion and grant defendants' petition.

On appeal, defendants argue the trial court erred in granting plaintiff's motion for summary judgment because (I) a genuine issue of material fact existed as to whether defendants remained in default after plaintiff accepted defendants' check and (II) plaintiff did not file a verified complaint and the affidavits submitted by plaintiff were not submitted by a party to the lawsuit.

I. Standard of Review

This Court has held summary judgment should 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. A moving

> party has the burden of establishing the lack of any triable issue of fact, and its supporting materials are carefully scrutinized, with all inferences resolved against it.

Van Reypen Assocs. v. Teeter, 175 N.C. App. 535, 539, 624 S.E.2d 401, 404 (2006) (internal quotation marks omitted) (citations omitted).

II. Payoff Funds

Defendants argue the pleadings and discovery in this case present a genuine issue of material fact that the check tendered by defendants and accepted by plaintiff constituted an accord and satisfaction of defendants' outstanding debt. We disagree.

Since Mr. Friedman signed a promissory note, a negotiable instrument, Article 3 of the North Carolina Uniform Commercial Code is applicable to the instant case. *See* N.C. Gen. Stat. § 25-3-104 (2001). Pursuant to this article, a payment by a party may constitute an accord and satisfaction if the following prerequisites are satisfied:

> (a) If a person against whom a claim is asserted proves that (i) that person in good faith tendered an instrument to the claimant as full satisfaction of the claim, (ii) the amount of the claim was unliquidated or *subject to a bona fide dispute*, and (iii) the claimant obtained payment of the instrument, the following subsections apply.
>
> (b) . . . the claim is discharged if the person against whom the claim is asserted proves that the instrument or an accompanying written communication contained a conspicuous statement to the effect that the instrument was tendered as full satisfaction of the claim.

N.C. Gen. Stat. § 25-3-311 (2001) (emphasis added).

Here, on 17 October 2001, Homecomings, plaintiff's servicing agent, sent a letter addressed to Mr. Friedman. The letter stated in relevant part:

> The above-referenced loan was recently referred by us to our local counsel to start foreclosure proceedings. The following information about the above-referenced loan is being provided to you pursuant to N.C.G.S. Section 45-21.16(c):
>
> Unpaid Principal Balance: $416,399.21
>
> Accrued Interest thru [sic] date of this letter: $99,704.44

On 12 November 2001, less than one month after Mr. Friedman received the letter from Homecomings, MSP, the law firm representing plaintiff, forwarded to defendants a payoff letter. The letter stated as follows:

> The amount necessary to pay off the . . . loan in full is as follows and MUST be in our office on or before November 30, 2001:
> . . . .
>
> Unpaid Principal Balance: $416,399.21
> Interest thru [sic] 11/30/01: $7,443.96

The amount of interest in the November 2001 letter was significantly lower than the amount stated in the October 2001 letter. Significantly, less than one month after defendant received the October 2001 letter, defendants received the letter from plaintiff's counsel stating that defendant owed only $7,443.96 in interest. Defendants should have known that the amount of the interest due on the unpaid principal balance of $416,399.21 was not merely $7,443.96 since there had not been a decrease in the amount

of the principal from October to November. Therefore, it was a clerical error. More importantly, a clerical error cannot be considered a "bona fide dispute" pursuant to N.C. Gen. Stat. § 25-3-311(a) regarding how much interest Mr. Friedman owed on his loan. Although defendants complied with N.C. Gen. Stat. § 25-3-311(b) by having their attorney send a check in the amount of $431,314.28 to MSP stating that the enclosed check "represents payment in full of the following Deed of Trust/Mortgage," defendant failed to satisfy both requirements under N.C. Gen. Stat. § 25-3-311. As such, defendants' tender of the check in the amount of $431,314.28 to plaintiff, and plaintiff's action of cashing the check, did not constitute an accord and satisfaction of Mr. Friedman's debt. This assignment of error is overruled.

III. Unverified Complaint and Affidavits

Defendants next argue the trial court erred in granting plaintiff's motion for summary judgment because plaintiff did not submit affidavits executed by a party to the lawsuit and plaintiff did not file a verified complaint. We disagree.

a. Affidavits

Defendants argue the trial court erred by granting plaintiff's motion for summary judgment because the trial court relied on invalid affidavits. Specifically, defendants argue plaintiff failed to produce affidavits executed by a party to the lawsuit and the trial judge erred in relying on these affidavits.

> Generally, affidavits must be made on the affiant's personal knowledge of the facts alleged in the petition. The affidavit must in some way show that the affiant is personally

> familiar with the facts so that he could personally testify as a witness. The personal knowledge of the facts asserted in an affidavit is not presumed from a mere positive averment of facts but rather the court should be shown how the affiant knew or could have known such facts and if there is no evidence from which an inference of personal knowledge can be drawn, then it is presumed that such does not exist. However, where it appears that an affidavit is based on the personal knowledge of the affiant and reasonable inference is that the affiant could competently testify to the contents of the affidavit at trial, there is no requirement that the affiant specifically attest to those facts.

Lemon v. Combs, 164 N.C. App. 615, 622-23, 596 S.E.2d 344, 349 (2004). In addition, Rule 56(e) of the North Carolina Rules of Civil Procedure states that "[s]upporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein." N.C. Gen. Stat. § 1A-1, Rule 56(e) (2001). Moreover, there is no rule of law or evidence that requires affidavits submitted at a motion hearing must only be executed by someone who is a party to the lawsuit.

Here, one affiant, Quovadis Wallace, stated under oath that he was a paralegal with MSP and had personal knowledge as to defendants' records because he is the custodian of MSP's business records. He also stated under oath that he faxed the November 2001 pay off letter declaring defendants owed the incorrect amount of interest. The second affiant, Rodney Willis, stated under oath that

he was the custodian of records at Homecomings and competent to testify regarding defendants' loan records.

Therefore, the sworn testimony of the two affiants reveals that both affiants were "personally familiar with the facts so that [they] could personally testify as a witness" as to matters stated in the affidavits. *Lemon*, 164 N.C. App. at 622, 596 S.E.2d at 349. In addition, defendants' trial counsel never objected to the admission of the affidavits at trial and therefore is precluded from objecting to the affidavits on appeal. *See Lexington State Bank v. Miller,* 137 N.C. App. 748, 752, 529 S.E.2d 454, 456 (2000) ("Additionally, we note that the record contains no objection by plaintiff nor a motion to strike the affidavit. Absent such an objection or motion to strike, plaintiff cannot now contest the admission of [defendants'] affidavit on appeal."). This assignment of error is overruled.

b. Verified Complaint

Defendants argue the trial court erred by relying on plaintiff's unverified complaint in granting plaintiff's motion for summary judgment.

"[T]he trial court may not consider an unverified pleading when ruling on a motion for summary judgment." *Tew v.* Brown, 135 N.C. App. 763, 767, 522 S.E.2d 127, 130 (1999); *see also Hill v. Hill*, 11 N.C. App. 1, 10, 180 S.E.2d 424, 430 (1971) ("An unverified complaint is not an affidavit or other evidence.").

Here, there is no evidence in the record that the trial judge considered plaintiff's unverified complaint before granting plaintiff's motion. The trial testimony states in relevant part:

> [Plaintiff's counsel]: Your Honor . . . the motion for summary judgment has been filed along with several briefs in support of and in opposition to our motion for summary judgment along with affidavits from Rodney Lewis who is the custodian of records at Homecomings. Homecomings is the servicing agent for [plaintiff]. And an affidavit has been filed by Corvalace [sic] Wallace who is the foreclosure payoff paralegal that works for [MSP] who is counsel for [plaintiff].

Moreover, even if the trial court did consider plaintiff's unverified complaint, the affidavits alone submitted by plaintiff reveal "that there is no genuine issue as to any material fact." *Van Reypen Assocs.*, 175 N.C. App. at 539, 624 S.E.2d at 404. The affidavits acknowledge the interest amount of $7,443.96 indicated in the November letter was an unintentional clerical error. The letter should have indicated $107,443.96 as the correct amount defendants owed in interest on the unpaid balance. The affidavits also state that on 17 October 2001, Homecomings mailed a statement to Mr. Friedman indicating the principal plus interest due on the note totaled an amount over $515,000.00.

In conclusion, both affidavits submitted by plaintiff show no bona fide dispute as to how much defendants owed, since the interest amount in the November 2001 letter was a clerical error. As such, there is no "triable issue of fact," and the trial court did not err in granting plaintiff's motion for summary judgment. *Id.*

Affirmed.

Judges WYNN and McGEE concur.

Report per Rule 30(e).