

An unpublished opinion of the North Carolina Court of Appeals does not constitute controlling legal authority.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. COA14-804
NORTH CAROLINA COURT OF APPEALS

Filed: 2 December 2014

ANTHONY T. MAZZONE and
LYNDA L. MAZZONE,
Plaintiffs,

v.

Mecklenburg County
No. 13 CVS 12300

BANK OF AMERICA, N.A.,
individually and as successor by
merger to BAC Home Loans
Servicing, LP, fka Countrywide
Home Loans Servicing, LP and
American Wholesale Lender, Inc.,
Defendant.

Appeal by plaintiffs from order entered 9 January 2014 by
Judge Richard D. Boner in Mecklenburg County Superior Court.
Heard in the Court of Appeals 17 November 2014.

Anthony T. Mazzone and Lynda L. Mazzone, pro se.

*Hutchens, Senter, Kellam & Pettit, P.A., by Lacey M. Moore,
for defendant-appellee.*

BELL, Judge.

Anthony T. Mazzone and Lynda L. Mazzone ("Plaintiffs")
appeal from the trial court's order granting the motion to
dismiss of Bank of America, N.A. ("Defendant") pursuant to Rule

12(b)(6) of the North Carolina Rules of Civil Procedure. After careful review, we affirm the trial court's order.

Factual Background

On 30 August 2000, Plaintiffs borrowed \$196,996.00 from NVR Mortgage Finance, Inc. to purchase a home located at 12159 Autumn Winds Lane in Pineville, North Carolina ("the Subject Property"). Plaintiffs executed a deed of trust securing the debt with the property. The deed of trust was recorded in the office of the Mecklenburg County Register of Deeds.

On 5 November 2001, in order to refinance their mortgage, Plaintiffs executed a promissory note ("the Note") in favor of America's Wholesale Lender, Inc. in the principal amount of \$205,600.00. On the same date, Plaintiffs executed a deed of trust ("the Deed of Trust") in favor of Countrywide Title Corporation ("Countrywide"), as Trustee for America's Wholesale Lender, securing the debt with the Subject Property. The deed of trust was recorded in the office of the Mecklenburg County Register of Deeds. On 28 September 2011, Countrywide assigned the deed of trust to Defendant.

Plaintiffs subsequently defaulted on the Note after they failed to make any installment payments due on or after 1 January 2011. On 9 April 2012, Defendant filed a notice of

hearing prior to foreclosure on the deed of trust. On 5 March 2013, a foreclosure hearing was held before the Mecklenburg County Clerk of Superior Court. The Assistant Clerk entered an order authorizing the Substitute Trustee to proceed with foreclosure, making the following relevant findings of fact:

1. That Bank of America, N.A., successor by merger to BAC Home Loans Servicing, LP is the holder of the note sought to be foreclosed and it evidences that this is a valid debt owed by Anthony T. Mazzone and Lynda Mazzone.
2. That said note is now in default and the instrument securing said debt gives the note holder the right to foreclose under a power of sale.
3. That notice of this hearing has been served on the record owners of the real estate and to all other persons against whom the note holder intends to assert liability for the debt.
4. That the debtors have shown no valid legal reason why foreclosure should not commence.

The Clerk's order was filed on 5 March 2013.

Plaintiffs did not file an appeal.

On 10 July 2013, Plaintiffs filed a document captioned "Lis Pendens," attached to which was a document captioned "Quiet Title Action" ("Complaint¹") against Defendant, purportedly

¹ Plaintiffs' pleading is not captioned as a Complaint, but

claiming that Defendant did not have the right to foreclose on the subject property. Plaintiffs challenged Defendant's status as holder of the Note, alleging that "[o]n October 5, 2011, an Assignment of DEED OF TRUST appears in Book 26707, Pg 706, falsely claiming to give ownership interest to [Defendant] in 2010" and, thus, the deed of trust was "invalid and unenforceable as to [Defendant]."

On 9 August 2013, Defendant filed a motion to dismiss Plaintiffs' Complaint pursuant to Rule 12(b)(6) of the North Carolina Rules of Civil Procedure for failure to state a claim upon which relief may be granted. Defendant's motion came on for hearing on 9 January 2014. The trial court entered an order dismissing Plaintiffs' Complaint. Plaintiffs filed a timely notice of appeal to this Court.

Analysis

When a party files a motion to dismiss pursuant to Rule 12(b)(6), the question for the court is whether the allegations of the complaint, treated as true, are sufficient to state a claim upon which relief may be granted under some legal theory, whether

served to initiate the present action. In its Order dismissing the action, the trial court referred to the document by stating, "to the extent that the same is considered or determined to be a Complaint by this Court." Further, the document is referred to in Defendant's brief as a Complaint. Therefore, for the purposes of this opinion, we will refer to Plaintiffs' pleading as a "Complaint."

properly labeled or not. A complaint may be dismissed pursuant to Rule 12(b)(6) where (1) the complaint on its face reveals that no law supports a plaintiff's claim, (2) the complaint on its face reveals the absence of facts sufficient to make a good claim, or (3) the complaint discloses some fact that necessarily defeats a plaintiff's claim. An appellate court reviews *de novo* a trial court's dismissal of an action under Rule 12(b)(6).

Horne v. Cumberland Cty. Hosp. Sys. Inc., __ N.C. App. __, __, 746 S.E.2d 13, 16 (2013) (internal citations and quotation marks omitted). In ruling on a motion to dismiss, "the allegations of the complaint must be viewed as admitted, and on that basis the court must determine as a matter of law whether the allegations state a claim for which relief may be granted." *Stanback v. Stanback*, 297 N.C. 181, 185, 254 S.E.2d 611, 615 (1979) (citation omitted).

Plaintiffs argue that the trial court erred in granting Defendant's motion to dismiss because their complaint stated a *prima facie* case for removing a cloud on the title to the subject property. We disagree.

I. Res Judicata

In their Complaint, Plaintiffs allege that a cloud of title existed on the subject property because the assignment of the Deed of Trust was not valid, and, therefore, Defendant was not

the proper holder of the Note and had no right to foreclose on the subject property. However, Defendant contends, and we agree, that the allegations made in Plaintiffs' Complaint constitute an "impermissible collateral attack" on the Clerk's order from the foreclosure hearing, and is barred by *res judicata*. *Phil Mechanic Const. Co., Inc. v. Haywood*, 72 N.C. App. 318, 322, 325 S.E.2d 1, 3 (1985) (holding that "when a mortgagee or trustee elects to proceed under G.S. 45-21.1 et seq., issues decided thereunder as to the validity of the debt and the trustee's right to foreclose are *res judicata* and cannot be relitigated").

Pursuant to N.C. Gen. Stat. § 45-21.16(d), in a power of sale foreclosure hearing, the clerk of court in the county where the land is located must make certain findings, including: (1) the existence of a valid debt of which the party seeking to foreclose is the holder; (2) default; and (3) the right to foreclose under the instrument. N.C. Gen. Stat. § 45-21.16(d) (2013). N.C. Gen. Stat. § 45-21.16(d1) further provides that the findings of the clerk may be appealed within 10 days. N.C. Gen. Stat. § 45-21.16(d1) (2013). However, if an appeal is not perfected within 10 days of the clerk's findings, "the clerk's order is binding and plaintiffs are estopped from arguing those

same issues in [another] case.” *Phil Mechanic*, 72 N.C. App. at 322, 325 S.E.2d at 3.

In the present case, the Clerk made the requisite findings of fact, including, in pertinent part: (1) Bank of America was the holder of the Note sought to be foreclosed on; (2) Plaintiffs had defaulted on the Note; and (3) the Note and Deed of Trust gave Bank of America the right to foreclose on the subject property. Plaintiffs failed to appeal the Clerk’s order. As such, after 10 days had lapsed, the Clerk’s findings from the foreclosure hearing became binding and Plaintiffs are now barred from relitigating these issues that are essential to maintain their quiet title action. N.C. Gen. Stat. § 45-21.16(d1) (2013); *Phil Mechanic*, 72 N.C. App. at 322, 325 S.E.2d at 3.

II. 12(b)(6) Motion to Dismiss

The remainder of Plaintiffs’ Complaint purports to assert a claim against Defendant for registering a false claim pursuant to N.C. Gen. Stat. § 47B-6, which prohibits the intentional registration of a false or fictitious claim to real property. N.C. Gen. Stat. § 47B-6 (2013). However, this portion of Plaintiffs’ Complaint merely recites, verbatim, the text of N.C. Gen. Stat. § 47B-6 and does not provide any facts or allegations

in support of this claim. Additionally, as stated above, the validity of the debt, Defendant's status as holder of the Note, and Defendant's right to foreclose on the subject property had been established by the Clerk's order. As such, Plaintiffs could not allege any of the facts necessary to support a claim against Defendant for registering a *false* claim. Thus, we conclude that the trial court did not err in dismissing Plaintiffs' Complaint for failure to state a claim upon which relief may be granted.

Conclusion

For the reasons stated above, the trial court's 9 January 2014 order is affirmed.

AFFIRMED.

Chief Judge McGEE and Judge Robert C. HUNTER concur.

Report per Rule 30(e).