NO. COA08-287

NORTH CAROLINA COURT OF APPEALS

Filed: 6 January 2009

In the matter of the foreclosure of a deed of trust executed by Charles Ray Thomas and wife, Shirley P. Thomas, dated December 16, 2004, recorded in Book 3655, Page 189, Union County, North Carolina Registry, by Stephen A. Lamb, Substitute Trustee.

Union County
No. 06 SP 551

Appeal by Respondents from orders entered 5 September 2007 by Judge Kimberly S. Taylor in Union County Superior Court. Heard in the Court of Appeals 6 October 2008.

Nexsen Pruet, PLLC, by David S. Pokela and Brian T. Pearce, for Appellee.

Harry B. Crow, Jr., for Respondents-Appellants.

STEPHENS, Judge.

Pursuant to regulations promulgated under the Federal Truth in Lending Act, 15 U.S.C. § 1601 *et seq.* (2004), a consumer participating in "a credit transaction in which a security interest is or will be retained or acquired in [the] consumer's principal dwelling" has the right to rescind the transaction by providing written notification to the creditor before midnight of the third business day following consummation of the transaction. 12 C.F.R. § 226.23(a) (2004). The primary issue before us in this case is

whether the trial court erred in finding that Respondents did not properly rescind such a credit transaction.

BACKGROUND

In 2004, Respondents-Appellants Charles Ray Thomas and Shirley P. Thomas ("the Thomases") owned a house encumbered by a mortgage held by Homecomings Financial ("Homecomings"). On 17 December 2004, the Thomases executed documents necessary to refinance their Homecomings mortgage with Appellee Ameriquest Mortgage Company ("Ameriquest"). Among other documents, the Thomases executed a promissory note in the amount of $174,000.00 and a deed of trust securing the note for the benefit of Ameriquest.[1] Either later that day or the following day, the Thomases contacted Ameriquest to rescind the transaction. The evidence surrounding the Thomases' purported rescission conflicted and is more fully discussed in our analysis below.

At some point after the Thomases executed Ameriquest's loan package, Ameriquest disbursed $156,403.10 to Homecomings to pay off the Thomases' Homecomings mortgage.[2] On or about 22 December 2004, apparently believing that they had rescinded the Ameriquest transaction and were still obligated to Homecomings, the Thomases

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[1]Ameriquest Mortgage Company subsequently transferred the note and deed of trust to Ameriquest Mortgage Securities, Inc. Ameriquest Mortgage Securities, Inc. later transferred the note and deed of trust to Ameriquest Funding II REO Subsidiary LLC. For purposes of this opinion, we simply refer to these entities as Ameriquest.

[2]There is also evidence in the record that Ameriquest disbursed funds to, *inter alia*, the Thomases, the Union County Tax Department, and the Union County Register of Deeds.

mailed Homecomings a check for their December mortgage payment. Homecomings received the check on 23 December and credited the payment to the Thomases' account. On or about 21 January 2005, the Thomases mailed Homecomings a check for their January mortgage payment. On 26 January 2005, Homecomings notified the Thomases that it was unable to apply the payment to the Thomases' account because the loan had been paid in full.

On 25 February 2005, Ameriquest notified the Thomases that it intended to foreclose under the deed of trust because the Thomases did not make the first payment due under the note executed 17 December 2004. On 6 July 2005, the Thomases advised Ameriquest that, since they had rescinded the transaction, Ameriquest had the burden to recover all disbursed funds. On 25 August 2005, Ameriquest informed the Thomases that, as an accommodation, it would grant the Thomases a rescission if the Thomases returned all funds disbursed.

On 19 June 2006, Stephen A. Lamb, substitute trustee under Ameriquest's deed of trust, initiated foreclosure proceedings by filing a Notice of Hearing in Union County Superior Court. William F. Helms, III, Union County Clerk of Superior Court, conducted the hearing on 26 September 2006. Attorney Brian T. Pearce represented Ameriquest at the hearing.[3] In an order entered 27 November 2006,

[3]The Clerk's order states that the Thomases were represented by counsel at the hearing and that Mr. Pearce represented the substitute trustee at the hearing. In fact, Mr. Pearce undoubtedly represented Ameriquest. *See* North Carolina Rules of Professional Conduct, RPC 82 (January 12, 1990) (stating that the fiduciary relationship between trustee, trustor, and beneficiary "demands that the trustee be impartial to both the trustor and the

the Clerk found that the Thomases had rescinded the transaction and denied the substitute trustee authority to proceed in foreclosure.

On or about 5 December 2006, Mr. Pearce, as attorney for Ameriquest, filed a notice of appeal to Union County Superior Court from the Clerk's order. On 11 January 2007, the Thomases filed a motion to dismiss Ameriquest's appeal, contending that only the substitute trustee could appeal the Clerk's order. Superior Court Judge Kimberly S. Taylor conducted a hearing on both the Thomases' motion and Ameriquest's appeal on 13 August 2007. By orders entered 5 September 2007, Judge Taylor (1) denied the Thomases' motion to dismiss the appeal, and (2) found that the Thomases had not rescinded the transaction, reversed the Clerk's order, and authorized the substitute trustee to proceed in foreclosure. The Thomases timely appealed.

On appeal, the Thomases contend that (1) the appeal to the Superior Court should have been dismissed because Ameriquest is not a "real party in interest" to the proceedings, and (2) there was insufficient evidence that they failed to rescind within three days of executing Ameriquest's loan package.

ANALYSIS

1. Real Party In Interest

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beneficiary and, therefore, the trustee may not act as advocate for either against the other."); 1 James A. Webster, Jr., *Webster's Real Estate Law in North Carolina* § 13-31, at 583 (Patrick K. Hetrick & James B. McLaughlin, Jr. eds., 5th ed. 1999) ("Where the hearing before the clerk becomes adversarial and there is a need for legal representation and advocacy on the part of the lender or borrower, the party in need of legal representation will need to retain an attorney . . . .").

The Thomases first argue that, pursuant to a deed of trust by which the power of sale has been granted to a trustee and not to the holder of the debt secured by the deed of trust, only a trustee may appeal a clerk's adverse ruling to superior court. *See* N.C. Gen. Stat. § 45-21.16(e) (2005) (providing for the right to appeal from the clerk to a district or superior court having jurisdiction). Thus, the Thomases argue, the trial court in this case should have dismissed Ameriquest's appeal. Because this argument raises issues of standing and subject matter jurisdiction, we review the trial court's denial of the motion to dismiss *de novo*. *E.g.*, *Fuller v. Easley*, 145 N.C. App. 391, 553 S.E.2d 43 (2001).

Preliminarily, we note that, in one of this jurisdiction's leading foreclosure cases, *In re Foreclosure of Deed of Trust of Michael Weinman Assocs.*, 333 N.C. 221, 424 S.E.2d 385 (1993), appeal was taken from the clerk of superior court to a superior court judge by the beneficiary of a deed of trust, not the trustee. Nevertheless, "'[a] real party in interest is a party who is benefited or injured by the judgment in the case. An interest which warrants making a person a party is not an interest in the action involved merely, but some interest in the subject matter of the litigation.'" *Parnell v. Nationwide Mut. Ins. Co.*, 263 N.C. 445, 448-49, 139 S.E.2d 723, 726 (1965) (quoting *Choate Rental Co. v. Justice*, 211 N.C. 54, 55, 188 S.E. 609, 610 (1936)). *See also Energy Investors Fund, L.P. v. Metric Constructors, Inc.*, 351 N.C. 331, 525 S.E.2d 441 (2000) (quoting *Parnell*); *Black's Law*

Dictionary 1154 (8th ed. 2004) (defining "real party in interest" as "[a] person entitled under the substantive law to enforce the right sued upon and who generally, but not necessarily, benefits from the action's final outcome."). In the case at bar, it cannot seriously be disputed that Ameriquest has an interest in the subject matter of the litigation. Ameriquest disbursed at least $156,403.10 as a result of the transaction. These funds were secured by the Thomases' property which, according to Ameriquest's loan package, had an appraised value of $265,000.00. Ameriquest was injured by the Clerk's order and clearly stands to benefit from a favorable judgment in this matter. Accordingly, Ameriquest is a real party in interest, and the trial court properly proceeded on Ameriquest's notice of appeal.[4]

2. Right to Rescind

The Thomases next argue that there was "insufficient evidence" to support the following findings of fact in the order authorizing the substitute trustee to conduct a sale:

> 3. At the time that Mr. and Mrs. Thomas executed the Note and the Deed of Trust, they were each given two properly completed copies of a Notice of Right to Rescission in the form

[4]The Thomases errantly rely on N.C. Gen. Stat. §§ 45-21.16(a), (b), (d1), and (e), for the proposition that "the parties to a foreclosure of a deed of trust are the trustee[,] the obligor, and other persons who have a present or future interest in the property other than the owner or holder of the deed of trust which is the subject of the proceeding." Before the clerk may authorize a trustee to proceed in foreclosure under a deed of trust, the clerk must find the existence of, *inter alia*, a "valid debt of which *the party seeking to foreclose is the holder*[.]" N.C. Gen. Stat. § 45-21.16(d) (2005) (emphasis added). In this case, Ameriquest is the holder of the debt. Thus, Ameriquest is "the party seeking to foreclose." N.C. Gen. Stat. § 45-21.16(d).

> specified by applicable federal statutes and regulations.
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> 4. Mr. and Mrs. Thomas failed to exercise their statutory right to rescind the Note and Deed of Trust within three (3) days of executing the Note and Deed of Trust.

"[T]his Court does not function as an appellate fact finder." *In re Foreclosure of a Deed of Trust Executed by Bigelow*, 185 N.C. App. 142, 146, 649 S.E.2d 10, 13 (2007) (citing *Rose v. City of Rocky Mount*, 180 N.C. App. 392, 399, 637 S.E.2d 251, 256 (2006), *disc. review denied*, 361 N.C. 356, 644 S.E.2d 232 (2007)). "'[T]he applicable standard of review on appeal where, as here, the trial court sits without a jury, is whether competent evidence exists to support its findings of fact and whether the conclusions reached were proper in light of the findings.'" *In re Foreclosure of Land Covered by a Certain Deed of Trust Given by Aal-Anubiaimhotepokorohamz*, 123 N.C. App. 133, 135, 472 S.E.2d 369, 370 (quoting *Walker v. First Fed. Sav. & Loan*, 93 N.C. App. 528, 532, 378 S.E.2d 583, 585, *disc. review denied*, 325 N.C. 230, 381 S.E.2d 791 (1989)), *disc. review denied*, 345 N.C. 179, 479 S.E.2d 203 (1996).

A. Receipt of Notice of Right to Rescind

We agree with Ameriquest that we need not address the Thomases' contention that the third finding of fact is not supported by competent evidence. Although the Thomases state in the conclusion to their brief that "the trial court erred in determining that [they] had been provided two properly completed copies of a notice of right to rescis[s]ion[,]" the Thomases

present no discernible argument in support of this statement. Accordingly, the assignment of error upon which this contention is based is deemed abandoned. N.C. R. App. P. 28(b)(6).

Assuming, *arguendo*, that the argument is preserved, there was competent evidence to support the finding. This evidence included (1) a statement signed by the Thomases in which they acknowledged receiving two copies of the notice, and (2) the closing agent's signed affidavit in which she averred that she provided two copies of the notice to the Thomases. Moreover, we note that the Thomases do not contend that a failure to deliver two copies of the notice entitles them to relief.

B. Rescission

"In a foreclosure proceeding, the lender bears the burden of proving that there was a valid debt, default, right to foreclose under power of sale, and notice." *In re Foreclosure of Real Prop. Under Deed of Trust from Brown*, 156 N.C. App. 477, 489, 577 S.E.2d 398, 406 (2003) (citing *In re Foreclosure of the Deed of Trust Executed by Kitchens*, 113 N.C. App. 175, 177, 437 S.E.2d 511, 512 (1993); N.C. Gen. Stat. § 45-21.16(d) (2001)). The debtor must be given notice of his right to appear at the foreclosure hearing and "show cause as to why the foreclosure should not be allowed to be held." N.C. Gen. Stat. § 45-21.16(c)(7) (2005). The Thomases argue that there was "insufficient evidence" to support the trial court's finding that they did not rescind the transaction and, thus, the Thomases argue, there was not a valid debt. We reiterate, however, that our standard of review is whether

"competent evidence," not "sufficient evidence," supports the trial court's finding. *Aal-Anubiaimhotepokorohamz*, 123 N.C. App. 133, 472 S.E.2d 369.

At the hearing before Judge Taylor, Mr. Thomas testified that he called Ameriquest to inform it that he was rescinding the transaction. Mr. Thomas further testified that, on 18 December 2004, he signed and faxed to Ameriquest a written notification that he was exercising the right to rescind. In an affidavit tendered by Ameriquest, which was "accepted and considered by [Judge Taylor] without objection during the hearing in this matter on August 13, 2007[,]" an Ameriquest Customer Resolution Specialist acknowledged that Mr. Thomas gave verbal notice that he rescinded the transaction. The Specialist also averred, however, that Ameriquest never received "a written and signed document from either Mr. or Mrs. Thomas" manifesting an intent to rescind the transaction before midnight on 21 December 2004, the third business day following consummation of the transaction. As stated above, in order to rescind the transaction, the Thomases were required to provide Ameriquest with *written* notice that they were exercising their right to rescind. 12 C.F.R. § 226.23(a). Thus, although the evidence conflicted, there was competent evidence from which the trial court could find that the Thomases never properly rescinded the transaction. The Thomases' argument is overruled.

CONCLUSION

The trial court correctly denied the Thomases' motion to dismiss the appeal. Additionally, competent evidence supports the

trial court's finding that the Thomases did not rescind the transaction within the statutory time period. The trial court's orders are affirmed.

AFFIRMED.

Chief Judge MARTIN and Judge McGEE concur.

Report per Rule 30(e).