IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA17-1268

Filed: 3 July 2018

Mecklenburg County, No. 16 SP 2777

IN THE MATTER OF THE FORECLOSURE OF A DEED OF TRUST EXECUTED BY REBECCA WORSHAM AND GREG B. WORSHAM DATED JANUARY 8, 2007 AND RECORDED IN BOOK 21638 AT PAGE 600 IN THE MECKLENBURG COUNTY PUBLIC REGISTRY, NORTH CAROLINA.

Appeal by respondents from order entered 12 April 2017 by Judge Hugh B. Lewis in Mecklenburg County Superior Court. Heard in the Court of Appeals 4 April 2018.

Bradley Arant Boult Cummings LLP, by Brian M. Rowlson and Colin T. Dean, for petitioner-appellee.

Scarbrough & Scarbrough, PLLC, by Madeline J. Trilling, for respondent-appellants.

ZACHARY, Judge.

Respondents Rebecca Worsham and Greg Worsham appeal from the superior court's order authorizing the foreclosure of their property pursuant to the power of sale provision of the Deed of Trust. We reverse and remand the superior court's order.

Background

Respondents purchased property located on Providence Road in Charlotte, North Carolina ("the Property") in 2005, and financed the purchase in part with a loan secured by a Deed of Trust in favor of First Franklin Financial Corporation. Ms. Worsham refinanced the initial loan in January 2007 by executing a new Note and Deed of Trust in favor of Delta Funding Corporation. Respondents thereafter executed three loan modifications in February 2009, September 2010, and December 2010. Under the terms of the Deed of Trust, Respondents "irrevocably grant[ed] and convey[ed]" the property "to Trustee and Trustee's successors and assigns, in trust, with power of sale" in order to secure payment on the Note. Respondents made payments pursuant to the effective loan modifications until early 2012. Respondents contend that they did not stop making payments, but that the loan servicer had refused to accept the payment.

In June 2012, Petitioner HSBC Bank USA, N.A. commenced a power of sale foreclosure proceeding against Respondents to enforce payment of the loan through the sale of the Property. According to Petitioner, by that time the Note and Deed of Trust had been assigned to Petitioner. However, on appeal to the superior court, the trial court denied Petitioner's request for foreclosure by power of sale on the grounds that Petitioner had failed to prove that it was the holder of the debt at the time its petition was filed. Petitioner then brought a second power of sale foreclosure proceeding against Respondents on 19 July 2016. Petitioner maintains that "a

Corporate Assignment of Deed of Trust dated 14 July 2016" evidenced the assignment of the Deed of Trust to it.

The Assistant Clerk of Superior Court entered an order on 6 December 2016 dismissing Petitioner's second power of sale foreclosure on the grounds that "insufficient evidence was presented to sustain the substitute trustee's authority to proceed with the foreclosure" on behalf of Petitioner. Petitioner gave notice of appeal to the superior court pursuant to N.C. Gen. Stat. § 45-21.16(d1). The superior court entered an order on 12 April 2017 permitting the non-judicial foreclosure of the property by power of sale as provided in the Deed of Trust. Respondents timely appealed.

On appeal, Respondents argue that "the superior court's order fails to authorize nonjudicial foreclosure as a matter of law because it lacks the requisite findings and conclusions under N.C. Gen. Stat. § 45-21.16(d) and its findings are unsupported by competent evidence." We agree.

Discussion

Foreclosure under power of sale is a non-judicial foreclosure by way of "a contractual arrangement in a mortgage or a deed of trust which confers upon the trustee or mortgagee the power to sell the real property mortgaged without any order of court in the event of a default." *In re Foreclosure of Michael Weinman Assoc.*, 333 N.C. 221, 227, 424 S.E.2d 385, 388 (1993) (alteration omitted) (citation and quotation

marks omitted). " 'A power of sale provision in a deed of trust is a means of avoiding lengthy and costly foreclosures by action,' whereby 'the parties have agreed to abandon the traditional foreclosure by judicial action in favor of a private contractual remedy to foreclose.' " *In re Foreclosure of Adams*, 204 N.C. App. 318, 321, 693 S.E.2d 705, 708 (2010) (quoting *In re Foreclosure of Michael Weinman Assoc.*, 333 N.C. at 227, 424 S.E.2d at 388) (alteration omitted).

Foreclosure under power of sale allows the clerk of court to authorize the foreclosure of property if it "finds the existence of" the requisite statutory elements, including: "(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," (v) home loan status, and (vi) military status of debtor. N.C. Gen. Stat. § 45-21.16(d) (2017). A party may appeal the clerk's decision to the district or superior court, at which point the court must determine *de novo* the existence of the same elements. *In re Foreclosure of Adams*, 204 N.C. App. at 321, 693 S.E.2d at 709 (citing *In re Foreclosure of Burgess*, 47 N.C. App. 599, 603, 267 S.E.2d 915, 918 (1980)) (internal citations omitted). The lender bears the burden of proving the establishment of the required elements. *Id.*

"Non-judicial foreclosure by power of sale arises under contract and is not a judicial proceeding." *In re Foreclosure of Lucks*, 369 N.C. 222, 225, 794 S.E.2d 501, 504 (2016) (citing *In re Foreclosure of Michael Weinman Assocs.*, 333 N.C. at 227, 424

S.E.2d at 388) (internal citations omitted). Rather, foreclosure by power of sale is governed by Chapter 45 of the North Carolina General Statutes, which the General Assembly "crafted . . . to be the comprehensive and exclusive statutory framework governing non-judicial foreclosures by power of sale." *Id.* at 226, 794 S.E.2d at 505 (citations omitted). Accordingly, the Rules of Civil Procedure do not apply to non-judicial foreclosures by power of sale "unless explicitly engrafted into the statute." *Id.* (citations omitted).

One such rule "explicitly engrafted into the statute" is Rule 52 of the Rules of Civil Procedure. Rule 52(a)(1) requires that "[i]n all actions tried upon the facts without a jury . . . , the court shall find the facts specially and state separately its conclusions of law thereon and direct the entry of the appropriate judgment." N.C. Gen. Stat. § 1A-1, Rule 52(a)(1) (2017). It has been stated that "Rule 52(a) 'requires the trial judge to do the following three things in writing: (1) to find the facts on all issues of fact joined on the pleadings; (2) to declare the conclusions of law arising on the facts found; and (3) to enter judgment accordingly.' " *In re Foreclosure of Garvey*, 241 N.C. App. 260, 265, 772 S.E.2d 747, 751 (2015) (quoting *Hinson v. Jefferson*, 287 N.C. 422, 428, 215 S.E.2d 102, 106 (1975)) (internal quotation marks omitted) (emphasis omitted) (alteration omitted). Further, "Rule 52(a) requires the findings to be *specific findings* of the ultimate facts established by the evidence, admissions and stipulations[.] " *Id.* (citation and quotation marks omitted). "[T]he purpose for

requiring findings of fact and conclusions of law under Rule 52 is to allow meaningful appellate review." *Id.* (alterations omitted) (citation and quotation marks omitted).

That Chapter 45 specifically incorporates Rule 52(a) is evident by its requirement that the clerk, or the superior court upon hearing the matter *de novo*, "finds the existence" of the requisite factors. N.C. Gen. Stat. § 45-21.16(d) (2017). While non-judicial foreclosure by power of sale is not itself a judicial proceeding, Chapter 45 explicitly provides that "[t]he act of the clerk in . . . finding [the statutory elements] or refusing to so find *is* a judicial act[,]" N.C. Gen. Stat. § 45-21.16(d1) (2017) (emphasis added), and in the event that a party appeals from the clerk's order, the superior court must hold a hearing in order to determine the same *de novo*. *In re Foreclosure of Garvey*, 241 N.C. App. at 267, 772 S.E.2d at 752 ("[B]ecause the superior court was required to conduct a *de novo* hearing and not just a *de novo* review, the superior court . . . was required . . . to make its own findings of fact as to each of the statutorily-required factors set forth in N.C. Gen. Stat. § 45-21.16(d)."); *see also In re Foreclosure of Lucks*, 369 N.C. at 226, 794 S.E.2d at 505 ("Nonetheless, Chapter 45 does require a minimal degree of judicial oversight for the sole purpose of requiring a creditor to establish its right to proceed with the foreclosure." (citing N.C. Gen. Stat. § 45-21.16(d)). In directing the clerk and superior court to make specific findings regarding the required statutory elements in non-judicial foreclosure proceedings, the General Assembly has "explicitly engrafted" Rule 52(a) into Chapter

45. *In re Foreclosure of Lucks*, 369 N.C. at 226, 794 S.E.2d at 505 (citation omitted). Accordingly, a superior court's determination in a non-judicial foreclosure proceeding is subject to Rule 52 of the North Carolina Rules of Civil Procedure requiring specific findings on the ultimate facts in issue. *In re Foreclosure of Garvey*, 241 N.C. App. at 265, 772 S.E.2d at 751 (citation omitted). It is well established that the superior court must make specific findings of fact as follows: "(1) the existence of a valid debt of which the party seeking to foreclose is the holder, (2) the occurrence of a default, (3) the existence of a right to foreclose under the instrument at issue, (4) the giving of notice to those entitled to receive notice," (5) the home loan status, and (6) the military status of the debtor. *Id.* (citation omitted).

In the instant case, the superior court's order contains only the following findings:

> 1. Greg B. Worsham executed the deed of trust relating to the above-described property.
>
> 2. The Worshams did not dispute that there was a valid debt, default, notice, home loan classification or military service bar.
>
> Based upon the above FINDINGS OF FACT, the Court concludes as a MATTER OF LAW that:
>
> 1. Greg B. Worsham consented that his interest in the above-described property could be foreclosed to satisfy the unpaid debt by executing the deed of trust.
>
> 2. Where only one spouse executes a promissory note in favor of a lender, but both spouses execute the deed of trust

> securing the note, the lender is entitled to foreclose the interests of both spouses upon default. . . .
>
> 3. HSBC Bank, USA, N.A. has the right to foreclose.

"In order to find that there is sufficient evidence that the party seeking to foreclose is the holder of a valid debt[,]" the superior court is required to answer two questions "in the affirmative: (1) is there sufficient competent evidence of a valid debt?; and (2) is there sufficient competent evidence that the party seeking to foreclose is the holder of the notes that evidence that debt?" *In re Foreclosure of Adams*, 204 N.C. App at 321-22, 693 S.E.2d at 709 (alterations omitted) (citation and quotation marks omitted). Here, however, the superior court summarily concluded that Petitioner had the right to foreclose on the property without first having made a finding as to whether Petitioner was the holder of the debt at issue. This was not only required under N.C. Gen. Stat. § 45-21.16(d), but was also one of Respondents' main contentions at the hearing. Because a finding as to whether Petitioner was the holder of the debt is required in order for this Court to review the propriety of the court's order allowing non-judicial foreclosure by power of sale, and because the superior court did not make such a finding, we must reverse and remand this matter for additional findings of fact. *In re Foreclosure of Garvey*, 241 N.C. App. at 266-67, 772 S.E.2d at 752.

Additionally, while the superior court made a finding as to the occurrence of a default, this finding is not supported by competent evidence. *In re Foreclosure of*

Adams, 204 N.C. App. at 320, 693 S.E.2d at 708 ("The applicable standard of review on appeal where, as here, the trial court sits without a jury, is whether competent evidence exists to support the trial court's findings of fact[.]"). The superior court found that Respondents "did not dispute that there was a valid debt, default, notice, home loan classification or military service bar." However, it is clear from the record that Respondents specifically contested the existence of a valid default. In fact, Respondents' primary contention at the hearing was that they had not defaulted: the narrative of the hearing itself provides that "respondents *chiefly claim that they are not in default*[.]" (emphasis added). Thus, the finding that there was no dispute that there existed a valid default is not supported by the evidence. Accordingly, we must remand the superior court's order in order for it to render an appropriate finding as to the existence of default.

In sum, the superior court was required to make findings as to each of the six statutorily-enumerated elements for non-judicial foreclosure set forth in N.C. Gen. Stat. § 45-21.16(d). Because the superior court did not do so, and because the facts are in dispute as to some of those elements,[1] we must reverse and remand. On remand, the trial court may take additional evidence or make additional findings based on the existing record.

[1] For this reason, we decline to address the propriety of the trial court's authorizing non-judicial foreclosure, as requested by the parties.

Conclusion

For the reasons contained herein, the superior court's order is

REVERSED AND REMANDED.

Judges ELMORE and TYSON concur.

Report per Rule 30(e).