NO. COA 12-450
NORTH CAROLINA COURT OF APPEALS

Filed: 6 November 2012

BANK OF NORTH CAROLINA,

Plaintiff,

v. Guilford County
No. 11 CVS 66

EQUITY PARTNERS, INCORPORATED, and MARK E. HORTON,

Defendants.

Appeal by defendants from judgment entered 3 November 2011 by Judge L. Todd Burke in Guilford County Superior Court. Heard in the Court of Appeals 8 October 2012.

*Robertson Haworth & Reese, P.L.L.C., by Christopher C. Finan and Andrew D. Irby for plaintiff-appellee.*

*Rallings & Associates, PLLC, by Thomas B. Rallings, Jr., and James L. Fretwell for defendant-appellants.*

STEELMAN, Judge.

Where plaintiff had exercised due diligence in the service of defendants in a prior foreclosure action, it was not barred from seeking a deficiency judgment from defendants.

## I. Factual and Procedural History

On 14 December 2006, Equity Partners Incorporated, ("Equity Partners") executed a $348,000.00 promissory note to Bank of North Carolina ("Bank"). This debt was secured by a deed of trust upon real estate owned by Equity Partners located in Cabarrus County. Mark E. Horton ("Horton"), president and registered agent of Equity Partners, executed personal guarantees of the debts of Equity Partners. In addition, on 30 July 2009, Horton executed a promissory note to Bank in the original amount of $27,000.00.

On 9 July 2010, Bank instituted foreclosure proceedings concerning the real property of Equity Partners in the Superior Court of Cabarrus County. The foreclosure sale did not generate sufficient funds to satisfy the debt of Equity Partners. On 10 January 2011, Bank filed a complaint in this action seeking to recover the balance due on the debt of $117,065.32, together with interest and attorney's fees from Equity Partners, and from Horton as guarantor. The complaint also sought to recover from Horton, individually, the sum of $27,521.49 together with interest and attorney's fees due on the 30 July 2009 note.

On 30 March 2011, Equity Partners and Horton filed answer asserting that Bank never procured proper service during the foreclosure proceeding, and that as a result they were not

liable for any deficiency. On 31 August 2011, Bank filed a Motion for Summary Judgment. On 3 November 2011, the trial court entered summary judgment against Equity Partners and Horton in the amount of $117,065.32, plus interest and attorney's fees. In addition, judgment was entered against Horton in the amount of $27,521.49, plus interest and attorney's fees.

Equity Partners and Horton appeal.

## II. $27,000 Note

Defendants make no argument concerning the entry of summary judgment against Horton in the amount of $27,521.49, based on the 30 July 2009 note. The trial court's grant of summary judgment on this issue is affirmed. N.C. R. App. P. 28(b)(6).

## III. Service in Foreclosure Proceeding

In their sole argument on appeal, defendants contend that the trial court erred in granting summary judgment in favor of Bank, on the grounds that there was improper service in the foreclosure proceedings. We disagree.

### A. Standard of Review

"Our standard of review of an appeal from summary judgment is de novo; such judgment is appropriate only when the record shows 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.'" *In re Will of Jones*, 362 N.C. 569, 573, 669 S.E.2d 572, 576 (2008) (citing *Forbis v. Neal*, 361 N.C. 519, 523-24, 649 S.E.2d 382, 385 (2007)).

B. Analysis

Notice of a foreclosure hearing must be given to "[a]ny person obligated to repay the indebtedness against whom the holder thereof intends to assert liability therefor[.]" N.C. Gen. Stat. § 45-21.16(b)(2) (2011). Any person who does not receive such notice "shall not be liable for any deficiency remaining after the [foreclosure] sale." *Id*. The trustee must exercise due diligence in serving notice. *See* N.C. Gen. Stat. § 45-21.16(a). "Due diligence dictates that plaintiff use all resources reasonably available to her in attempting to locate defendants. Where the information required for proper service of process is within plaintiff's knowledge or, with due diligence, can be ascertained, service of process by publication is not proper." *Fountain v. Patrick*, 44 N.C. App. 584, 587, 261 S.E.2d 514, 516 (1980) (citations omitted).

Prior to filing the foreclosure action, on 2 June 2010, Bank sent a written demand for payment to 1340 S. Ocean Blvd., Suite 1505, Pompano Beach, Florida 33062, by certified mail,

return receipt requested. On 2 July 2010, this letter was returned to the sender, marked "RETURN TO SENDER, UNCLAIMED, UNABLE TO FORWARD[.]" When foreclosure proceedings were instituted on 9 July 2010, the notice of hearing listed five separate addresses for Equity Partners and Horton; two addresses in Kannapolis; one address in Harrisburg; one address in Concord; and one address in Pompano Beach, Florida (a post office box). On 26 August 2010, Bank filed an Amended Notice of Hearing, which was addressed to Equity Partners at the Kannapolis and Harrisburg addresses. On 27 August 2010, an order continuing the foreclosure hearing was mailed to Equity Partners and Horton at the same five addresses in North Carolina and Florida as the original notice.

Defendants contend that service was not proper because Horton, guarantor of the note and registered agent of Equity Partners, was not personally served with the Notice or Amended Notice at 1340 S. Ocean Blvd., Suite 1505, Pompano Beach Florida 33062. They contend that this was a "reasonably ascertainable" address for defendants. They further contend that Bank's written demand for payment, dated 2 June 2010, evidenced that Bank had knowledge of the 1340 S. Ocean Blvd. address.

"[A] plaintiff is not required to jump through every hoop later suggested by a defendant in order to meet the requirement of 'due diligence.' This is particularly true when there is no indication in the record that any of the steps suggested by a defendant would have been fruitful." *Jones v. Wallis*, ___ N.C. App. ___, ___, 712 S.E.2d 180, 185 (2011).

Since the notice of 2 June 2010 sent to the 1340 S. Ocean Blvd. address was returned, marked "RETURN TO SENDER, UNCLAIMED, UNABLE TO FORWARD[,]" it was not unreasonable for Bank to send the Notice of Hearing to other addresses, and not attempt service at the 1340 S. Ocean Blvd. address. Based upon the information available to Bank at the time of the commencement of the foreclosure action, there was nothing to indicate that an attempt to serve either of the defendants at the 1340 S. ocean Blvd. address would have been fruitful. *Id.*

Defendants acknowledged that the addresses served by Bank were listed, either in documents signed by defendants or in the Office of the Secretary of State, as valid for service purposes. In their answers to interrogatories, defendants acknowledged that the post office box address in Pompano Beach Florida was a valid mailing address for both Equity Partners and Horton, and that the Pompano Beach post office box was a forwarding address

for both the Harrisburg and the Concord addresses in North Carolina. The original notice of foreclosure and the order continuing the foreclosure hearing were sent to each of these addresses. Further, on 14 September 2010, after the commencement of the foreclosure proceedings, Equity Partners filed a document with the Office of the North Carolina Secretary of State listing defendants' addresses as the Kannapolis and Harrisburg addresses. The filing with the Secretary of State's Office did not show the 1340 S. Ocean Blvd. address.

We further note that the promissory note executed by Equity Partners stated its address as 5259 Pit Road South, Concord, NC 28027, and contained a representation that this was "the location of my chief executive offices or sole place of business." There was a further covenant that Equity Partners agreed to "provide you with at least 30 days notice prior to any change in my name, address, or state of organization or registration."

We hold that Bank was duly diligent in service of the foreclosure proceedings upon both Equity Partners and Horton. Bank was not barred from pursuing a claim for the deficiency against defendants. The ruling of the trial court is affirmed.

AFFIRMED.

Chief Judge MARTIN and Judge ERVIN concur.

Report per Rule 30(e).