NO. COA14-498

NORTH CAROLINA COURT OF APPEALS

Filed: 2 December 2014

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| In the Matter of the Foreclosure of a Deed of Trust executed by Courtney M. Powell aka Courtney Powell (PRESENT RECORD OWNER(s): Courtney M. Powell) in the Original amount of $107,813.00 dated November 12, 2008, recorded in Book 6092, Page 635, Durham County Registry Substitute Trustee Services, Inc., Substitute Trustee | Durham County No. 13 SP 577 |

Appeal by Courtney M. Powell from order entered 20 November 2013 by Judge Paul C. Ridgeway in Durham County Superior Court. Heard in the Court of Appeals 7 October 2014.

*The Law Office of Benjamin D. Busch, PLLC, by Benjamin D. Busch, for appellant.*

*Hutchens Law Firm, by Hilton T. Hutchens, Jr. and Natasha M. Barone, for appellee.*

HUNTER, Robert C., Judge.

Courtney M. Powell ("appellant") appeals from the trial court's order denying her motion to set aside a foreclosure sale of her residence. Appellant contends that the trial court abused its discretion in denying her motion because Substitute

Trustee Services, Inc. ("STS") failed to exercise due diligence before attempting to serve appellant by posting notice of the hearing for foreclosure on her door. Therefore, appellant argues that she was never properly served with notice of the hearing for foreclosure, and the order entered in the foreclosure proceeding is void.

After careful review, we affirm the trial court's order.

**Background**

On 12 November 2008, appellant executed a promissory note ("the Note") and deed of trust ("Deed") securing the note with Bank of America, N.A. for the purchase of her residence in Durham, North Carolina ("the subject property"). Bank of America then assigned all of its interest in the Note and the Deed to Nationstar Mortgage, LLC ("Nationstar").

Appellant defaulted on the Note on or around 1 September 2012. By letter dated 5 March 2013, Nationstar sent a notice of default to appellant advising her of the amount necessary to be paid within 45 days to cure default. This notice was sent by first class mail to the subject property and was received by appellant. The notice also provided that if appellant failed to cure her default, all amounts due on the Note would be accelerated and foreclosure proceedings would be initiated.

Nationstar then sent appellant notice of her right to dispute the debt owed within thirty days pursuant to N.C. Gen. Stat. § 45-21.16(c)(5a) (2013) and informed appellant that Nationstar had begun to proceed with a foreclosure action. Appellant claimed that she "may" have received this notice at the subject property. Appellant failed to cure her default, so Nationstar appointed STS as substitute trustee under the Deed. On 26 April 2013, STS filed a notice of hearing prior to foreclosure in Durham County, and the foreclosure hearing was scheduled for 5 June 2013 at 11:00 a.m.

On 29 April 2014, STS attempted to serve appellant with notice of the foreclosure hearing by sending a copy of the notice to the Durham County Sheriff's office to be served personally on appellant at the subject property. Durham County Sheriff's Deputy Mike Veasey ("Deputy Veasey") went to the subject property at 2:50 p.m., but appellant was not home. Deputy Veasey posted notice of the hearing on appellant's door. On 1 May 2013, STS then mailed a copy of the notice via certified mail to appellant at the subject property address. The certified mail was not claimed by appellant and was subsequently returned to counsel for STS on 22 May 2013. Appellant contends that she did not see the notice posted on her

door by Deputy Veasey and did not receive the notice sent by certified mail.

The foreclosure hearing took place on 5 June 2013 without appellant's presence. By order entered the same day, the clerk of court authorized Nationstar to foreclose under the power of sale contained in the Deed. The sale of the subject property was scheduled for 26 June 2013 at 10:00 a.m. Three copies of the notice of foreclosure sale were mailed to appellant at the subject property address. The sale took place as planned on 26 June, with Nationstar submitting the highest bid. On 15 July 2013, Nationstar sent appellant notice via UPS and regular mail to vacate the subject property.

On 9 August 2013, appellant filed a motion to set aside the foreclosure order pursuant to North Carolina Rule of Civil Procedure 60(b)(4). At the hearing on appellant's motion, appellant contended that the notice to vacate was the first time that she became aware of the foreclosure proceedings. The trial court denied appellant's motion to set aside the foreclosure order. Appellant filed timely notice of appeal.

**Discussion**

Appellant argues that the trial court abused its discretion by denying her motion to set aside the foreclosure order because

STS did not exhaust all necessary methods of service before relying on constructive notice, or in the alternative, did not put forth a diligent effort to serve defendant before relying on constructive notice. We disagree.

Appellate review of an order denying relief under North Carolina Rule of Civil Procedure 60(b) is "limited to determining whether the court abused its discretion." *Sink v. Easter*, 288 N.C. 183, 198, 217 S.E.2d 532, 541 (1975). "Abuse of discretion is shown only when the challenged actions are manifestly unsupported by reason." *Blankenship v. Town & Country Ford, Inc.*, 155 N.C. App. 161, 165, 574 S.E.2d 132, 134 (2002) (internal quotation marks omitted). "If there is competent evidence of record on both sides of the Rule 60(b) motion, it is the duty of the trial court to evaluate such evidence, and the trial court's findings supported by competent evidence are conclusive on appeal." *Id.* at 165, 574 S.E.2d at 134-35.

N.C. Gen. Stat. § 45-21.16 provides that notice of a hearing prior to a foreclosure under power of sale must be served on all parties by any manner set forth in Rule 4 of the North Carolina Rules of Civil Procedure. Section 45-21.16(a) specifies that service may be achieved by posting the notice to

the subject property whenever service by publication would be permissible under Rule 4(j1). Pursuant to Rule 4(j1), "when a party cannot with due diligence be served by personal delivery, registered or certified mail, or by a designated delivery service," the party may be served by publication. N.C. Gen. Stat. § 1A-1, Rule 4(j1) (2013).

Appellant offers two arguments in support of her contention that service here was ineffective: (1) the use of the word "or" in Rule 4(j1) is conjunctive rather than disjunctive, and therefore a party must attempt service by personal delivery, registered/certified mail, *and* designated delivery service before it may rely on posting notice to the subject property; or in the alternative, (2) if the word "or" is disjunctive, STS did not exercise due diligence before relying on posting. We are not persuaded.

First, we conclude that the word "or" in Rule 4(j1) is disjunctive, not conjunctive. "A statute's words should be given their natural and ordinary meaning, and need not be interpreted when they speak for themselves." *Grassy Creek Neighborhood Alliance, Inc. v. City of Winson-Salem*, 142 N.C. App. 290, 297, 542 S.E.2d 296, 301 (2001) (citation omitted). "[T]he word 'or,' as used in a statute, is a disjunctive

particle indicating that the various members of the sentence are to be taken separately[.]" *Id.* (quoting 73 Am.Jur.2d, *Statutes* § 241 (1974)). Rule 4(j1) provides in relevant part that: "A party that cannot with due diligence be served by personal delivery, registered or certified mail, or by a designated delivery service authorized pursuant to 26 U.S.C. § 7502(f)(2) may be served by publication."

In the considerable amount of caselaw interpreting Rule 4(j1), neither this Court nor our Supreme Court has ever adopted the interpretation espoused by appellant in this case—that a party must attempt personal service, service through registered or certified mail, *and* service through a designated delivery service before resorting to publication. Rather, because our appellate courts have "refused to make a restrictive mandatory checklist for what constitutes due diligence," *Barnes v. Wells*, 165 N.C. App. 575, 582, 599 S.E.2d 585, 590 (2004), and have instead held that a party "is not required to jump through every hoop later suggested by a defendant in order to meet the requirement of due diligence," *Jones v. Wallis*, 211 N.C. App. 353, 359, 712 S.E.2d 180, 185 (2011), we have consistently applied Rule 4(j1) in the disjunctive.

Specifically, in *Barnes*, this Court analyzed the version of the statute as it existed in 1979. Under the language of the rule, a party could be served with publication after "a diligent but unsuccessful attempt to serve the party under either Paragraph A [personal service] or under Paragraph B [registered or certified mail] or under Paragraphs A and B of this subsection." *Barnes*, 165 N.C. App. at 582, 599 S.E.2d at 590. The *Barnes* Court held that attempted service via certified mail at an address the respondent later admitted was the correct mailing address, even though the notice was unclaimed for weeks at the post office, constituted due diligence sufficient for the petitioner to rely on service by publication. *Id.* Thus, the Court applied the rule in the disjunctive, holding that the party had exerted due diligence despite no attempt at serving the respondent personally under paragraph A. This interpretation was reinforced in *McCoy v. McCoy*, 29 N.C. App. 109, 111, 223 S.E.2d 513, 515 (1976), where the Court characterized the statute as requiring "a diligent but unsuccessful attempt to serve [a party] under *one of the preceding subparagraphs* of subsection (9)," not both.

Our concurring colleague argues that *Barnes* is not controlling because the current language of Rule 4(j1) reflects

a change in the General Assembly's intent, as indicated by its inclusion of the word "cannot" in the statute. Utilizing the logical construct of DeMorgan's Law, which provides that "the negation of a disjunction is the conjunction of the negatives," the concurrence argues that the inclusion of the word "cannot" before "with due diligence be served by personal delivery, registered or certified mail, or by a designated delivery service" requires at least a showing that a party cannot be served by all three methods before it may be allowed to effect service by publication. Although we believe this interpretation is plausible on its face, we are bound by previous decisions of this Court applying the rule in the disjunctive and allowing service by publication without a showing that all other methods of service would be futile. *See In re Appeal from Civil Penalty*, 324 N.C. 373, 384, 379 S.E.2d 30, 37 (1989) ("Where a panel of the Court of Appeals has decided the same issue, albeit in a different case, a subsequent panel of the same court is bound by that precedent, unless it has been overturned by a higher court."). For example, in *McArdle Corp. v. Patterson*, 115 N.C. App. 528, 445 S.E.2d 604 (1994), this Court applied Rule 4(j1) containing the same "cannot . . . with due diligence" language before us. Even though the plaintiff did not make a

showing that the defendant could not with due diligence be served by personal delivery, this Court affirmed the trial court's legal conclusions that the plaintiff's attempt to serve defendants at their known address by certified mail was a reasonable and diligent effort sufficient to allow service by posting on the subject property. *Id.* at 532-33, 445 S.E.2d at 607.

The issue then becomes whether STS's efforts at serving appellant with notice of the hearing for foreclosure here constituted due diligence. As noted above, this Court has held that where a petitioner attempted to serve the respondent at their known mailing address via certified mail, but the mail was not claimed by the party to be served, the petitioner exercised due diligence sufficient to allow service by publication. *Barnes*, 165 N.C. App. at 582, 599 S.E.2d at 590; *McArdle Corp.*, 115 N.C. App. at 532-33, 445 S.E.2d at 607. Here, like in *Barnes* and *McArdle*, STS attempted to serve appellant by mailing notice of the foreclosure hearing to her address via certified mail, return receipt requested, but appellant claimed that she did not receive the parcel. It is immaterial that notice was posted to the subject property before and during the attempts to serve appellant by certified mail. *See* N.C. Gen. Stat. § 45-

21.16(a) (2013) (noting that service by posting "may run concurrently with any other effort to effect service"). STS also took the additional step of attempting personal service through Deputy Veasey, but was unsuccessful. Given that this Court has held repeatedly that an unsuccessful attempt at service via certified mail constitutes due diligence, it follows that an unsuccessful attempt at service via certified mail in addition to an unsuccessful attempt at personal service through the Sheriff's department also constitutes due diligence.

Accordingly, we conclude that STS exercised due diligence under Rule 4(j1) and section 45-21.16(a) sufficient to allow constructive notice by posting on the subject property.

**Conclusion**

After careful review, we conclude that Rule 4(j1) is disjunctive, not conjunctive, and the record demonstrates that STS diligently attempted service before posting notice of the foreclosure hearing on the subject property. Thus, we hold that the trial court did not abuse its discretion in denying appellant's motion to set aside the foreclosure order.

AFFIRMED.

Judge DAVIS concurs.

Judge DILLON concurs in result by separate opinion.

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DILLON, Judge, concurring in the result.

I concur in the result reached by the majority that the trial court did not err in denying Appellant's motion to set aside the foreclosure order. However, I disagree with the majority that Rule 4(j1) of the North Carolina Rules of Civil Procedure is conjunctive, and not disjunctive.

Rule 4(j1) states that a party may be served by publication when that party "**cannot** with due diligence be served by personal delivery, registered or certified mail, **or** by a designated delivery service authorized pursuant to 26 U.S.C. § 7502(f)(2)[.]" N.C. Gen. Stat. § 1A-1, Rule 4(j1) (2013) (emphasis added). I agree with the majority that "[a] statute's words should be given their natural and ordinary meaning[.]"

*Grassy Creek Neighborhood Alliance, Inc. v. City of Winston-Salem*, 142 N.C. App. 290, 297, 542 S.E.2d 296, 301 (2001). I also agree with the majority that the word "or" in a list typically requires an interpretation that the list is to be read in the disjunctive. *See id.* However, when the list is preceded by the word "not" or "cannot," the context may require that the list be read in the conjunctive. For example, if a father tells his daughter that she is *not* allowed to go to the movies *or* to the football game, the parent has effectively told the child that she is not allowed to do either activity; that is, she may not go to the movies *and* she may not go to the football game. However, if the father tells his daughter that she is *not* allowed to go to the movies *and* to the football game, the parent has only stated that she may not do both activities, but that she could do one *or* the other. In the field of logic, the "not . . . or" construct is governed by a principle known as DeMorgan's Law, which provides, in part, that the negation of a disjunction is the conjunction of the negatives; that is, "not (A *or* B)" is the same as "not A *and* not B." Accordingly, applying DeMorgan's Law, I believe the plain language of Rule 4(j1) requires a showing that a party may only be served by publication where it is shown that the party cannot with due

diligence be served by any of the listed methods, not just one of them. *See State v. Martin*, ___ N.C. App. ___, 762 S.E.2d 1, 2014 N.C. App. LEXIS 591, *12-13 (2014) (unpublished decision) (applying DeMorgan's Law in construing the former version of N.C. Gen. Stat. § 14-112.2).

I believe that *Barnes v. Wells*, cited by the majority, is not controlling. In *Barnes*, we were construing a prior version of Rule 4 which was *not* written in the "not . . . or" construct, but rather used the word "or" by itself, providing that a party may be served by publication where "there has been a diligent but unsuccessful attempt to serve the party under either Paragraph A [personal service] or Paragraph B [registered or certified mail] or under Paragraphs A and B of this subsection." 165 N.C. App. 575, 582, 599 S.E.2d 585, 590 (2004) (construing N.C. Gen. Stat. § 1A-1, Rule 4(j)(9)(1979)). Accordingly, I believe that under the current version of Rule 4, a party may be served by publication where the party cannot with due diligence be served by any of the following: (1) personal delivery, (2) registered or certified mail, (3) a designated delivery service authorized pursuant to 26 U.S.C. § 7502(f)(2).

Even though I believe the word "or" in Rule 4(j1) is to be read in the conjunctive, I do not believe the Rule requires that

a party must actually attempt to serve the opposing party in all three ways before utilizing service by publication. Rather, the Rule only requires that a party must show that the opposing party "cannot with due diligence be served" by any of the three methods. In the present case, the substitute trustee attempted to serve Appellant by personal service at her home through the Sheriff's office and by certified mail. Based on the foregoing, where the appellant has refused to claim a certified letter, I believe that it is proper to conclude that the appellant could not with due diligence have been served by UPS or FedEx or another method authorized pursuant to 26 U.S.C. § 7502(f)(2). In a case cited by the majority, we have held that a party "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 would have been fruitful." *Jones v. Wallis*, 211 N.C. App. 353, 359, 712 S.E.2d 180, 185 (2011). Accordingly, I agree with the majority that the trial court did not err in denying Appellant's motion to set aside the foreclosure order.