IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA18-419

Filed: 18 December 2018

Iredell County, No. 17 SP 252

IN THE MATTER OF THE FORECLOSURE OF A DEED OF TRUST EXECUTED BY MICHAEL D. RADCLIFF AND MARGENE K. RADCLIFF DATED MAY 23, 2003 AND RECORDED IN BOOK 1446 AT PAGE 2024 AND RERECORDED IN BOOK 1472 AT PAGE 2465 IN THE IREDELL COUNTY PUBLIC REGISTRY, NORTH CAROLINA.

Appeal by Michael Johnson from order entered 2 January 2018 by Judge Casey M. Viser in Iredell County Superior Court. Heard in the Court of Appeals 15 October 2018.

Scarbrough & Scarbrough, PLLC, by John F. Scarbrough, James E. Scarbrough, and Madeline J. Trilling, for appellant Michael Johnson.

Horack, Talley, Pharr & Lowndes, PA, by Amy P. Hunt, for appellee Wells Fargo Bank, N.A.

ELMORE, Judge.

Michael Johnson appeals from an order granting the motion of Wells Fargo Bank, N.A., to reopen the upset bid period in a power-of-sale foreclosure action on the basis that Wells Fargo never received notice of Johnson's upset bid, and that if it had, Wells Fargo would have placed an additional upset bid prior to the period's expiration. On appeal, Johnson contends the trial court lacked subject matter jurisdiction to reopen the upset bid period because the rights of the parties had already become fixed pursuant to N.C. Gen. Stat. § 45-21.29A. Johnson further

contends the trial court abused its discretion in granting Wells Fargo's motion pursuant to N.C. Gen. Stat. § 45-21.27(h).

For the reasons stated herein, we affirm.

I. Background

This appeal arises out of a special proceeding by a mortgagee to foreclose on a deed of trust given by Michael and Margene Radcliff in 2003 to secure a promissory note in the amount of $1,000,000.00. The collateral real property was encumbered by two junior deeds of trust for the benefit of Wells Fargo: one given by Margene Radcliff in 2005 to secure future advances of as much as $1,000,000.00 under the terms of a business equity line promissory note, and another given by Margene Radcliff—as trustee of the Margene Radcliff Revocable Trust—in 2007 to secure future advances of up to $820,000.00 under a home equity line of credit.

The substitute trustee under the first deed of trust initiated this action by filing a notice of hearing on 18 May 2017. On 20 July, the clerk of court entered an order permitting the substitute trustee to proceed with a foreclosure sale. At the 31 August sale, Affinity Capital, LLC, was the high bidder at $970,073.69. The substitute trustee thereafter filed a report setting forth the high bid and indicating that the 10-day statutory period for upset bids would expire on 11 September.

On 6 September 2017, Wells Fargo placed and filed a notice of upset bid in the amount of $1,018,577.37, and the upset bid period was renewed until 18 September.

On 15 September, Johnson—an individual third-party bidder—filed his upset bid in the amount of $1,069,506.24, and the upset bid period was renewed until 25 September. On 28 September, Wells Fargo filed a "motion to extend upset period." The motion requested that the upset bid period be reopened and extended for an additional ten days on the basis that Wells Fargo had not received notice of Johnson's 15 September upset bid, and that if it had, Wells Fargo would have placed an additional upset bid prior to 25 September.

Wells Fargo's motion was first heard by the clerk of court on 17 October 2017, and on 31 October, the clerk entered an order denying the motion and concluding that Johnson's 15 September upset bid was the high and final bid. Wells Fargo then appealed to the trial court, which granted the motion and reopened the upset bid period in an order dated 2 January 2018. In its order, the trial court made the following relevant findings of fact and conclusions of law[1]:

> 5. [Wells Fargo] never received notice of the September 15, 2017 upset bid as required, or contemplated, by G.S. § 45-21.27(e), and Wells Fargo was prepared to tender an additional upset bid had it known an upset bid had been filed on September 15, 2017.
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> 6. Wells Fargo has interests in the collateral real property that stand to be eliminated by this foreclosure proceeding. Without limitation, Wells Fargo is the beneficiary of (i) that certain Deed of Trust securing the original principal amount of $1,000,000 recorded on June 1, 2005 in Deed

[1] The trial court failed to distinguish between its findings of fact and conclusions of law in the order.

> Book 1650, Page 1540, and (ii) that certain Open-End Deed of Trust securing advances up to the original principal amount of $820,000 recorded on August 29, 2007 in Deed Book 1879, Page 1853, both of the Iredell County Registry.
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> 7. The Court has the authority pursuant to G.S. [§] 45-21.27(h) to "make all such orders as may be just and necessary to safeguard the interests of all parties" and has the inherent authority to remedy issues that may arise in foreclosure sales.
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> 8. Michael Johnson has incurred attorney's fees in defense of Wells Fargo's motion . . . which the Court finds to be reasonable and should be borne by Wells Fargo.

Based on its findings and conclusions, the trial court ordered that

> A. The upset period in this matter is reopened for ten (10) days, starting with the date this order is filed;
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> B. The September 15, 2017 upset bid is presently the high bid subject to upset pursuant to the provisions of Chapter 45 of the General Statutes and the terms of this Order, and this matter is remanded to the Clerk; [and]
>
> C. Wells Fargo will pay Michael Johnson the sum of $2,175.00, being the reasonable attorney's fees he incurred in defense of the motion before the Court[.]

On 4 January 2018, Wells Fargo placed an upset bid in the amount of $1,122,981.56. Instead of placing an additional upset bid within the 10-day period, Johnson filed notice of appeal on 10 January from the trial court's order granting Wells Fargo's motion to reopen the upset bid period.

II. Discussion

On appeal, Johnson contends that because the rights of the parties had already become fixed pursuant to N.C. Gen. Stat. § 45-21.29A, the trial court lacked subject matter jurisdiction to reopen the upset bid period. He further contends the trial court abused its discretion in granting Wells Fargo's motion pursuant to N.C. Gen. Stat. § 45-21.27(h) because the trial court's findings of fact and conclusions of law were not supported by the evidence.

In response to Johnson's appeal, Wells Fargo contends the trial court had subject matter jurisdiction pursuant to N.C. Gen. Stat. § 45-21.27(h), and that as a third-party bidder with no interest in the collateral real property, Johnson's "rights" were not fixed. Wells Fargo emphasizes that Johnson is not a party the foreclosure statutes seek to protect, that the trial court properly reopened the upset bid period based on the evidence presented, and that the plain language of N.C. Gen. Stat. § 45-21.27(h) supports the trial court's order.

Each assignment of error is addressed in turn.

A. The trial court had subject matter jurisdiction to reopen the upset bid period.

"In reviewing a question of subject matter jurisdiction, our standard of review is *de novo*." *In re Cornblum*, 220 N.C. App. 100, 102, 727 S.E.2d 338, 340 (2012) (citation omitted).

In contending that the trial court lacked subject matter jurisdiction to reopen the upset bid period, Johnson quotes *Cumberland Cty. Hosp. Sys., Inc. v. N.C. Dep't*

of Health & Human Servs., 242 N.C. App. 524, 528, 776 S.E.2d 329, 333 (2015), for the proposition that "a moot claim is not justiciable, and a trial court does not have subject matter jurisdiction over a non-justiciable claim[.]" He then cites to N.C. Gen. Stat. § 45-21.29A (2017), which provides that "[i]f an upset bid is not filed following a sale, resale, or prior upset bid within the period specified in this Article, the rights of the parties to the sale or resale become fixed." Johnson asserts that "[t]his Court has consistently held that once the upset bid period in a foreclosure proceeding has expired, and the rights of the parties are fixed under N.C. Gen. Stat. § 45-21.29A, any action by a party seeking to prevent the sale from becoming final is moot and subject to dismissal." He relies primarily on *Goad v. Chase Home Fin., LLC*, 208 N.C. App. 259, 704 S.E.2d 1 (2010), to support his argument.

In *Goad*, the plaintiff borrower sought to have a foreclosure sale enjoined. In affirming the trial court's denial of the plaintiff's request, this Court held that

> absent sufficient action by a party seeking to avoid a foreclosure sale to prevent the sale from becoming final, any attempt to enjoin such a sale which has not been heard and decided by the date for the submission of upset bids becomes moot and subject to dismissal at that time.

Id. at 264, 704 S.E.2d at 5. Similarly, in the case of *In re Hackley*, 212 N.C. App. 596, 713 S.E.2d 119 (2011), this Court—relying on its holding in *Goad*—held that where the appellant borrower did not obtain a stay of the foreclosure sale pending appeal,

and the foreclosure sale was consummated and the rights of the parties fixed, the case was moot and the appeal subject to dismissal. *Id.* at 605–06, 713 S.E.2d at 125.

The cases cited by Johnson are distinguishable as they each address a situation in which a borrower was attempting to delay or halt a foreclosure sale. That is simply not the case here, where the dispute does not involve a borrower but rather two bidders, one of which has interests in the collateral real property that stand to be eliminated by the foreclosure sale. That bidder, Wells Fargo, was not seeking to avoid a foreclosure sale altogether, but to reopen the upset bid period on the basis that it did not receive proper notice of Johnson's 15 September upset bid. Wells Fargo correctly asserts that "[t]he present case is an attempt to cure a procedural defect in the foreclosure statutes, to obtain a high bid, and to enhance the rights of the parties to the foreclosure."

In contending that the trial court had subject matter jurisdiction to reopen the upset bid period, Wells Fargo relies on N.C. Gen. Stat. § 45-21.27(h) (2017), which provides as follows:

> The clerk of superior court shall make all such orders as may be just and necessary to safeguard the interests of all parties, and shall have the authority to fix and determine all necessary procedural details with respect to upset bids in all instances in which this Article fails to make definite provisions as to that procedure.

The procedural defect here refers to the vague notice requirements contained in N.C. Gen. Stat. § 45-21.27(e1), discussed in more detail below. As for the trial court's

authority to fix that procedural defect, we conclude that under these circumstances, the trial court had subject matter jurisdiction pursuant to N.C. Gen. Stat. § 45-21.27(h) to reopen and extend the upset bid period for an additional ten days. This assignment of error is therefore overruled.

B. The trial court did not abuse its discretion in reopening the upset bid period.

In his second and final argument on appeal, Johnson contends the trial court's order reopening the upset bid period was not supported by competent evidence. We disagree.

Pursuant to N.C. Gen. Stat. § 45-21.27(h), it is within the trial court's discretion to "make all such orders as may be just and necessary to safeguard the interests of all parties." "Where matters are left to the discretion of the trial court, appellate review is limited to a determination of whether there was a clear abuse of discretion." *In re Brown*, 156 N.C. App. 477, 485, 577 S.E.2d 398, 403 (2003).

N.C. Gen. Stat. § 45-21.27(e) (2017) provides that "[a]t the same time that an upset bid on real property is submitted to the court . . . the upset bidder shall simultaneously file with the clerk a notice of upset bid." N.C. Gen. Stat. § 45-21.27(e1) (2017) requires that the clerk then "notify the trustee or mortgagee who shall thereafter mail a written notice of upset bid by first-class mail to the last known address of the last prior bidder and the current record owner(s) of the property." Of

particular significance to the instant case, subsection (e1) does not provide a deadline by which the trustee must give notice of an upset bid to the last prior bidder.

Here, Wells Fargo moved to reopen the upset bid period on the basis that it did not receive adequate notice as required, or contemplated, by N.C. Gen. Stat. § 45-21.27(e1). In support of its motion, counsel for Wells Fargo emphasized the following timeline of events:

6 September 2017	Wells Fargo placed an upset bid.
6 September 2017	The clerk notified the substitute trustee of Wells Fargo's upset bid via email.
6 September 2017	The substitute trustee mailed notice of Wells Fargo's upset bid to the last prior bidder.
15 September 2017	Johnson placed an upset bid.
15 September 2017	The clerk notified the substitute trustee of Johnson's upset bid via email.
20 September 2017	The substitute trustee mailed notice of Johnson's upset bid to the last prior bidder (*i.e.*, Wells Fargo).
25 September 2017	The upset bid period expired.
28 September 2017	Wells Fargo served its motion requesting an extension of the upset bid period.

As the timeline illustrates, there was an inexplicable five-day delay between the substitute trustee's receipt of notice from the clerk of Johnson's upset bid and its mailing of notice of the same to Wells Fargo.

On appeal, Wells Fargo concedes that "[t]he substitute trustee technically acted in accord with [N.C. Gen. Stat. § 45-21.27(e1), which does not specify when a trustee must give notice of an upset bid to the last prior bidder]; however, the statute did not contemplate the impact of delayed notice by the substitute trustee when there is a party (like [Wells Fargo]) bidding to protect a property interest in the collateral." We agree and hold that under the circumstances of the instant case, the trial court did not abuse its discretion in reopening and extending the upset bid period to safeguard the interests of all parties as permitted by N.C. Gen. Stat. § 45-21.27(h).

III. Conclusion

Where Wells Fargo, as the last prior bidder with interests in the collateral real property that stood to be eliminated by the foreclosure proceeding, did not receive notice of a third-party's upset bid in sufficient time to protect its interests, the trial court properly reopened and extended the upset bid period for an additional ten days. Accordingly, the order of the trial court is hereby:

AFFIRMED.

Chief Judge McGEE and Judge ARROWOOD concur.