IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA18-1058

Filed: 20 August 2019

Wake County, No. 16 SP 2231

In the Matter of the Foreclosure of a Deed of Trust executed by Wendy S. Stephens and Mark T. Stephens in the original amount of $154,800.00 dated August 10, 2005, recorded in Book 11562, Page 2594, Wake County Registry

Appeal by respondents from order entered 4 May 2018 by Judge G. Bryan Collins, Jr. in Wake County Superior Court. Heard in the Court of Appeals 28 March 2019.

Hutchens Law Firm, by Claire L. Collins, for petitioner-appellee.

Mark T. Stephens, pro se.

BERGER, Judge.

Wendy and Mark Stephens ("Respondents") appeal from the trial court's order authorizing foreclosure on a deed of trust by Petitioner Wilmington Savings Fund Society, FSB, d/b/a Christiana Trust, not individually but as trustee for Hillsdale Trust ("Petitioner"). On appeal, Respondents assert several errors committed by the trial court in allowing the foreclosure to proceed. Essentially, Respondents argue that the underlying documents that evidence Respondents' debt and grant Petitioner

the right to foreclose were rescinded by Respondents, and are therefore void. As explained below, we reject these arguments and affirm the order of the trial court.

Factual and Procedural History

On August 10, 2005, Respondents closed on their purchase of real property located in Wake Forest, North Carolina. To secure funding for the purchase of the residential property, Respondent Wendy S. Stephens executed an adjustable rate note whereby she agreed to repay Countrywide Bank a principal amount of $154,800.00 plus all interest owed under the terms of the note. The note was secured by a deed of trust, executed on the same day by Respondents, granting Countrywide Bank a security interest in the property. Countrywide subsequently sold, assigned, and transferred the note to Petitioner. Respondents stopped making payments on their debt at some point before May 1, 2015 and, therefore, defaulted on the deed of trust.

On August 10, 2016, Petitioner appointed Substitute Trustee Services, Inc., as substitute trustee. One week later, Substitute Trustee initiated foreclosure proceedings by filing a Notice of Hearing Prior to Foreclosure. On October 25, 2017, the parties participated in a contested hearing before the Assistant Clerk of Court for Wake County. As required by N.C. Gen. Stat. § 45-21.16(d), the Assistant Clerk found that a valid debt existed, that the holder of the note sought to foreclose, that the note was in default, that Respondents had been served with all requisite notices, that

Respondents had shown no valid reason why the foreclosure should not commence, that the periods of time required by statute had elapsed, and that the foreclosure sale of the property was not barred by statute.

Respondents exercised their right to a *de novo* appeal before the Superior Court and paid the appeal bond of $1,550.00 on October 30, 2017. Due to an administrative error, the receipt evidencing Respondents' bond payment was not entered into the clerk's casefile and the appeal was dismissed. Accordingly, the foreclosure sale went forward and the property was sold on November 20. When the error was discovered, the foreclosure sale and deed were set aside, and Respondents' appeal was allowed to proceed.

At both the hearing before the clerk and the subsequent hearing before the trial court for the appeal of the clerks order, Respondents presented evidence purporting to show that they had rescinded the loan transaction with the original lender, Countrywide Bank, pursuant to the federal Truth in Lending Act, 15 U.S.C. § 1635 ("TILA"). In letters dated August 15, 2007, which Respondents asserted were mailed to Countrywide, Respondents purported to have exercised their right to rescind the note and deed of trust because "two copies of the Notice of the Right to Cancel were not given to [Respondents] at closing." Countrywide neither acknowledged receipt of nor responded to the letters, and none of the letters were sent via registered mail.

In their ongoing challenge to the foreclosure of the property, Respondents had previously filed both federal and state lawsuits. The state lawsuit was dismissed for lack of jurisdiction on November 9, 2016, due to the pendency of the power of sale proceeding. The federal lawsuit was dismissed with prejudice on September 28, 2017 for failure to state a claim, for baseless allegations underlying their claims, and for lack of standing.

Respondents' *de novo* appeal of the clerk's order was heard on January 2, 2018, and an order authorizing the foreclosure to proceed was entered on May 4. It is from this order that Respondents appeal.

Analysis

Respondents contend that the trial court erred in authorizing the non-judicial foreclosure under the power of sale provision because the note had been rescinded and was, thus, void. Therefore, they allege, both the clerk and the trial court erred in accepting this note as evidence of a legal debt. We decline to reach this argument because it is equitable in nature and, therefore, outside the scope of a power of sale foreclosure proceeding. We therefore limit our review to the actions of the trial court, and whether it correctly authorized the foreclosure to proceed.

Additionally, Petitioner filed a motion in this Court on January 2, 2019 seeking sanctions against Respondents for failure to comply with the North Carolina Rules of Appellate Procedure and for prosecuting a frivolous appeal. In their motion for

sanctions, Petitioner asks for monetary sanctions in the amount of $4,327.00 to be levied against Respondents. Petitioner alleges Respondents have unnecessarily delayed the foreclosure proceeding. We will briefly address the motion for sanctions, and deny the motion.

Motion for Sanctions

Pursuant to Rule 28(a) and Rule 34 of the North Carolina Rules of Appellate Procedure, Petitioner moves for the imposition of sanctions against Respondents for failure to clearly define the issues and for prosecuting a frivolous appeal. Rule 34 allows this court to impose sanctions when an "appeal was taken or continued for an improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation." N.C. R. App. P. 34(a)(2) (2017).

> Rules of procedure are necessary in order to enable the courts properly to discharge their duty of resolving disputes. It necessarily follows that failure of the parties to comply with the rules, and failure of the appellate courts to demand compliance therewith, may impede the administration of justice. As this Court explained long ago:
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> > Procedure is essential to the application of principle in courts of justice, and it cannot be dispensed with. It is dangerous to ignore or disregard it. To do so is not only discreditable to the administration of public justice, but it leads eventually to confusion and wrong, and leaves the rights and estates of many people in a more or less perilous condition.
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> *Spence v. Tapscott*, 92 N.C. 576, 578 (1885). Compliance with the rules, therefore, is mandatory.

Dogwood Dev. & Mgmt. Co., LLC v. White Oak Transp. Co., 362 N.C. 191, 193-94, 657 S.E.2d 361, 362 (2008) (purgandum).

It is true that Respondents' brief contains irrelevant and duplicative assignments of error, but it also contains a cognizable argument that asserts legitimate, if not prevailing, issues regarding the authorization of foreclosure. Respondents are highly incentivized to fight the foreclosure as they want to keep their home, and they are also entitled to their day(s) in court. We caution Respondents that compliance with the rules is mandatory. However, in our discretion, we will consider the merit of their discernable argument. *See Sullivan v. Pender Cnty.*, 196 N.C. App. 726, 729, 676 S.E.2d 69, 71 (2009) (cautioning *pro se* Plaintiff that compliance with our Appellate Rules is mandatory, before exercising discretion to address his arguments). Because we cannot conclude this appeal was taken for an improper purpose, the motion for sanctions is hereby denied.

TILA Rescission

"When this Court reviews a trial court's order permitting a foreclosure sale, where the trial court sat without a jury, findings of fact have the force and effect of a verdict by a jury and are conclusive on appeal if there is evidence to support them, even though the evidence might sustain a finding to the contrary." *Matter of Frucella*, ___ N.C. App. ___, ___, 821 S.E.2d 249, 251 (2018), *disc. rev. denied*, ___ N.C. ___, 824 S.E.2d 416 (2019) (citation and quotation marks omitted). "Unchallenged findings of

fact are presumed correct and are binding on appeal." *In re Schiphof*, 192 N.C. App. 696, 700, 666 S.E.2d 497, 500 (2008). "Conclusions of law drawn by the trial court from its findings of fact are reviewable *de novo* on appeal." *In re Foreclosure of Bass*, 366 N.C. 464, 467, 738 S.E.2d 173, 175 (2013) (citation omitted).

> A power of sale is a contractual arrangement which may be contained in a mortgage or a deed of trust. When a deed of trust contains a power of sale provision, the trustee or mortgagee is vested with the power to sell the real property mortgaged without any order of court in the event of a default.

In re Foreclosure of Cain, 248 N.C. App. 190, 193, 789 S.E.2d 835, 839 (2016) (citation and quotation marks omitted). To be granted authorization to proceed with a power of sale provision in a note or deed of trust, the foreclosing mortgagee or trustee must prove the existence of six elements and,

> 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. 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. . . .

N.C. Gen. Stat. § 45-21.16(d) (2017).

During this pre-foreclosure hearing, "the clerk is limited to making the six findings of fact specified under subsection (d) [of Section 45-21.16]." *Cain*, 248 N.C. App. at 193, 789 S.E.2d at 839 (citation and ellipses omitted). "The clerk's decision may be appealed to superior court for a hearing *de novo*, N.C. Gen. Stat. § 45-21.16(d1), but the superior court is similarly limited to determining whether subsection 45-21.16(d)'s six criteria have been satisfied." *Id.* (citing *In re Foreclosure of Carter*, 219 N.C. App. 370, 373, 725 S.E.2d 22, 24 (2012)); *see also In re Foreclosure of Godwin*, 121 N.C. App. 703, 704, 468 S.E.2d 811, 812 (1996).

"Evidence of legal defenses that tend to negate any of the [six] findings made under G.S. [S]ection 45-21.16 may be raised and considered at the hearing before the clerk or on an appeal therefrom." *Godwin*, 121 N.C. App. at 705, 468 S.E.2d at 812 (citation omitted). "The [Section 45-21.16] hearing was not intended to settle all matters in controversy between mortgagor and mortgagee, nor was it designed to provide a second procedure for invoking equitable relief." *In re Watts*, 38 N.C. App. 90, 94, 247 S.E.2d 427, 429 (1978). As such, "equitable defenses may not be raised in a hearing pursuant to [Section] 45-21.16, but must instead be asserted in an action to enjoin the foreclosure sale under [Section] 45-21.34." *In re Foreclosure of Fortescue*, 75 N.C. App. 127, 131, 330 S.E.2d 219, 222 (1985) (citation omitted). Rescission

asserted as a defense pursuant to TILA is an equitable defense. *In re Foreclosure of Gilbert*, 211 N.C. App. 483, 488, 711 S.E.2d 165, 170 (2011).

Here, Respondents raised the equitable defense of TILA rescission during their power of sale foreclosure proceeding. Since equitable defenses fall outside the narrow scope of a power of sale proceeding, both the clerk and the trial court properly declined to consider the rescission argument. Rather, a party must assert equitable defenses in a separate civil action brought in superior court under N.C. Gen. Stat. § 45-21.34. *Simpson*, 211 N.C. App. at 489, 711 S.E.2d at 170; *Fortescue*, 75 N.C. App. at 131, 330 S.E.2d at 222.

"Any [person with an interest in real estate] may apply to a judge of the superior court, prior to the time that the rights of the parties to the sale or resale becoming fixed pursuant to G.S. 45-21.29A to enjoin such sale." N.C. Gen. Stat. § 45-21.34 (2017). This court has construed "apply" to mean that "an application must be heard and decided, as well as filed, prior to the date upon which the rights of the parties to the sale became fixed in order for the Superior Court to retain the authority to enjoin a foreclosure sale." *Goad v. Chase Home Fin., LLC*, 208 N.C. App. 259, 262, 704 S.E.2d 1, 3 (2010). The rights of the parties to a foreclosure sale become fixed upon the expiration of the period for filing an upset bid as specified in Section 45-21.27, the provision of injunctive relief precluding the consummation of the

foreclosure sale, or the occurrence of some similar event. N.C. Gen. Stat. § 45-21.29A (2017); *Goad*, 208 N.C. App. at 263, 704 S.E.2d at 4.

Significantly, Respondents do not dispute any of the findings of fact made below, and "[u]nchallenged findings of fact are presumed correct and are binding on appeal." *Schiphof*, 192 N.C. App. at 700, 666 S.E.2d at 500. Here, the trial court found the existence of all six requisite elements necessary for the authorization of the foreclosure sale. Because these findings are binding here, and because Respondents' other arguments seek equitable relief inappropriate to this type of proceeding, we affirm the trial court's determination that the foreclosure sale may proceed.

AFFIRMED.

Judges MURPHY and HAMPSON concur.

Report per Rule 30(e).