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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA16-298

Filed: 6 December 2016

Lenoir County, No. 14 CVD 452

COUNTY OF LENOIR, Plaintiff,

v.

HELEN DAVIS, ET AL, Defendants.

Appeal by appellant from order entered 10 December 2015 by Judge David B. Brantley in Lenoir County District Court. Heard in the Court of Appeals 3 November 2016.

Cauley Pridgen, PA, by Kelly V. Chase, for County of Lenoir and City of Kinston-appellees.

Dr. Joseph Askew, pro se-appellant.

McCULLOUGH, Judge.

Dr. Joseph Askew (“appellant”) appeals from the 10 December 2015 order of the trial court, denying his motion to vacate, set aside, or modify a 1 June 2015 default judgment, dismissing his appeal of the 1 June 2015 default judgment, and in the alternative, holding that each is moot. For the reasons stated herein, we dismiss appellant’s appeal.

I. Background

LENOIR CTY. V. DAVIS

Opinion of the Court

On 22 May 2014, the County of Lenoir (“plaintiff”) commenced a tax foreclosure action by filing a complaint against Helen Davis and spouse, if any, and any HEIRS, ASSIGNS or DEVISEES of HELEN DAVIS and spouse, if any, or any other person or entity claiming thereunder (“defendant Davis”) and the City of Kinston (collectively “defendants”). Plaintiff alleged that defendants owned property in Lenoir County, North Carolina (“subject property”) and that plaintiff was owed taxes “which have been duly assessed and levied and that, by operation of Section 105-356 of the General Statutes,” constituted a first lien against the subject property.

On 1 July 2014, defendant City of Kinston filed an answer.

On 1 May 2015, plaintiff’s attorney served upon the parties to the tax foreclosure action the following: Notice of a hearing to be held on 1 June 2015; plaintiff’s motion for judgment on the pleadings as to defendant City of Kinston; an affidavit in support of motion to determine attorneys’ fees and costs; and a motion to enter default judgment against defendant Davis for failure to plead.

On 12 May 2015, appellant filed a “Response to Plaintiff’s Motion and for Judgment/Motion of Trustee and Lienholder et al.” Appellant alleged that he was trustee and lienholder to the subject property and a real party in interest. Appellant alleged that when this action was commenced on 22 May 2014, Helen Davis was sick and due to her mental condition, not aware of any legal proceedings. Appellant alleged that Helen Davis died on or about 1 August 2014. Appellant moved the court

LENOIR CTY. V. DAVIS

Opinion of the Court

to add him as a third party to the suit and as a real party in interest. Appellant also moved the court for a continuance in order to properly plead and file an answer to plaintiff's complaint. On 19 May 2015, appellant filed a "Motion to Continue and Intervene."

On 1 June 2015, the trial court entered "Entry of Default" against defendant Davis based on failure to plead. Judgment was entered on 1 June 2015 and filed 2 June 2015. The trial court ordered that:

Plaintiff has a first and prior lien upon the parcel or tract of real property described below for taxes in the amount of \$4,667.32 as set out on the attached Tax Report(s) . . . together with costs of this action, and that the CITY OF KINSTON has a lien upon the real property for assessments in the amount of \$330.00, which are of equal priority to the tax lien of the Plaintiff.

The trial court ordered that all of the rights, title, and interest of defendants to the subject property were "hereby barred and forever foreclosed, except as to their right of redemption before confirmation of the sale and except as to their right to participate in the distribution of any surplus that may result from the sale herein authorized[.]" Plaintiff's counsel was appointed commissioner to sell the subject property at public auction for cash to the highest bidder. Furthermore, the trial court found that \$750.00 was a reasonable attorney's fee for plaintiff, and \$250.00 is a reasonable attorney's fee for the attorney for the City of Kinston. The trial court concluded that plaintiff could recover: the attorneys' fees as "costs" pursuant to N.C.

LENOIR CTY. V. DAVIS

Opinion of the Court

Gen. Stat. §§ 105-374 and 105-355; reasonable commissioner's fee of five percent of the purchase price; remaining costs for filing fees, service fees, copy charges, long distance telephone charges, publication charges, locater service charges, and the like. The parties to the action were served with the 1 June 2015 judgment on 25 June 2015.

On 28 July 2015, appellant filed "Motion to Vacate and Motion for Modification of Judgment" pursuant to Rule 60(a) and Rule 55(d) of the North Carolina Rules of Civil Procedure. On 29 July 2015, appellant also filed a "Notice of Appeal" from the 1 June 2015 judgment.

On 11 August 2015, plaintiff filed a motion to dismiss appellant's appeal. Plaintiff alleged that defendants were served on 25 June 2015 and had a thirty day period within which to file notice of appeal pursuant to Rule 3 of the North Carolina Rules of Appellate Procedure, together with a three day period to be added to this time limit as set forth in Rule 6. Because appellant did not file his notice of appeal until 29 July 2015, thirty-four days after service of the 1 June 2015 judgment, plaintiff argued that appellant was one day late and therefore, in violation of the Rules of Appellate Procedure. Also on 11 August 2015, appellant filed a "Vacate Set Aside Judgment or Modify Rule 59, 60[]."

On 10 December 2015, the trial court entered an "Order Denying Trustee's Motion to Vacate, Set Aside or Modify Judgment." The trial court found that appellant filed his notice of appeal of the 1 June 2015 judgment on 29 July 2015,

LENOIR CTY. V. DAVIS

Opinion of the Court

thirty-four days after service of the judgment. The trial court further found that on 12 August 2015, appellant paid all of the County of Lenoir and City of Kinston taxes, assessments, and costs and that plaintiff filed a Notice of Redemption and Approval and a Certificate of Satisfaction of Judgment of this matter on 24 August 2015. The trial court concluded as follows, in pertinent part:

3. [Appellant] has no lien of record against the [subject property] which is the subject of this suit.

4. [Appellant] failed to move forward to protect his interest, if any, during the many times that this matter was calendared prior to the June 1, 2015, term of this Court, and therefore his motion to continue was properly denied, and the doctrine of laches applies.

5. [Appellant] has never been a party in this suit and he does not have standing to file a motion to vacate, set aside or modify the judgment entered by this Court on June 1, 2015.

6. That Rule 3 of the Rules of Appellate Procedure provides a thirty (30) day period within which to file a Notice of Appeal, together with a three (3) day period to be added to this time limit as set forth in Rule 6 of the Rules of Civil Procedure, where service by mail was used to serve the judgment in question.

7. That the Notice of Appeal was filed one day late and is therefore in violation of the North Carolina Rules of Appellate Procedure.

8. That on August 12th, 2015, [appellant] paid all amounts due in this matter and exercised the equity of redemption allowed under North Carolina law to redeem this parcel from foreclosure, and in reliance on same, Plaintiff filed a Notice of Redemption and Approval and a

LENOIR CTY. V. DAVIS

Opinion of the Court

Certificate of Satisfaction of Judgment of this matter on August 24, 2015, which cancelled the judgment from which [appellant] has appealed.

Based upon these findings and conclusions of law, the trial court ordered that appellant's "Motion to Set Aside, Vacate or Modify is hereby denied, that his Appeal is hereby dismissed, or in the alternative, that each is moot."

Appellant appeals from the 10 December 2015 order of the trial court.

II. Discussion

First, appellant challenges the trial court's award of attorneys' fees and costs to plaintiff in the 1 June 2015 judgment.

In the 10 December 2015 order, the trial court dismissed appellant's appeal from the 1 June 2015 judgment based on failure to timely file notice of appeal, in violation of the North Carolina Rules of Appellate Procedure. Our Courts have stated that "[n]o appeal lies from an order of the trial court dismissing an appeal for failure to perfect it within apt time, the proper remedy to obtain review in such case being by petition for writ of certiorari." *State v. Evans*, 46 N.C. App. 327, 327, 264 S.E.2d 766, 767 (1980). Because the trial court in the present case dismissed appellant's appeal for failure to comply with the Rules of Appellate Procedure, no appeal can lie to this Court. Furthermore, appellant has not sought review by writ of certiorari pursuant to N.C. R. App. P. Rule 21(a) (2015). Thus, appellant's argument is dismissed.

LENOIR CTY. V. DAVIS

Opinion of the Court

Next, appellant challenges the trial court's conclusion that he did not have standing to file a motion to vacate, set aside, or modify the judgment entered 1 June 2015.

It is well established that

[W]henever during the course of litigation it develops that . . . the questions originally in controversy between the parties are no longer at issue, the case should be dismissed, for courts will not entertain an action merely to determine abstract propositions of law. If the issues before the court become moot at any time during the course of the proceedings, the usual response is to dismiss the action.

Cape Fear River Watch v. N.C. Envtl. Mgmt. Comm'n, 368 N.C. 92, 97-98, 772 S.E.2d 445, 449 (2015) (citation omitted).

In the present case, it is undisputed that appellant paid all of the County of Lenoir and City of Kinston taxes, assessments, and costs on 12 August 2015 and exercised the equity of redemption allowed under North Carolina law to redeem the subject property from foreclosure. Accordingly, plaintiff filed a Notice of Redemption and Approval and a Certificate of Satisfaction of Judgment of this matter on 24 August 2015, which cancelled the judgment from which appellant has appealed. Because appellant's challenges to the trial court's conclusion that he did not have standing to file a motion to vacate, set aside, or modify the 1 June 2015 judgment are no longer at issue, we dismiss appellant's argument as moot.

III. Conclusion

LENOIR CTY. V. DAVIS

Opinion of the Court

Appellant's appeal from the 10 December 2015 order dismissing his appeal of the 1 June 2015 order is dismissed. Appellant's appeal of the 10 December 2015 order, concluding that he had no standing to file a motion to vacate, set aside, or modify the 1 June 2015 judgment, is dismissed as moot.

DISMISSED.

Judges STROUD and ZACHARY concur.

Report per Rule 30(e).