NO. COA14-552
NORTH CAROLINA COURT OF APPEALS

Filed: 16 December 2014

JABEZ CONSOLIDATED HOLDINGS, INC.,
Plaintiffs,

v.

Mecklenburg County
No. 13 CV 14695

WELLS FARGO BANK, N.A. as TRUSTEE FOR CERTIFICATEHOLDERS OF BANC OF AMERICA MORTGAGE SECURITIES, INC. MORTGAGE PASS-THROUGH SERIES 2005-L, a/k/a "WELLS FARGO AS TRUSTEE," and TRUSTEE SERVICES OF CAROLINA, LLC,
Defendants.

Appeal by plaintiff from order entered 6 January 2014 by Judge Eric L. Levinson in Mecklenburg County Superior Court.

Heard in the Court of Appeals 7 October 2014.

*The Law Offices of Kenneth T. Davies, by Kenneth T. Davies, for plaintiff-appellant.*

*McGuireWoods, LLP, by Kelli A. Burns and Emily F. Lowder, for defendant-appellee Wells Fargo Bank, N.A. as Trustee for Certificate holders of Banc of America Mortgage Securities, Inc. Mortgage Pass-Through Series 2005-L, a/k/a "Wells Fargo as Trustee."*

*Brock & Scott, PLLC, by Gregory D. Spink, for defendant-appellee Trustee Services of Carolina, LLC.*

DAVIS, Judge.

Plaintiff Jabez Consolidated Holdings, Inc. ("Jabez") appeals from the trial court's order granting the motion to dismiss of Wells Fargo Bank, N.A. as Trustee for Certificate holders of Banc of America Mortgage Securities, Inc. Mortgage Pass-Through Series 2005-L, a/k/a "Wells Fargo as Trustee" ("Wells Fargo") and Trustee Services of Carolina, LLC ("Trustee Services") (collectively "Defendants") pursuant to Rule 12(b)(6) of the North Carolina Rules of Civil Procedure. After careful review, we affirm the order of the trial court.

**Factual Background**

On 26 October 2005, Stephen Terpak ("Terpak") executed an adjustable rate note ("the Note") in the amount of $1,323,000.00 payable to Bank of America N.A. ("Bank of America"). The Note was secured by a parcel of real property ("the Property") designated as Lot 2 of the Flagship Subdivision and recorded in Map Book 28 at Page 692 in the Mecklenburg County Public Registry.

Jabez sought to expand its holdings by acquiring the Property subject to the bank's lien through a special warranty deed executed on 25 May 2011. The record indicates that prior

to 6 December 2011, Bank of America assigned the Note to Wells Fargo.[1]

Terpak subsequently defaulted on the Note, and Wells Fargo declared the balance of the Note immediately due and payable. On 6 December 2011, Wells Fargo appointed Trustee Services as substitute trustee. The appointment was filed of record on 5 January 2012. Trustee Services initiated foreclosure proceedings on the Property that same day by filing a notice of foreclosure sale and notice of hearing with the Mecklenburg County Clerk of Superior Court ("the Clerk") and serving Jabez and Terpak with these notices via certified mail.

On 8 November 2012, a hearing on Trustee Services' foreclosure petition was held by the Clerk. In conjunction with the foreclosure proceedings, Trustee Services filed the affidavits of Jennifer Bartholomew and Arsheen Littlejohn, employees of Bank of America, who each attested to the fact that Bank of America had indorsed and transferred the Note to Wells Fargo sometime prior to 6 December 2011 as evidenced by the indorsement stamp affixed to the Note.

On 8 November 2012, the Clerk entered an order allowing the foreclosure sale to go forward. Among the findings contained in its order were that (1) Wells Fargo was the holder of the Note;

[1] As discussed in detail below, Jabez asserts that no actual assignment of the Note occurred before this date.

(2) the Note established a valid debt owed by Terpak secured by the Property; and (3) the Note was in default. Jabez appealed the Clerk's order to Superior Court pursuant to N.C. Gen. Stat. § 45-21.16(d1).

On 6 May 2013, a hearing was held in Mecklenburg County Superior Court before the Honorable Eric L. Levinson. On 31 May 2013, Judge Levinson entered an order authorizing Trustee Services to proceed with the foreclosure sale.

Jabez appealed the Superior Court's order to this Court and was ordered to post a bond in the amount of $137,000.00. However, because Jabez failed to post the required bond, the foreclosure sale was allowed to proceed, and the Property was subsequently sold. As a result, we dismissed Jabez' appeal as moot.

On 15 August 2013, Jabez filed a lawsuit in Mecklenburg County Superior Court, which is the action from which the current appeal arises. In its complaint, Jabez alleged that the Note initially presented to it by Wells Fargo had no indorsement stamp upon it and that while the foreclosure proceeding was pending, Wells Fargo fraudulently caused an indorsement stamp to be placed upon the Note. The complaint further asserted that the affidavits submitted by Defendants to the Clerk and to the Superior Court in the foreclosure proceeding contained false statements intended to create the erroneous impression that

Wells Fargo was in possession of, and entitled to enforce, the Note prior to 6 December 2011, so as to deprive Jabez of its title to the Property. Based upon these allegations, Jabez asserted a slander of title claim against Defendants along with a claim for unfair trade practices pursuant to Chapter 75 of the North Carolina General Statutes.

On 16 September 2013, Wells Fargo filed an answer containing a motion to dismiss pursuant to Rule 12(b)(6) based in part on the doctrine of collateral estoppel. On 3 October 2013, Trustee Services filed an answer also containing a motion to dismiss based on Rule 12(b)(6).

On 19 December 2013, the motions to dismiss were heard by Judge Levinson. On 6 January 2014, Judge Levinson entered an order granting Defendants' motions to dismiss with prejudice. Jabez filed a timely notice of appeal.

**Analysis**

Jabez' sole argument on appeal is that the trial court erred in granting Defendants' motions to dismiss. We conclude that the trial court properly dismissed this action based on the doctrine of collateral estoppel.

> The standard of review of an order granting a Rule 12(b)(6) motion is whether the complaint states a claim for which relief can be granted under some legal theory when the complaint is liberally construed and all the allegations included therein are taken as true. On appeal, we review the pleadings

> *de novo* to determine their legal sufficiency and to determine whether the trial court's ruling on the motion to dismiss was correct.

*Gilmore v. Gilmore*, __ N.C. App. __, __, 748 S.E.2d 42, 45 (2013) (internal citations, quotation marks, and brackets omitted).

The elements of collateral estoppel are as follows: "(1) a prior suit resulting in a final judgment on the merits; (2) identical issues involved; (3) the issue was actually litigated in the prior suit and necessary to the judgment; and (4) the issue was actually determined." *Bluebird Corp. v. Aubin*, 188 N.C. App. 671, 678, 657 S.E.2d 55, 61 (citation omitted), *disc. review denied*, 362 N.C. 679, 669 S.E.2d 741 (2008). It is well established that "[w]hether the doctrine of collateral estoppel is applicable and bars a specific claim or issue is a question of law subject to *de novo* review." *Powers v. Tatum*, 196 N.C. App. 639, 642, 676 S.E.2d 89, 92, *disc. review denied*, 363 N.C. 583, 681 S.E.2d 784 (2009).

It is undisputed that the Superior Court's order allowing the foreclosure sale to go forward was a final judgment on the merits in light of our dismissal of Jabez' appeal of that order. Therefore, we must determine whether the remaining elements of collateral estoppel are satisfied.

> An issue is actually litigated, for purposes of collateral estoppel or issue preclusion, if it is properly raised in the pleadings or

> otherwise submitted for determination and is in fact determined. A very close examination of matters actually litigated must be made in order to determine if the underlying issues are in fact identical; if they are not identical, then the doctrine of collateral estoppel does not apply.

*Williams v. Peabody*, 217 N.C. App. 1, 6, 719 S.E.2d 88, 93 (2011) (internal citations, quotation marks, and brackets omitted).

Jabez argues that the issues it seeks to litigate in the present action were not before the Clerk or the Superior Court in the foreclosure proceeding due to "procedural limitations that would not be present at a later hearing[.]" We disagree.

Foreclosure proceedings before a clerk of court pursuant to a power of sale are governed by N.C. Gen. Stat. § 45-21.16, which states, in pertinent part, that

> the clerk shall consider the evidence of the parties and may consider, in addition to other forms of evidence required or permitted by law, affidavits and certified copies of documents. If the clerk finds the existence of (i) valid debt of which the party seeking to foreclose is the holder, (ii) default, (iii) right to foreclose under the instrument, (iv) notice to those entitled to such under subsection (b), (v) that the underlying mortgage debt is not a home loan as defined in G.S. 45-101(1b), or if the loan is a home loan under G.S. 45-101(1b), that the pre-foreclosure notice under G.S. 45-102 was provided in all material respects, and that the periods of time established by Article 11 of this Chapter have elapsed, and (vi) that the sale is not barred by G.S. 45-21.12A, then the

> clerk shall authorize the mortgagee or trustee to proceed under the instrument, and the mortgagee or trustee can give notice of and conduct a sale pursuant to the provisions of this Article.

N.C. Gen. Stat. § 45-21.16(d) (2013).

"If the foreclosure action is appealed to the superior court for a *de novo* hearing, the inquiry before a judge of superior court is also limited to the same issues. Furthermore, the trial court may not hear equitable defenses, although evidence of legal defenses is permissible." *In re Hudson*, 182 N.C. App. 499, 502, 642 S.E.2d 485, 488 (2007) (internal citations and quotation marks omitted); *see also In re Godwin*, 121 N.C. App. 703, 705, 468 S.E.2d 811, 812 (1996) ("Evidence of legal defenses that tend to negate any of the four findings made under G.S. section 45-21.16 may be raised and considered at the hearing before the clerk or on an appeal therefrom.").

We find our decision in *Hudson* instructive. In *Hudson*, the petitioner sought to foreclose on various properties owned by the respondents pursuant to the terms of a promissory note upon which the respondents had defaulted. *Hudson*, 182 N.C. App. at 500-01, 642 S.E.2d at 486-87. In the foreclosure proceeding, the petitioner asserted that the promissory note was secured by certain properties listed in handwriting on a document attached to the note. *Id.* The respondents claimed that the attachment listing these properties was not a part of the originally

executed deed of trust and that the parties had never previously discussed the possibility of using those properties as security interests. *Id.*

Both the clerk of court and the Superior Court — on appeal from the clerk's order — determined that the attachment to the note listing the disputed properties as security interests was a forgery. On appeal to this Court, the petitioner argued that "by considering respondents' evidence of petitioner's alleged fraudulent acts, and then making findings and conclusions of law in relation to those acts, the trial judge exceeded both his statutory jurisdiction and the scope of inquiry permitted in the context of a hearing conducted pursuant to N.C. Gen. Stat. § 45-21.16[.]" *Id.* at 503, 642 S.E.2d at 488.

We rejected the petitioner's argument, stating that

> the forgery of loan documents is a proper legal defense to a lender's assertion that a "valid debt" exists. Thus, the trial judge did not exceed his authority by examining the underlying validity of the loan documents. . . . [S]uch inquiry relates to the finding of a "valid debt" under General Statutes section 45-21.16.

*Id.* (internal citations omitted).

> Although petitioner argues that fraud has no place in a 45-21.16 hearing, and that "[t]he issue of the existence of <u>fraud</u> is properly raised, if at all, only in the context of a separate civil action brought under N.C. Gen. Stat. § 45-21.34," our Supreme Court has held that:

> For reasons of judicial economy and efficient resolution of disputes . . . N.C.G.S. § 45-21.16(d) provides a more appropriate process to resolve who truly is the equitable or legal owner of . . . any property sought to be sold under foreclosure. . . . It would be inefficient and an unnecessarily burdensome requirement for parties to have to file a subsequent action in the superior court to decide whether the land being foreclosed upon is secured by the Deed of Trust after the parties have already appeared before the Clerk of Court. We do not see the Clerk of Court in a preforeclosure hearing performing a mere perfunctory role.
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> *Weinman*, 333 N.C. at 230, 424 S.E.2d at 390. A superior court judge hearing an appeal from the clerk of court is charged with making the same determinations as the clerk under section 45-21.16, and performs a no more perfunctory role.

*Hudson*, 182 N.C. App. at 504, 642 S.E.2d at 489 (quoting *In re Weinman*, 333 N.C. 221, 230, 424 S.E.2d 385, 390 (1993)). Therefore, we cannot accept Jabez' argument that procedural limitations inherent in the foreclosure proceedings prevented the clerk of court and the Superior Court from considering its allegations that fraudulent means were used to convey the impression that Wells Fargo was, in fact, the holder of the Note.

Moreover, our review of the record demonstrates that the issues regarding the validity of the indorsement stamps on the

Note were before the Superior Court on appeal from the Clerk's order. Jabez' pleading in Superior Court setting forth its objections to the Clerk's order authorizing foreclosure stated, in pertinent part, that "[Jabez] challenges the validity and legal effect of the stamps which purportedly appear on the [Note] submitted by [Defendants]." In that same document, Jabez further alleged, in pertinent part, as follows:

> 5. Wells Fargo . . . has no standing to pursue this action because it was, upon information and belief, not the Holder of the [Note] when this foreclosure was commenced on 5 January 2012. . . .
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> 6. Upon information and belief, the alleged Holder of the Note herein, Wells Fargo . . . and its servicer, Bank of America . . . have fraudulently caused an endorsement [sic] to be placed upon the [Note] immediately prior to the foreclosure hearing before the Clerk . . . on 8 November 2012.
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> 7. Any document filed with this Court in a foreclosure proceeding by [Bank of America] or [Wells Fargo] should be considered highly suspect by this Court. Both entities have a known history of perpetrating fraud upon the court in foreclosure proceedings, including robo-signing of documents, back-dating documents, forgery of documents, and other abuses for which both entities have been sued by Attorneys General of various states, resulting in the National Mortgage Settlement, with 49-State Attorneys General and the Department of Justice.
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> 8. Specifically, pursuant to N.C.G.S. § 25-3-308, [Jabez] denies the authenticity of, and authority to make the endorsements [sic] or "signatures" on the [Note] submitted by the Petitioner. . . .

In its 31 May 2013 order allowing the foreclosure sale, the Superior Court summarized the documents it had reviewed as follows:

> At the hearing, the Court reviewed [Jabez'] exhibits, all of which were introduced into evidence, including but not limited to: (1) the Affidavit of Arsheen Littlejohn; (2) a certified copy of the subject Deed of Trust; and (3) a certification as to military status. The Court also reviewed [Defendants'] exhibits, all of which were introduced into evidence, including: (1) Substitute Trustee letter dated November 8, 2012 with attached Promissory Note; and (2) Notice of Hearing filed on April 24 2009 in Mecklenburg County File Number 09 SP 2947.

The Superior Court then made the following relevant findings:

> 5. Bank of America . . . indorsed the Note "in blank"; and
>
> 6. Wells Fargo . . . obtained physical possession of the original Note, indorsed "in blank" prior to December 6, 2011 and has maintained physical possession of the original Note to present; and
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> 7. After obtaining physical possession of the original Note, Wells Fargo as Trustee stamped "Wells Fargo Bank, N.A. as trustee for the holders of the Banc of America Mortgage Securities, Inc., Mortgage Pass-Through Certificates Series 2005-L," on page 6 of the Note, below Bank of America, N.A.'s indorsement "in blank"; and
>
> 8. Wells Fargo as Trustee currently has physical possession of the original Note. Counsel for Wells Fargo as Trustee brought the original Note to the appeal hearing in this matter for inspection by the Borrower and the Court. The Court in fact inspected

> each and every page of the original Note; and
>
> 9. Wells Fargo as Trustee is entitled to enforce the Note and collect payments due under the Note; and
>
> 10. Wells Fargo as Trustee is the current holder of the Note and Deed of Trust. Wells Fargo as Trustee is the current obligee under the Note and the current obligee under the Deed of Trust[.]

Thus, the Superior Court expressly found — based on its review of the documents of record — that the requisite facts necessary for the foreclosure sale to go forward were established. Furthermore, it rendered these findings in the face of Jabez' express contention that the indorsement stamps on the Note had been fraudulently added immediately prior to the foreclosure hearing and that, as a result, Wells Fargo was not the actual holder of the Note at the time it appointed Trustee Services as substitute trustee to initiate foreclosure proceedings.

Jabez' complaint in the present action contains (1) a claim for slander of title; and (2) a claim for unfair trade practices. Slander of title is a cause of action "based upon a defamatory attack upon property. . . . Its gist is the special pecuniary loss sustained by reason of malicious utterances or publications by the slanderer." *Selby v. Taylor*, 57 N.C. App. 119, 120, 290 S.E.2d 767, 768 (citation omitted), *disc. review*

*denied*, 306 N.C. 387, 294 S.E.2d 212 (1982). The statements made by the defendant must be: "(1) False; (2) maliciously published; and (3) result in some special pecuniary loss." *Id.*

A claim for unfair trade practices is based on N.C. Gen. Stat. § 75-1.1, which states, in pertinent part, that "unfair or deceptive acts or practices in or affecting commerce, are declared unlawful." N.C. Gen. Stat. § 75-1.1(a) (2013).

> The General Assembly has provided a means to enforce the mandate of section 75–1.1. Section 75–16 allows any individual who has been injured by reason of any act or thing done by any other person, firm or corporation in violation of the provisions of this Chapter to bring a civil action. In order to establish a *prima facie* claim for unfair trade practices, a plaintiff must show: (1) the defendant committed an unfair or deceptive act or practice, (2) the action in question was in or affecting commerce, and (3) the act proximately caused injury to the plaintiff.

*Bumpers v. Cmty. Bank of N. Virginia*, __ N.C. __, __, 747 S.E.2d 220, 226 (2013) (internal citations, quotation marks, and brackets omitted).

Both of Jabez' claims for relief hinge on the proposition that Defendants falsely represented that Wells Fargo was the actual holder of the Note. In support of this assertion, Jabez' complaint states, in pertinent part, as follows:

> f) [Jabez] challenges the validity and legal effect of the stamps which appear upon the [Note] submitted by the Defendants at the foreclosure hearing.

> g) Defendant Wells Fargo . . . has no standing to pursue the foreclosure because it was, upon information and belief, not the Holder of the [Note] when the foreclosure proceeding was commenced on 5 January 2012.
>
> . . . .
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> j) . . . Wells Fargo . . . has a known history of fraudulent activity in foreclosure proceedings, including robo-signing of documents, back-dating documents, forgery of documents, and other abuses for which it has been sued by Attorneys General of various states, resulting in the National Mortgage Settlement, with 49-State Attorneys General and the Department of Justice.

These allegations essentially mirror the contentions made by Jabez in the foreclosure action. As was also true in that proceeding, Jabez' assertions in the present action are based on its challenge to Wells Fargo's authority to initiate foreclosure proceedings on the theory that it was not the holder of the Note at the time these proceedings were commenced.

While the Superior Court's order in the foreclosure proceeding does not contain a finding expressly rejecting Jabez' specific allegation that the affidavits submitted by Defendants were false, Jabez' specific challenge to the veracity of the affidavits is only for the purpose of bolstering its contention that Wells Fargo was not, in fact, the holder of the Note at the time the foreclosure proceedings were initiated. Therefore, given that (1) Jabez' allegations as to the falsity of the

affidavits go to the larger issue of whether Wells Fargo was the holder of the Note on the relevant date; and (2) Wells Fargo's status as the holder of the Note (and as the party therefore authorized to enforce the Note through foreclosure proceedings) clearly *was* confirmed by explicit findings made by the Superior Court, we are satisfied that the key issue on which both of Jabez' causes of action in the present case hinge was actually litigated and necessary to the outcome of the foreclosure action.

Consequently, the doctrine of collateral estoppel is applicable in light of the fact that (1) the Superior Court's order allowing the foreclosure sale to occur was a final judgment on the merits; (2) both in the present action and in the foreclosure proceeding, identical issues were raised concerning Wells Fargo's status as the holder of the Note and its authority to enforce the Note on the relevant date; (3) these issues were actually litigated in the foreclosure action and necessary to the Superior Court's order allowing the foreclosure sale to go forward; and (4) these issues were actually determined based on the Superior Court's finding that Wells Fargo was the holder of the Note and, as such, was entitled to enforce it by means of foreclosure. Accordingly, the trial court correctly granted Defendants' motions to dismiss.

**Conclusion**

For the reasons stated above, the order of the trial court is affirmed.

AFFIRMED.

Judges HUNTER, Robert C., and DILLON concur.

Report per Rule 30(e).