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No. COA13-285
NORTH CAROLINA COURT OF APPEALS

Filed: 1 October 2013

IN THE MATTER OF THE FORECLOSURE
OF A DEED OF TRUST EXECUTED BY
VICTOR RADISI AND ELIZABETH A.
RADISI DATED FEBRUARY 20, 2007 AND
RECORDED IN BOOK 1825 AT PAGE 1200
IN THE IREDELL COUNTY PUBLIC
REGISTRY, NORTH CAROLINA

Iredell County
No. 12 SP 244

Appeal by respondents from order entered 15 October 2012 by Judge Mark E. Klass in Iredell County Superior Court. Heard in the Court of Appeals 28 August 2013.

Shapiro & Ingle, LLP, by Jason K. Purser, for petitioner-appellee.

Victor Radisi, for Victor and Elizabeth Radisi, Pro Se respondent-appellants.

McCULLOUGH, Judge.

Respondents Victor and Elizabeth A. Radisi appeal from a trial court's order authorizing the substitute trustee to proceed with a foreclosure sale of certain real property as

permitted by a deed of trust. We dismiss respondents' appeal as moot.

I. Background

On 20 February 2007, respondents executed a note in favor of Coldwell Banker Home Loans ("Coldwell Banker") in the principal amount of \$36,500.00. Respondents also executed a Deed of Trust to secure the debt with real property located at 419 Woodlawn Drive, Statesville, North Carolina 28677.

On 2 March 2012, an "Assignment of Mortgage/Deed of Trust" was filed stating the following:

For Value Received, Mortgage Electronic Registration Systems, Inc. ("MERS") as nominee for COLDWELL BANKER HOME LOANS, its successors and assigns . . . , and transfer to HSBC BANK USA, NATIONAL ASSOCIATION AS TRUSTEE FOR PHH ALTERNATIVE MORTGAGE [TRUST], Series 2007-2, its successors and assigns, . . . all its right, title and interest in and to a certain Mortgage/Deed of Trust executed by [respondents] and bearing the date of 01/20/2007[.]

On the same date, a "Notice of Hearing on Foreclosure of Deed of Trust" was filed, requesting to proceed with a foreclosure and sale of real property described in the 20 February 2007 Deed of Trust.

On 31 July 2012, an affidavit of default was filed by PHH Mortgage Corporation as servicer on behalf of HSBC Bank USA, National Association as Trustee for PHH Alternative Mortgage Trust, Series 2007-2 (hereinafter "petitioner") stating that respondents had failed to pay their monthly installments since 1 October 2010.

Following a hearing held on 31 July 2012, an order permitting foreclosure of the deed of trust was filed. The order found the following: petitioner was the holder of the 20 February 2007 note and that the balance due on the note constituted a valid debt to petitioner; the respondents were in default under the note and deed of trust; and that there was a right of foreclosure under power of sale. On 9 August 2012, respondents appealed this order to the Iredell County Superior Court.

On 15 August 2012, respondents obtained an order of stay from the Assistant Clerk of Superior Court of Iredell County pending appeal.

Following a hearing held on 15 October 2012, the trial court entered an Order Permitting Foreclosure and Dismissing Appeal. The order made the following findings of fact and conclusions of law, in pertinent part:

2. HOLDERSHIP OF NOTE. HSBC is the holder of said Promissory Note.
3. VALIDITY OF DEBT. The balance due on said Promissory Note constitutes a valid debt to HSBC.
4. DEFAULT. Respondents are in default under the Note and Deed of Trust.

. . . .
6. RIGHT TO FORECLOSURE UNDER POWER OF SALE. The Deed of Trust contains a power of sale. HSBC has the right to have the Deed of Trust foreclosed under the power of sale contained therein.

The order stated that "the Substitute Trustee is authorized to proceed with a foreclosure sale" and that "there is no stay of the sale pending further appeal pursuant to N.C.G.S. § 1-292." From this 15 October 2012 order, respondents appeal.

On 15 November 2012, the real property as described in the deed of trust was sold at public auction. The purchaser and highest bidder was petitioner. On 30 November 2012, a trustee's deed was filed, showing that the trustee conveyed the property to the highest bidders - petitioner - from the 15 November 2012 sale.

II. Respondents' issues on appeal

Respondents argue that the trial court erred in authorizing the foreclosure sale by (1) failing to recognize that the 2

March 2012 "Assignment of Mortgage/Deed of Trust" was fraudulent; (2) failing to notice discrepancies between copies of the 20 February 2007 note and the note tendered to the trial court; and by (3) failing to give more weight to an affidavit by respondent Victor Radisi.

III. Mootness

Before addressing respondents' substantive arguments, petitioner urges us to dismiss respondents' appeal as moot based on the holding in *In re Foreclosure of Hackley*, 212 N.C. App. 596, 713 S.E.2d 119 (2011). Because this issue is dispositive, we address the issue of mootness.

"A case is considered moot when a determination is sought on a matter which, when rendered, cannot have any practical effect on the existing controversy." *Lange v. Lange*, 357 N.C. 645, 647, 588 S.E.2d 877, 879 (2003) (internal quotation marks and citation omitted).

Unlike the question of jurisdiction, the issue of mootness is not determined solely by examining facts in existence at the commencement of the action. If the issues before a court or administrative body become moot *at any time during the course of the proceedings*, the usual response should be to dismiss the action.

Carolina Marina & Yacht Club, LLC., v. New Hanover Cnty. Bd. of Comm'rs, 207 N.C. App. 250, 252, 699 S.E.2d 646, 648 (2010)

(internal quotation marks and citation omitted), *disc. review denied*, 365 N.C. 89, 706 S.E.2d 253 (2011).

In *Hackley*, the respondent property owner appealed from a trial court's order authorizing a substitute trustee to proceed with a foreclosure sale of certain real property as permitted by a deed of trust. *Id.* at 597, 713 S.E.2d at 120. The record indicated that a sale was completed based on the recorded Trustee's Deed. *Id.* at 604, 713 S.E.2d at 124.

Our Court dismissed the respondent's appeal holding the following:

There is no indication in the record that respondent paid a bond to stay the foreclosure sale, see N.C. Gen. Stat. § 1-292; nor was there an upset bid during the 10 day period, see N.C. Gen. Stat. § 45-21.29A, or any indication in the record that respondent obtained a temporary restraining order or preliminary injunction prior to the end of the ten-day upset bid period. See [*Goad v. Chase Home Fin., LLC*, 208 N.C. App. 259, 263, 704 S.E.2d 1, 4 (2010)]. Therefore, respondent's and the secured creditor's rights in the subject real property are fixed and respondent's appeal is moot.

Id. at 605, 713 S.E.2d at 125.

Just as in *Hackley*, respondents in the present case are appealing the trial court's order authorizing a substitute trustee to proceed with a foreclosure sale of certain real

property as permitted by a deed of trust. Based on a review of the record, the property at issue was sold to petitioner subsequent to the order permitting foreclosure and the trustee's deed was recorded. There is no indication in the record that respondents paid a bond to stay the foreclosure sale pursuant to N.C. Gen. Stat. § 1-292 (providing how judgment for real property is stayed through the execution of a bond), nor was there an upset bid during the ten-day period as provided in N.C. Gen. Stat. § 45-21.29(A) (2011) (stating that "[i]f an upset bid is not filed following a sale, resale, or prior upset bid within the period specified in this Article, the rights of the parties to the sale or resale become fixed"), or any indication in the record that respondents obtained a temporary restraining order or preliminary injunction prior to the end of the ten-day upset bid period. See *Goad*, 208 N.C. App. at 263, 704 S.E.2d at 4 (stating that "the rights of the parties to a foreclosure sale become fixed upon either the expiration of the period for filing an upset bid, the provision of injunctive relief precluding the consummation of the foreclosure sale, or the occurrence of some similar event").

Therefore, petitioner's rights in the property at issue are fixed and respondents' appeal is moot. Accordingly, we dismiss respondents' appeal.

Dismissed.

Judges HUNTER, (Robert C.) and GEER concur.

Report per Rule 30(e).