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NO. COA12-272
NORTH CAROLINA COURT OF APPEALS

Filed: 6 November 2012

IN THE MATTER OF THE PROPOSED
FORECLOSURE OF CLAIM OF LIEN FILED
AGAINST STACY B. DAVIS AND MICHELE
C. DAVIS BY CHAIRMAKER SUBDIVISION
PROPERTY OWNERS' ASSOCIATION, INC.
DATED 20 MAY 2008

AND

STACY DAVIS AND MICHELE DAVIS,
Plaintiffs,

v.

Clay County
No. 08-SP-40; 08-CVS-209

CHAIRMAKER SUBDIVISION PROPERTY
OWNERS' ASSOCIATION, INC.,
Defendant.

Plaintiffs appeal from judgment entered 15 March 2011 by
Judge James U. Downs in Clay County Superior Court. Heard in
the Court of Appeals 26 September 2012.

David W. Gilpen, for the appellee.

*McKinney & Tallant, P.A., by Zeyland G. McKinney, Jr., for
appellants.*

ELMORE, Judge.

Stacy and Michele Davis (plaintiffs) appeal from a judgment
which granted a motion to dismiss in their favor pursuant to

Rule 41(b). Nonetheless, on appeal, plaintiffs challenge a finding of fact and conclusion of law set forth in the judgment. After careful consideration, we must dismiss plaintiffs' appeal as we have concluded that plaintiffs' issues before this Court are moot.

I. Background

Plaintiffs owned Lots 13, 14, 15, 16, and 17 of the Chairmaker Subdivision in Clay County (the subdivision). The Subdivision was managed by the Chairmaker Subdivision Property Owners' Association (defendant).

When plaintiffs purchased the five lots in the subdivision, each lot was subject to the restrictive covenants as provided by defendant's 1999 Declaration of Conditions, Covenants, Easements, Liens, and Restrictions. The restrictive covenants governing the subdivision specifically stated that the subdivision was a planned community subject to North Carolina's Planned Community Act as set out in Chapter 47 of the North Carolina General Statutes. According to the restrictive covenants, the developer and its successors in interest, including defendant, would have the power to levy assessments in order to help maintain the subdivision.

In an earlier action between defendant and plaintiffs, defendant, then a for-profit corporation, placed a claim of lien on the plaintiffs' property to recover unpaid assessments. Defendant then attempted to foreclose on the claim of lien. At that time, plaintiffs responded to defendant's foreclosure action with an action for wrongful foreclosure. The matter was later litigated, and the parties entered into a consent judgment whereby defendant was required to establish itself as a non-profit corporation, the foreclosure action was dropped, plaintiffs were awarded partial attorneys' fees, and the parties agreed to use their best efforts to cooperate, in good faith, to clarify the language of the existing restrictive covenants.

In the current action, defendant asserts that plaintiffs continued to be delinquent in paying their property assessments despite the consent judgment. Defendant filed a claim of lien against plaintiffs' property on 14 May 2008, though the lien was never served. Thereafter, defendant filed a second foreclosure action against plaintiffs and received an order of foreclosure from the Clay County Clerk of Court on 7 August 2008. On 6 October 2008, plaintiffs again filed a complaint for wrongful foreclosure. The matter was heard at the 22 September 2008 session of Cherokee County Superior Court; however, the judge

continued the case because it was unclear whether defendant was entitled to foreclose at that time. Thereafter, plaintiffs' appeal of the Clerk's foreclosure order and action for wrongful foreclosure was heard at the 14 February 2011 session in Clay County Superior Court. At the close of defendant's evidence, plaintiffs moved for a dismissal pursuant to Rule 41(b). The court granted the plaintiffs' motion and involuntarily dismissed the foreclosure action without prejudice. However, in that same judgment the trial court found that "a debt exists in the form of assessments due and past due" between plaintiffs and defendant and concluded that "[t]here is a valid debt in the form of unpaid assessments between party Stacy Davis and Michelle Davis and party Chairmaker Subdivision Property Owners Association." Plaintiffs now appeal the inclusion of this language in the judgment's findings of fact and conclusions of law section.

II. Motion to Dismiss

Plaintiffs argue that the trial court erred in concluding as a matter of law that plaintiffs owed a valid debt to defendant while simultaneously granting their motion to dismiss. More specifically, plaintiffs do not contest the validity of the trial court's conclusion that they owe defendant a valid debt;

plaintiffs merely assert that the trial court was prohibited from entering a judgment finding the existence of a valid debt and default on such debt. We disagree.

As plaintiffs do not contest the validity of the trial court's findings of fact and conclusion of law that a valid debt exists, we need not determine whether the factual findings support the judge's ultimate conclusions of law nor shall we review *de novo* said conclusions of law.

In foreclosure actions, the trial court is limited to reviewing *de novo* four findings of fact of the Clerk as set out under N.C. Gen. Stat. § 45-21.16: "the existence of a (1) valid debt of which the party seeking to foreclose is a holder, (ii) default, (iii) right to foreclose under the instrument, and (iv) notice to those entitled." See *In re Watts*, 38 N.C. App. 90, 94, 247 S.E.2d 427, 429 (1978) (quoting N.C. Gen. Stat. § 45-21.16 (2011)).

Here, the trial court granted plaintiff's motion to dismiss pursuant to Rule 41(b), which provides that an involuntary dismissal acts as adjudication upon the merits unless the action is dismissed for lack of jurisdiction, for improper venue, or for failure to join a necessary party. See N.C.R. Civ. P. 41(b). The trial court granted plaintiff's 41(b) motion on the

grounds that defendant failed to provide proper notice; therefore, such dismissal acted as an adjudication on the merits.

We must draw plaintiffs' attention to the fact that it was *their* wrongful foreclosure action before the court and *their* motion to dismiss was granted. Moreover, the dismissal acted as adjudication on the merits. Therefore, plaintiffs cannot bring this appeal as they are not considered an aggrieved party in this matter. A party is aggrieved if his rights are substantially affected by judicial order. *Coburn v. Roanoke Land & Timber Corp.*, 260 N.C. 173, 132 S.E.2d 340 (1963). In essence, plaintiffs have "won." After the trial court granted plaintiffs' involuntary dismissal, *defendant* had the option to either bring a new foreclosure action or appeal the judgment entered. Should defendant attempt to proceed with a new foreclosure action against plaintiffs, the trial court would review *de novo* the evidence presented. Therefore, plaintiffs would not be harmed by the findings of fact and conclusions of law entered in the earlier judgment.

Accordingly, we conclude that plaintiffs' issues before this Court are moot as the trial court dismissed the foreclosure action against plaintiffs.

Additionally, defendant mentions that plaintiffs paid \$6,181.00 to defendant on or about 15 April 2011 and that said payment was not made under protest. We have no direct evidence of payment in the record. However, should this be true, the issue at hand would again be moot as plaintiffs would have paid any alleged debt to defendant.

Finally, we deem it necessary to draw plaintiffs' and defendant's counsel's attention to the fact that plaintiffs' counsel failed to include a date on the certification of service in his brief. This information is particularly important in this instance because counsel was granted an extension of time in which to file the brief. That extension of time order required counsel to file the brief by 4 May 2012; yet the file stamp on the brief is dated 7 May 2012. Since counsel failed to provide a date of service on the certification of service page, we must look to the file stamp as evidence of when the brief was filed. As such, we must consider the brief to be untimely filed. Thus, counsel has violated Appellate Procedure Rule 15(g)(4), and it is within our authority to strike the brief in its entirety. Instead, we have decided to issue a warning. We urge counsel to comply with all Rules of Appellate Procedure in the future.

III. Conclusion

In sum, as plaintiffs are not an aggrieved party in this action, we must dismiss plaintiffs' appeal as we have concluded that plaintiffs' issues before this Court are moot.

Dismissed.

Judges CALABRIA and STEPHENS concur.

Report per Rule 30(e).