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NO. COA08-1503

NORTH CAROLINA COURT OF APPEALS

Filed: 4 August 2009

IN THE MATTER OF THE FORECLOSURE
OF A DEED OF TRUST EXECUTED BY
BOBBY TODD CARTER, DATED
JUNE 17, 2004, AND RECORDED IN THE
BOOK 2587 AT PAGE 1568, CATAWBA
COUNTY REGISTRY,

Catawba County
No. 07 SP 492

RECORD OWNERS:
BOBBY TODD CARTER, AND
DEBORAH BARBARA NELSON CARTER

Appeal by petitioner Kevin L. Carter from order entered 18 July 2008 by Judge James E. Hardin, Jr., in Catawba County Superior Court. Heard in the Court of Appeals 22 April 2009.

David Shawn Clark, PA, for petitioner-appellant.

Sigmon, Sigmon and Isenhower, by W. Gene Sigmon, for respondent-appellee.

ELMORE, Judge.

On 17 June 2004, Bobby Carter (Bobby) executed a deed of trust for the benefit of his brother, petitioner Kevin Carter (Kevin), and Bobby purportedly also executed a promissory note for \$125,000.00 at six percent interest payable to Kevin. Both documents were created by Susan Hoyle, an employee at attorney Curt Vaught's office in Hickory. The deed of trust was properly filed, and the promissory note was purportedly kept in the files of

Vaught's office. Oscar Carter, the father of Bobby and Kevin, was also present during these events.

Bobby died on 25 March 2006, and his wife, Debbie Carter, had her attorney contact Vaught's office, seeking a copy of the promissory note. Renee Wilcox, who had replaced Hoyle as Vaught's legal assistant, checked every file pertaining to members of the Carter family but could not find the promissory note. At Vaught's behest, Wilcox prepared an Affidavit of Lost Note and recreated the note that had been lost. Vaught's office then represented Kevin in the collection of the promissory note and sought foreclosure of the deed of trust against the estate of Bobby Carter.

However, Vaught died in March 2007 and thus was unable to testify when the foreclosure hearing was held before Al Jean Bogle, Clerk of Catawba County Superior Court, who filed her decision on 5 September 2007. Clerk Bogle found "[t]hat the only note produced was an un executed [sic] copy that material term [sic] was in handwriting where all other material terms were typed [sic] written" and that

[t]he alleged maker of the note is deceased.
The attorney for the note holder is deceased.
The note holder, Kevin L. Carter, was not in possession of the note when it was alleged to be lost and was not present at the hearing and could not testify as to the whereabouts of the note.

As such, Clerk Bogle was "unable to find the existence of . . . a valid debt of which the parties [sic] seeking to foreclose is the holder[.]"

Kevin appealed to the Catawba County Superior Court on 18 September 2007, and the case was heard without a jury. The superior court entered its order on 18 July 2008, affirming Clerk Bogle's decision as being "supported by substantial evidence in view of the entire record as submitted[.]" The superior court also focused on Kevin's failure "to show [that he] was in possession of the instrument and entitled to enforce it when loss of possession had occurred[.]" The superior court also stated that "the Promissory Note, if it existed, was left with Curt Vaught or his legal staff," and, therefore, Kevin had not been in possession of the note when it was lost, which the superior court found precluded Kevin from enforcing the note.

Kevin appealed to this Court. For the reasons stated below, we affirm the superior court's order.

ARGUMENTS

We review a decision from a bench trial to determine whether there was "competent evidence to support the trial court's findings of fact and whether its conclusions of law were proper in light of such facts. Findings of fact by the trial court in a non-jury trial . . . are conclusive on appeal if there is evidence to support those findings." *Luna v. Division of Soc. Servs.*, 162 N.C. App. 1, 4, 589 S.E.2d 917, 919 (2004) (quotations and citation omitted).

Kevin argues that this case centers entirely on statutory construction. N.C. Gen. Stat. § 25-3-309, which addresses enforcement of lost, destroyed, or stolen instruments, states:

(a) A person not in possession of an instrument is entitled to enforce the instrument if (i) *the person was in possession of the instrument and entitled to enforce it when loss of possession occurred*, (ii) the loss of possession was not the result of a transfer by the person or a lawful seizure, and (iii) the person cannot reasonably obtain possession of the instrument because the instrument was destroyed, its whereabouts cannot be determined, or it is in the wrongful possession of an unknown person or a person that cannot be found or is not amenable to service of process.

(b) A person seeking enforcement of an instrument under subsection (a) of this section *must prove the terms of the instrument and the person's right to enforce the instrument*.

N.C. Gen. Stat. § 25-3-309 (2007) (emphases added). Neither party disputes that (a)(ii) and (a)(iii) have been met. As such, the dispute is based on whether Kevin: (1) "was in possession of the instrument and entitled to enforce it when loss of possession occurred" and (2) could "prove the terms of the instrument." *Id.*

Kevin urges this Court to read § 25-3-309(a)(i) as allowing him to enforce the promissory note despite not having actual possession of the note when it was lost. He argues that he had *constructive* possession of the note because it was purportedly in his legal files in Vaught's office. This Court can find no North Carolina case addressing whether mere constructive possession will satisfy § 25-3-309(a)(i). Section 25-3-309(a)(1) is closely modeled after the 2001 version of U.C.C. § 3-309 (the Old U.C.C.),

and we cannot find a decision from any other state specifically holding that constructive possession alone satisfies the Old U.C.C., although one Florida case implies that constructive possession might have been enough. *See State Street Bank & Trust Co. v. Lord*, 851 So.2d 790, 791 (Fla. Dist. Ct. App. 2003) (holding that, where plaintiff "never had actual or constructive possession of the promissory note," plaintiff could not enforce the note). We observe that the 2002 amendments to U.C.C. § 3-309, which our legislature has not adopted, allow a promissory note to be enforced so long as the person seeking enforcement "was entitled to enforce the instrument when loss of possession occurred," thus rendering irrelevant the question of who was in possession of the note when it was lost. U.C.C. § 3-309 (2004).

At the present time, however, this Court need not determine whether constructive possession will satisfy N.C. Gen. Stat. § 25-3-309(a)(i) because Kevin did not meet the second required element of "[proving] the terms of the instrument," thereby mooting the issue of possession.

The superior court affirmed Clerk Bogle's finding that Kevin had not proved the terms of the instrument, explaining that the finding was "supported by substantial evidence in view of the entire record as submitted[.]" This evidence includes the following: (1) Bobby, who purportedly made the note, and attorney Vaught, who was present when the note was supposedly created, were both deceased at the time of the hearing and could not provide details about the note's terms; (2) when the note was discovered as

missing, Vaught had his assistant Wilcox re-create the note, apparently basing its terms solely on Vaught's two-year-old memory of the purported drafting of the original note; (3) Vaught was an interested party with respect to the promissory note because his office represented Kevin in his attempt to collect on the note by foreclosure; (4) the re-created note was on a Bar Form, not signed by either party, and had one of the material terms in handwriting; (5) Kevin identified a different note as the one that Bobby had supposedly signed; (6) Kevin was present at the note's supposed creation but is also an interested party to the litigation; and (7) Hoyle and Oscar Carter were both present at the note's supposed creation, but they both testified that the note was payable on demand or over a five-year term, while Vaught's Affidavit of Lost Note stated that the note was only payable on demand. As such, there was considerable evidence supporting the superior court's affirmation of Clerk Bogle's finding that the terms of the purported promissory note were uncertain and, thus, Kevin had failed to meet § 25-3-309(b)'s requirement that a person wishing to enforce a lost note must "prove the terms of the instrument." N.C. Gen. Stat. § 25-3-309(b) (2007). Furthermore, the trial court, in a finding that Kevin has not challenged on appeal as lacking adequate evidentiary support, found that "there is no competent evidence that there was a specific event or obligation to prove a valid debt." Therefore, we conclude that Kevin's argument lacks merit.

Furthermore, we need not address Kevin's second argument, which concerns the posting of a bond. This argument is pertinent only if the estate of Bobby Carter was required to honor the purported promissory note. Having already determined that the estate is not required to honor the purported promissory note, Kevin's bond argument is now moot.¹ Accordingly, we affirm the superior court's order.

Affirmed.

Judges STROUD and ERVIN concur.

Report per Rule 30(e).

¹ Our holding here is based upon the evidence in the record on appeal, which does not include the original promissory note. We have not considered the content, validity, or enforceability of the original promissory note, should it be found.