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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA15-195

Filed: 10 May 2016

Columbus County, No. 13 SP 121

IN THE MATTER OF THE FORECLOSURE OF A DEED OF TRUST EXECUTED BY JOHN PAUL SMITH<sup>1</sup> DATED NOVEMBER 10, 2007 AND RECORDED IN BOOK RB 913 AT PAGE 432 IN THE COLUMBUS COUNTY PUBLIC REGISTRY, NORTH CAROLINA

Appeal by petitioner from order entered 26 June 2014 by Judge Gale M. Adams in Columbus County Superior Court. Heard in the Court of Appeals 4 November 2015.

*Womble Carlyle Sandridge & Rice, LLP, by B. Chad Ewing and Amanda G. Ray, for petitioner-appellant.*

*The Law Offices of Oliver & Cheek, PLLC, by Ciara L. Rogers, George Mason Oliver, and Clayton W. Cheek, for respondent-appellee.*

GEER, Judge.

Petitioner Wells Fargo Bank appeals the superior court's order dismissing this foreclosure action brought against respondent John Paul Smith. On appeal, petitioner contends that the superior court erred when it found that the trustee had no right to foreclose on the deed of trust and dismissed the foreclosure action based on the erroneous conclusion that petitioner's lien was void, having been extinguished

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<sup>1</sup>The superior court's order failed to include respondent John Paul Smith's name in the caption.

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by confirmation of respondent's amended bankruptcy plan. Because the amended plan was not in fact confirmed, we reverse and remand for further proceedings consistent with this opinion.

Facts

Petitioner Wells Fargo seeks to foreclose a deed of trust securing respondent's obligations under a promissory note. On 10 November 2007, respondent executed the note in the original principal amount of \$148,000.00 in favor of World Savings Bank, FSB. The note was secured by a deed of trust encumbering property located at 1902 Baldwin Road, Whiteville, North Carolina (the "Property"), and the deed of trust was recorded in Book 913, Page 432, of the Columbus County Registry, North Carolina. Petitioner has possession of the note, which is either payable to petitioner or the note has been duly endorsed, and the note evidences a valid debt owed by respondent to petitioner.

Respondent filed a voluntary petition for relief under Chapter 11 of the Bankruptcy Code on 7 July 2008. On 5 September 2008, petitioner filed a proof of claim in respondent's bankruptcy case asserting a secured lien on the Property in the amount of \$146,559.52. Respondent filed his original plan of reorganization on 12 November 2008, but then later filed an amended plan on 19 May 2009. The amended plan proposed to treat the debt owed to petitioner as secured in the amount of \$60,000.00, with the balance of \$86,559.52 treated as a general unsecured claim.

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The bankruptcy court held a confirmation hearing on respondent's amended plan on 28 October 2009. On 3 February 2010, the bankruptcy court entered a confirmation order, which provided that "[t]he Plan is CONFIRMED, subject to the following modifications . . . ." One of those modifications specified that petitioner's claim "shall be treated as a general unsecured claim[.]" Paragraph 4 of the order also provided:

Except as provided in this Order, the Plan, or in Section 1141(d) of the Bankruptcy Code, [respondent] is hereby released from all dischargeable debts, provided, however *that confirmation is expressly conditioned upon [respondent] providing for the payment of all allowed claims assertable against [respondent's] estate as specified in the Plan and in this Order.*

(Emphasis added.)

Respondent filed a motion to dismiss his Chapter 11 case on 29 June 2012 after being unable to meet the terms and conditions of the amended plan. On 4 October 2012, the bankruptcy court entered an order allowing respondent's motion to dismiss, noting that "dismissal is in the best interest of all parties in interest" since respondent had "defaulted under the terms of the confirmed Plan[] of Reorganization . . . ."

On 14 May 2013, petitioner commenced an action in Columbus County, case number 13-SP-121, seeking to foreclose upon the deed of trust encumbering the Property. On 13 March 2014, the Clerk of Superior Court entered an order allowing

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for the foreclosure sale of the Property. Respondent subsequently, on 21 March 2014, filed an appeal of the foreclosure order to superior court.

On 26 June 2014, the superior court entered an order dismissing the foreclosure action on the grounds that the bankruptcy court's confirmation of the amended plan rendered petitioner's deed of trust void. The superior court found:

Upon the entry of the Order Confirming Plan of John Paul Smith, ordering that Claim 5 of Wells Fargo would be paid as a general unsecured claim, the lien of Wells Fargo was made void by operation of 11 U.S.C. § 1141(c), and the obligation of John Paul Smith was replaced by the terms of the Order Confirming Plan. Because the lien is void, the Trustee does not have the right to foreclose on the security instrument.

(Internal citations omitted.) Petitioner timely appealed the superior court's order to this Court.

Discussion

Petitioner contends that the superior court erred in dismissing its foreclosure proceeding. In a foreclosure proceeding, "the clerk of court may conduct a hearing for the limited purpose of determining (i) the existence of a valid debt of which the party seeking foreclosure is the holder, (ii) the existence of default, (iii) the trustee's right to foreclose, and (iv) the sufficiency of notice of the hearing to the record owners of the property." *In re Foreclosure of Goforth Properties, Inc.*, 334 N.C. 369, 374, 432 S.E.2d 855, 858 (1993). "On appeal from an order of the clerk authorizing the trustee

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to proceed with sale, the judge is limited to determining those same four issues resolved by the clerk.” *Id.*

Here, the superior court, in reversing the clerk of court, determined that the trustee had no right to foreclose because the bankruptcy court confirmed respondent’s amended plan of reorganization, thereby rendering petitioner’s lien void under 11 U.S.C. § 1141(c) (2012). Section 1141(c) provides:

Except as provided in subsections (d)(2) and (d)(3) of this section and except as otherwise provided in the plan or in the order confirming the plan, after confirmation of a plan, the property dealt with by the plan is free and clear of all claims and interests of creditors, equity security holders, and of general partners in the debtor.

*Id.*

Petitioner argues that the bankruptcy court’s confirmation order did not actually confirm the amended plan because it contained a condition precedent to confirmation. Specifically, the confirmation order provided that “confirmation is expressly conditioned upon [respondent] providing for the payment of all allowed claims assertable against [respondent’s] estate as specified in the Plan and in this Order.” Subsequent to the entry of the confirmation order, the bankruptcy court, in allowing dismissal of the bankruptcy proceeding, found that respondent had “defaulted under the terms of the confirmed Plan[] of Reorganization . . . .” Because confirmation was conditioned on payment of all allowed claims and respondent failed to pay all allowed claims, confirmation never occurred.

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Petitioner has filed with this Court memoranda of additional authority attaching (1) the decision of the bankruptcy court, subsequent to the superior court's order in this case, specifying that respondent's amended plan was not confirmed, (2) the bankruptcy court's order denying respondent a stay pending appeal of that order, and (3) the order from the United States District Court for the Eastern District of North Carolina affirming the bankruptcy court order. These orders establish that no confirmation occurred.

Specifically, the bankruptcy court determined, consistent with petitioner's contentions:

[Respondent] dismissed the case before paying all allowed claims as required by the Confirmation Order. The Confirmation Order is clear. Confirmation of the Plan is expressly conditioned on [respondent] paying all allowed claims assertable against [respondent's] estate. [Respondent] did not pay those claims and elected to dismiss his case. The dismissal negates the terms and conditions in the Plan, and the debtor-creditor relationship between [respondent] and [petitioner] is unaffected by the Plan and by the bankruptcy case. In other words, because a condition of confirmation did not occur, § 1141(c) was not implicated, and [petitioner's] lien was not stripped under § 1141(c).

Respondent filed a notice of appeal to the United States District Court for the Eastern District of North Carolina, as well as a motion for a stay pending appeal. The bankruptcy court denied the stay on the grounds that respondent had failed to “show (1) that he will likely prevail on the merits of the appeal, (2) that he will suffer

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irreparable injury if the stay is denied, (3) that other parties will not be substantially harmed by the stay, *and* (4) that the public interest will be served by granting the stay.’ ” (Quoting *Long v. Robinson*, 432 F.2d 977, 979 (4th Cir. 1970) (emphasis added)).

On 18 February 2016, the United States District Court entered an order affirming the bankruptcy court’s 10 July 2015 order. The District Court held:

The bankruptcy court correctly concluded that the 3 February 2010 confirmation order conditioned confirmation of the Chapter 11 plan on [respondent’s] making the payments on allowed claims as required under the plan. Because [respondent] did not pay the allowed claims pursuant to the plan and voluntarily dismissed his bankruptcy case, the condition precedent to confirmation was not satisfied. [Respondent’s] reorganization plan was therefore not confirmed, and he cannot derive the benefits of Chapter 11 protection. Moreover, because the plan was not confirmed, [petitioner’s] lien on [respondent’s] property was neither stripped nor discharged, leaving [petitioner] in the same relationship with [respondent] as it was pre-petition.

Respondent has not disputed that the District Court’s affirmance of the bankruptcy court’s order establishes, contrary to the superior court’s order, that the trustee does have a right to foreclose. As the Fourth Circuit emphasized in *In re Merry-Go-Round Enterprises, Inc.*, 400 F. 3d 219, 227 (4th Cir. 2005) (quoting *Colonial Auto Ctr. v. Tomlin*, 105 F.3d 933, 941 (4th Cir. 1996)), “a bankruptcy court is in the ‘best position to interpret its own orders.’ ”

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All of respondent's arguments in support of the superior court's order assume that respondent's amended plan of reorganization was confirmed. Since the bankruptcy court has expressly determined that respondent's amended plan was not confirmed and the United States District Court has affirmed, we reverse the superior court's dismissal of petitioner's foreclosure action, concluding that petitioner does have a right to foreclose under the deed of trust since the amended plan was never confirmed. We remand this matter to the superior court for further proceedings consistent with this opinion.

REVERSED AND REMANDED.

Judges HUNTER, JR. and DILLON concur.

Report per Rule 30(e).