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NO. COA14-389  
NORTH CAROLINA COURT OF APPEALS

Filed: 18 November 2014

IN THE MATTER of the Foreclosure of  
the Deed of Trust of:

Robert J. Rosemeier,

Grantor,

BB&T Collateral Service  
Corporation,

Trustee,

Onslow County  
No. 13 SP 572

As recorded in Book 2902,  
Page 495 of the Onslow County  
Registry

See Substitution of Trustee  
recorded in Book 3991 at Page 753  
of the Onslow County Registry.

Appeal by respondents from order entered 7 October 2013 by  
Judge Jack W. Jenkins in Onslow County Superior Court. Heard in  
the Court of Appeals 23 September 2014.

*Murchison, Taylor & Gibson, PLLC, by Michael Murchison and  
Andrew K. McVey, for petitioner-appellee.*

*Shanklin & Nichols, LLP, by Kenneth A. Shanklin and Matthew  
A. Nichols, for respondents-appellants.*

DAVIS, Judge.

Robert J. Rosemeier and Lorrie Ann Pendola Rosemeier ("the Rosemeiers") appeal from the trial court's 7 October 2013 order authorizing Kevin McConnell, as Substitute Trustee, to proceed with foreclosure under power of sale of certain real property. After careful review, we dismiss the appeal as moot.

**Factual Background**

On 27 June 2007, Robert J. Rosemeier ("Mr. Rosemeier") executed a promissory note in favor of Branch Banking and Trust Company ("BB&T") in the principal amount of \$1,000,000. On that same day, Mr. Rosemeier also executed a deed of trust securing the debt with real property located at 1819 Gum Branch Road in Jacksonville, North Carolina ("the Subject Property"). On 28 May 2013, a notice of hearing on foreclosure of deed of trust was filed by the Substitute Trustee. The notice was posted at the Subject Property after the Sheriff's Office was unable to locate Mr. Rosemeier "after due and diligent effort." On 19 July 2013, the Rosemeiers filed an objection to the attempted service of process, a motion to disqualify the Substitute Trustee, and a motion to dismiss the foreclosure hearing.

The Substitute Trustee filed an amended notice of foreclosure hearing listing both Mr. and Mrs. Rosemeier on 30

July 2013 and attempted service on the Rosemeiers by certified mail. On 27 August 2013, the Clerk of Superior Court of Onslow County entered an order authorizing the Substitute Trustee to proceed with the foreclosure. The Rosemeiers appealed to Onslow County Superior Court.

Following a hearing held on 23 September 2013, the trial court entered an order affirming the clerk's order and authorizing the Substitute Trustee to proceed with the foreclosure sale on 7 October 2013. The Rosemeiers gave timely notice of appeal to this Court.

On 20 November 2013, the Subject Property was sold at a foreclosure sale, and BB&T was the purchaser and highest bidder. During the 10-day upset bid period, Whaja Brunelli ("Ms. Brunelli") submitted a notice of upset bid. The sale remained open for 10 additional days after Ms. Brunelli submitted her upset bid, and no additional upset bids were filed. Consequently, on 9 April 2014, the Substitute Trustee executed a trustee's deed conveying the Subject Property to Ms. Brunelli. The trustee's deed was recorded in Book 4138 at Page 159 in the Onslow County Register of Deeds on 11 April 2014.<sup>1</sup>

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<sup>1</sup> The trustee's deed is not contained in the record on appeal but rather included in the appendix of BB&T's brief. However, "this Court can take judicial notice of certain documents even though

### **Analysis**

On appeal, the Rosemeiers argue that the trial court erred in authorizing the foreclosure because (1) service of process was defective; and (2) the Substitute Trustee appointed by BB&T was not a neutral party. However, we do not reach these substantive arguments because we conclude that the appeal is moot and must be dismissed.

"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) (citation and quotation marks omitted). "If a case becomes moot at any time during the course of the proceedings, the usual response should be to

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they were not included in the record on appeal" so long as the judicially-noticed fact is one that is "capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." *In re Hackley*, 212 N.C. App. 596, 601-02, 713 S.E.2d 119, 123 (citation and quotation marks omitted), *disc. review dismissed as moot and disc. review denied*, 365 N.C. 351, 718 S.E.2d 376 (2011). In *Hackley*, we took judicial notice of "the fact that the foreclosure sale did occur and the property was conveyed by the trustee" based upon the trustee's deed included in the appendix of one of the briefs. *Id.* at 602, 713 S.E.2d at 123. We concluded that the trustee's deed "provide[d] evidence of the completed foreclosure sale of the subject real property," its accuracy could not be reasonably questioned, and the respondent did not dispute that the sale had occurred. *Id.* Because the same is true here, we likewise take judicial notice of the trustee's deed conveying the Subject Property to Ms. Brunelli.

dismiss the action.” *Hospice & Palliative Care Charlotte Region v. N.C. Dep’t of Health & Human Servs.*, 185 N.C. App. 109, 112, 648 S.E.2d 284, 286 (citation and quotation marks omitted), *disc. review denied*, 361 N.C. 692, 654 S.E.2d 476 (2007).

Under N.C. Gen. Stat. § 45-21.27(a), an upset bid must be “filed with the clerk of superior court, with whom the report of the sale or the last notice of upset bid was filed by the close of normal business hours on the tenth day after the filing of the report of the sale or the last notice of upset bid . . . .” N.C. Gen. Stat. § 45-21.27(a) (2013). Pursuant to N.C. Gen. Stat. § 45-21.29A, “[i]f an upset bid is not filed following a sale, resale, or prior upset bid within the period specified [in N.C. Gen. Stat. § 45-21.27], the rights of the parties to the sale or resale become fixed.” N.C. Gen. Stat. § 45-21.29A (2013). This Court has previously held that once the parties’ rights become fixed under § 45-21.29A, an appellant’s challenge to the foreclosure proceedings becomes moot. *In re Cornblum*, 220 N.C. App. 100, 105, 727 S.E.2d 338, 342, *disc. review denied*, 366 N.C. 404, 734 S.E.2d 864 (2012); *see also Hackley*, 212 N.C. App. at 605, 713 S.E.2d at 125.

Here, a foreclosure sale of the Subject Property was held on 20 November 2013, and BB&T was the highest bidder. Six days

later, Ms. Brunelli submitted an upset bid. After Ms. Brunelli submitted her upset bid on 26 November 2013, the sale remained open for 10 more days for the filing of additional upset bids. Because no further upset bids were submitted, the rights of the parties to the foreclosure sale became fixed, and the trustee's deed conveying the property to Ms. Brunelli was executed and recorded. There is no indication in the record that the Rosemeiers either (1) executed a bond to stay the foreclosure sale under N.C. Gen. Stat. § 1-292; or (2) applied for an injunction under N.C. Gen. Stat. § 45-21.34 to enjoin the sale prior to the expiration of the 10-day upset bid period. See *Hackley*, 212 N.C. App. at 605, 713 S.E.2d at 125 (explaining that appellant must either execute bond to stay foreclosure sale or seek injunction or temporary restraining order to halt sale in order to prevent appellee's rights in subject property from becoming fixed). As such, we must dismiss the appeal as moot.

**Conclusion**

For the reasons stated above, the appeal is dismissed.

DISMISSED.

Judges HUNTER, Robert C., and DILLON concur.

Report per Rule 30(e).