

An unpublished opinion of the North Carolina Court of Appeals does not constitute controlling legal authority. Citation is disfavored, but may be permitted in accordance with the provisions of Rule 30(e)(3) of the North Carolina Rules of Appellate Procedure.

NO. COA13-342
NORTH CAROLINA COURT OF APPEALS

Filed: 17 December 2013

IN THE MATTER OF THE FORECLOSURE
by Tamara R. Cornish, Substitute
Trustee of a Deed of Trust
Executed by Zaheer Ahmad Razack
and Salley Ann Razack a/k/a Sally Mecklenburg County
A. Razack, dated May 30, 2007 and No. 11 SP 8243
recorded on May 31, 2007, in Book
22302 at Page 536 of the
Mecklenburg County Public
Registry.

Appeal by Petitioners from order entered 17 October 2012 by
Judge Timothy S. Kincaid in Mecklenburg County Superior Court.
Heard in the Court of Appeals 10 September 2013.

Elliott Law Firm, PC, by Adam G. Breeding, for Petitioners.

*Rogers Townsend & Thomas, PC, by Renner St. John, for
Respondent.*

*Cornish Law, PLLC, by Tamara R. Cornish, for Substitute
Trustee.*

DILLON, Judge.

Zaheer and Salley Razack (Petitioners) appeal from the superior court's order dismissing without prejudice a foreclosure proceeding instituted against them by Green Tree Servicing, LLC (Green Tree). For the following reasons, we affirm.

I. Factual & Procedural Background

On or about 30 May 2007, Petitioners executed a promissory note (the Note) in favor of Suntrust Mortgage, Inc. (Suntrust), in the original principal amount of \$368,000.00. Petitioners granted Suntrust a Deed of Trust to secure the Note with real property located in Huntersville, North Carolina. Petitioners ultimately defaulted on the Note, prompting Green Tree, the successor in interest to the Deed of Trust, to initiate foreclosure proceedings against Petitioners.

The matter came on for hearing before the clerk of court on 31 May 2012. After hearing evidence, the clerk entered an order authorizing Green Tree to proceed with foreclosure. Petitioners appealed the clerk's decision to the superior court, which, upon conducting a *de novo* review of the matter, entered an order which included the following pertinent findings:

1. On or about May 30, 2007, a promissory note was executed by Petitioners in favor of [Suntrust].

2. [Green Tree] claimed to be the current holder of the Note.

3. Respondent produced what appeared to be the original Note, said Note containing a special indorsement without recourse from Suntrust [] to Green Tree [] at the foot of page 3. Attached to the Note was an allonge which contained a blank indorsement from Green Tree

4. In addition to the Note, [Green Tree] produced the affidavit of Thomas Clark, Foreclosure Specialist for Green Tree [] which stated "[t]he Promissory Note is endorsed in blank and in the possession of Green Tree[.]"

5. The affidavit submitted by [Green Tree] conflicts with the evidence on the Note, and as such creates doubt as to the validity of the Note and the affidavit.

Based upon these findings, the court concluded that "[g]iven the inconsistencies in the Note . . . and the affidavit produced, [Green Tree] failed to provide competent evidence capable of establishing that it was the holder of the Note"; and, "[a]s such, [Green Tree] has failed to prove that it is the owner and holder of a valid indebtedness as required pursuant to N.C.G.S. 45-21.16(d) and therefore cannot foreclose on the subject property." The court entered its order dismissing the foreclosure proceedings "without prejudice" to Green Tree, effectively allowing Green Tree to bring a new proceeding upon curing its evidentiary deficiencies relating to the Note. From

this order, Petitioners appeal.

II. Analysis

A. Standing

We first address Green Tree's contention that Petitioners lack standing to bring this appeal because they are not aggrieved parties. Green Tree argues that the superior court's decision to dismiss Green Tree's foreclosure action, albeit without prejudice, meant that Petitioners "won" below and had no basis for an appeal to this Court. We disagree.

"It is well established that a party can appeal from a judgment in its favor if the judgment is not as favorable as the appealing party sought." *H.R. Technologies, Inc. v. Astechnologies, Inc.*, 275 F.3d 1378, 1381-82 (Fed. Cir. 2002) (citing *Deposit Guar. Nat'l Bank v. Roper*, 445 U.S. 326, 333-34 (1980); *Elec. Fittings Corp. v. Thomas & Betts Co.*, 307 U.S. 241, 242 (1939); *Intellectual Prop. Dev., Inc. v. TCI Cablevision of Cal., Inc.*, 248 F.3d 1333, 1339-40 (Fed. Cir. 2001)). The thrust of Petitioners' appeal is that the trial court's order did not afford them the full extent of the relief sought, as the order merely dismissed the foreclosure proceeding *without* prejudice. Petitioners contend that the trial court erred in failing to dismiss the foreclosure proceedings *with*

prejudice and that this error in itself was sufficient to render them aggrieved parties. We agree with Petitioners, as the superior court's dismissal without prejudice left Petitioners vulnerable to a subsequent action by Green Tree to foreclose on the same property, and, in this sense, the "relief" granted by the superior court was less than that which Petitioners sought in the proceedings below. We, accordingly, hold that Petitioners are aggrieved parties, and we proceed to address the merits of Petitioners' appeal.

B. Dismissal Without Prejudice

The question presented is whether the trial court erred in dismissing the foreclosure proceedings against Petitioners *without prejudice*. We hold that it did not.

The superior court dismissed the foreclosure proceedings on grounds that it was unclear, based upon the evidence presented at the 15 August 2012 hearing, whether Green Tree was in fact the holder of the note evidencing the underlying debt. Absent competent evidence demonstrating that it was the holder of the note, Green Tree was not entitled to proceed with foreclosure under N.C. Gen. Stat. § 45-21.16(d) (2011) (providing that the party seeking foreclosure must demonstrate, *inter alia*, "the existence of [a] valid debt of which the party seeking to

foreclose is the holder"); *In re Adams*, 204 N.C. App. 318, 321, 693 S.E.2d 705, 709 (2010). The trial court thus dismissed the proceeding, but did so without prejudice, thereby leaving open the possibility of Green Tree bringing a new foreclosure proceeding against Petitioners in the future.

Petitioners contend that a dismissal *without* prejudice has no place in a power of sale foreclosure proceeding brought under N.C. Gen. Stat. § 45-21.16 and that, accordingly, the superior court should have dismissed the proceeding *with* prejudice. We disagree.

Petitioners rely on *Phil Mech. Constr. Co. v. Haywood*, 72 N.C. App. 318, 325 S.E.2d 1 (1985), wherein we stated that "issues decided [in a foreclosure hearing] as to the validity of the debt and the trustee's right to foreclose are *res judicata* and cannot be relitigated[.]" *Id.* at 322, 325 S.E.2d at 3. *Haywood*, however, is distinguishable from the present case. In *Haywood*, the clerk dismissed a foreclosure proceeding filed by a mortgagee-creditor upon determining that the debtor's signature on the deed of trust had been forged. *Id.* at 319, 325 S.E.2d at 2. The mortgagee did not appeal the clerk's order, but rather instituted an action seeking a judicial foreclosure. *Id.* at 319-20, 325 S.E.2d at 2. The trial court dismissed the action

on *res judicata* grounds based on the finding previously made by the clerk of court that the deed of trust had been forged. *Id.* at 320, 325 S.E.2d at 2. In contrast, the superior court in the instant case made no definitive finding that would preclude Green Tree from bringing a subsequent foreclosure proceeding. The court made no finding, for example, that the debtor did not actually sign the deed of trust or that the underlying debt had been paid in full. The court determined only that Green Tree had not met its burden of showing that it was the holder of the note evidencing the debt.

The complexities often at play in establishing the legal holder of a note that has been transferred from one entity to another militate in favor of allowing the party seeking foreclosure to refile its proceeding where discrepancies arise in the first proceeding and clarification is needed. While we recognize, as Petitioners contend, that our Rules of Civil Procedure generally do not apply in the context of a foreclosure proceeding brought under N.C. Gen. Stat. § 45-21.16, see *Furst v. Loftin*, 29 N.C. App. 248, 224 S.E.2d 641 (1976), Petitioners do not cite any case law indicating that a trial court lacks the authority - similar to the court's authority under Rule 41 in a civil action - to enter an order vacating foreclosure

proceedings without prejudice in this context; nor does the comprehensive regime enacted by our Legislature regarding foreclosure proceedings expressly support such a conclusion. We, accordingly, hold that the superior court did not err by affording Green Tree the opportunity to "get its ducks in a row" and prove through introduction of competent evidence that it is in fact the holder of the note in the instant case, and that, as such, it is authorized to foreclose on property which, the evidence indicates, is in fact subject to a valid debt held by *some* entity.

III. Conclusion

For the foregoing reasons, we affirm the trial court's 17 October 2012 order.

AFFIRMED.

Judges McGEE and McCULLOUGH.

Report per Rule 30(e).