IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA16-653

Filed: 21 February 2017

Mecklenburg County, No. 15 SP 383

IN THE MATTER OF THE FORECLOSURE OF A DEED OF TRUST EXECUTED BY BRUCE J. ADAMS DATED DECEMBER 28, 2004 AND RECORDED IN BOOK 18194 AT PAGE 265 IN THE MECKLENBURG COUNTY PUBLIC REGISTRY, NORTH CAROLINA

Appeal by respondent from order entered 28 December 2015 by Judge James W. Morgan in Mecklenburg County Superior Court. Heard in the Court of Appeals 16 November 2016.

Shapiro & Ingle, LLP, by Jonathan Blake Davis, and Jason K. Purser, for petitioner-appellee.

The Law Office of Erin E. Rozzelle, PLLC, by Erin Rozzelle, for respondent-appellant.

DAVIS, Judge.

Bruce J. Adams appeals from the trial court's 28 December 2015 order authorizing the Bank of New York Mellon f/k/a the Bank of New York ("BONY") to foreclose on his property. Adams argues that BONY failed to give proper notice of the foreclosure proceeding or establish that it was the holder of the debt at issue. After careful review, we affirm.

Factual and Procedural Background

On 28 December 2004, Adams executed a promissory note (the "Note") in favor of Countrywide Home Loans, Inc. ("Countrywide") in the principal amount of $132,000. On that same day, Adams executed a deed of trust (the "Deed of Trust") securing the Note with real property located at 6808 Wannamaker Lane in Charlotte, North Carolina (the "Property"). The Deed of Trust designated Trustee Services of Carolina, LLC as the trustee.[1]

On 1 February 2012, Adams defaulted on his monthly payments under the Note. On 21 January 2015, the then-substitute trustee Grady I. Ingle or Elizabeth B. Ells, represented by the law firm of Shapiro & Ingle, LLP, filed a Notice of Hearing on Foreclosure of Deed of Trust in Mecklenburg County Superior Court and provided Adams with notice of a 6 March 2015 foreclosure hearing. On 26 August 2015, Cornish was appointed as the new substitute trustee.

After several continuances, the foreclosure petition was heard by the Clerk of Court on 26 August 2015. Following the conclusion of the hearing, the Clerk entered an order permitting the foreclosure. Adams appealed this order, and a *de novo* proceeding was held before the Honorable James W. Morgan on 3 December 2015. At the hearing, Adams moved to dismiss the action under Rule 41(b) of the North Carolina Rules of Civil Procedure on the basis that Cornish had failed to file and serve amended notice of hearing upon appointment as substitute trustee. The trial

[1] Two substitute trustees were subsequently named: "Grady I. Ingle or Elizabeth B. Ells" and Cornish Law, PLLC ("Cornish").

court denied that motion and, at the conclusion of the hearing, entered an order affirming the Clerk's order and allowing the foreclosure to proceed. Adams filed a timely notice of appeal.

Analysis

Adams argues that the trial court erred in (1) denying his motion to dismiss; (2) finding that Adams had been given proper notice of the foreclosure proceeding; and (3) determining that BONY had established that it was the holder of the Note.

Upon the filing and service of a notice of hearing on a mortgagee's or trustee's request to foreclose pursuant to a power of sale, N.C. Gen. Stat. § 45-21.16(d) provides that the clerk of court in the county where the land is situated shall conduct a hearing at which "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." N.C. Gen. Stat. § 45-21.16(d) (2015). The statute further provides, in pertinent part, as follows:

> 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.

Id.

Pursuant to N.C. Gen. Stat. § 45-21.16(d1), "[i]f 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." *In re Hudson*, 182 N.C. App. 499, 502, 642 S.E.2d 485, 488 (2007) (citation and quotation marks omitted). In reviewing the superior court's order under N.C. Gen. Stat. § 45-21.16(d1), this Court first determines whether the superior court applied the proper scope of review. *In re Watts*, 38 N.C. App. 90, 94-95, 247 S.E.2d 427, 430 (1978). If so, we decide only "whether competent evidence exists to support the trial court's findings of fact and whether the conclusions reached were proper in light of the findings." *In re Foreclosure of Gilbert*, 211 N.C. App. 483, 487, 711 S.E.2d 165, 169 (2011) (citation and quotation marks omitted).

I. Notice of Hearing

Adams initially argues that the trial court was required to dismiss this action because Cornish did not file and serve an amended notice of hearing when it became the substitute trustee. Pursuant to N.C. Gen. Stat. § 45-21.16(a), "[t]he mortgagee or trustee granted a power of sale under a mortgage or deed of trust who seeks to exercise such power of sale shall file with the clerk of court a notice of hearing . . . . The notice shall be served and proof of service shall be made in any manner provided

by the Rules of Civil Procedure for service of summons, including service by registered mail or certified mail, return receipt requested." N.C. Gen. Stat. § 45-21.16(a). Among those persons who must receive service are "[a]ny person obligated to repay the indebtedness against whom the holder thereof intends to assert liability therefor[.]" N.C. Gen. Stat. § 45-21.16(b).

Here, the record shows that Cornish submitted an affidavit to the trial court showing that service had been made upon Adams by Grady I. Ingle or Elizabeth B. Ells — the substitute trustee who initiated the foreclosure proceeding — and attached a certified mail return receipt signed by Adams on 3 February 2015. Thus, Adams actually received proper notice. Moreover, there is no indication that the substitution of trustee was in any way improperly made. *See generally* N.C. Gen. Stat. § 45-10(a) (2015) ("[T]he holders or owners of a majority in amount of the indebtedness, notes, bonds, or other instruments evidencing a promise or promises to pay money and secured by mortgages, deeds of trust, or other instruments conveying real property, or creating a lien thereon, may, in their discretion, substitute a trustee whether the trustee then named in the instrument is the original or a substituted trustee or a holder or owner of any or all of the obligations secured thereby[.]").

Adams does not point to — nor are we aware of — any legal authority that would compel dismissal of the action simply because Cornish did not file and serve an amended notice of hearing when it became the new substitute trustee. Nor has

Adams shown that he suffered any prejudice stemming from the fact that no amended notice of hearing was served upon him.

In a related argument, Adams argues that BONY failed to satisfy the notice requirement under N.C. Gen. Stat. § 45-21.16(d) because an attorney for Cornish — as opposed to Ingle or Ells — executed the affidavit of service attesting that Adams had been properly served. As noted above, at the foreclosure proceeding, BONY entered into evidence an affidavit from Cornish's counsel stating that Adams had been served with notice of the action via certified mail. Attached to the affidavit was the certified mail return receipt signed by Adams on 3 February 2015. Adams asserts that counsel for Cornish was not the proper person to complete the affidavit of service based on lack of personal knowledge.

Adams cites no legal authority that would support his argument that Cornish's counsel was not permitted to submit an affidavit regarding the service of process made upon Adams by the former substitute trustee. Moreover, as also noted above, attached to the affidavit was a copy of the return receipt signed by Adams. Notably, Adams does not deny that he was, in fact, properly served with notice. Accordingly, Adams has failed to demonstrate that the trial court erred in ruling that Adams received proper notice in compliance with N.C. Gen. Stat. § 45-21.16.

II. Holder of the Note

Adams's final argument is that the trial court erred in determining that BONY had established that it was the holder of the Note as required under N.C. Gen. Stat. § 45-21.16(d). In order for sufficient evidence to exist that the party seeking to foreclose is the holder of a valid debt, a court must find "(1) competent evidence of a valid debt, and (2) that the party seeking to foreclose is the current holder of the Note." *In re Foreclosure of a Deed of Trust Executed By Rawls*, __ N.C. App. __, __, 777 S.E.2d 796, 798 (2015) (citation and quotation marks omitted). Adams does not dispute that the Note constitutes a valid debt but instead argues that BONY failed to establish that it was the holder of the Note.

A "holder" includes a "person in possession of a negotiable instrument that is payable either to bearer or to an identified person that is the person in possession [of the instrument] . . . ." N.C. Gen. Stat. § 25-1-201(b)(21) (2015). A "bearer," in turn, is defined as "a person in possession of a negotiable instrument, negotiable tangible document of title, or certificated security that is payable to bearer or indorsed in blank." N.C. Gen. Stat. § 25-1-201(b)(5). "When indorsed in blank, an instrument becomes payable to bearer and may be negotiated by transfer of possession alone until specially indorsed." N.C. Gen. Stat. § 25-3-205(b) (2015).

In the present case, the Note was indorsed from Countrywide in blank — a fact Adams does not contest. BONY produced a copy of the Note at the foreclosure proceeding along with a supporting affidavit. Based upon this evidence, the trial

court's order found that BONY "is the holder" of the Note, which "constitutes a valid debt to [BONY]." *See In re Foreclosure of Brown*, 156 N.C. App. 477, 486-87, 577 S.E.2d 398, 404-05 (2003) (concluding that affidavit, along with note and deed of trust, may constitute sufficient competent evidence of a valid debt and default).

Adams asserts that the trial court's finding that BONY was the holder of the Note is unsupported by the evidence because there were versions of the Note presented that contained "variations" within the barcodes affixed to the bottom of them. The first version was provided by the original trustee, Trustee Services of Carolina, LLC, in April 2013; the second was provided by Shapiro & Ingle at the time the foreclosure proceeding was initiated; and the third was introduced into evidence at the foreclosure proceeding.

The only way the documents differ in any respect is that the bar codes appearing underneath the page number on the bottom of the first page of each document are different. We are not convinced that these slight variations were sufficient to preclude the trial court from finding that BONY was indeed the Note's holder. All three versions of the Note were the same in all other respects, and Adams does not contest the validity of the debt or the fact that the Note was indorsed in blank and was thus "payable to bearer." N.C. Gen. Stat. § 25-3-205(b).

Therefore, Adams has not shown that the trial court erred in determining that BONY was the holder of the Note. Accordingly, "because the Note was indorsed in

blank and [BONY] had possession of the Note, the superior court properly determined that [BONY] was the holder of the Note." *Greene v. Tr. Servs. of Carolina, LLC*, __ N.C. App. __, __, 781 S.E.2d 664, 669, *disc. review denied*, __ N.C. __, 786 S.E.2d 268 (2016).

Conclusion

For the reasons stated above, we affirm the trial court's 28 December 2015 order.

AFFIRMED.

Judges STROUD and HUNTER, JR. concur.

Report per Rule 30(e).