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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA18-1278

Filed: 16 July 2019

Franklin County, No. 17 CVS 565

DEUTSCHE BANK NATIONAL TRUST COMPANY AS TRUSTEE FOR FIRST FRANKLIN MORTGAGE LOAN TRUST 2006-FF9, MORTGAGE PASS-THROUGH CERTIFICATES, SERIES 2006-FF9, Plaintiff,

v.

BRIAN LAMONT FERGUSON; XAVIER MILTON EARQUHART a/k/a MILTON XAVIER a/k/a XAVIER MILTON, INDIVIDUALLY and as TRUSTEE OF THE FERGUSON FAMILY IRREVOCABLE TRUST OF 2015; CSH 2016-1 BORROWER, LLC; WILMINGTON SAVINGS FUND SOCIETY, FSB, d/b/a CHRISTIANA TRUST, as TRUSTEE FOR THE REGISTERED HOLDERS OF COLONY STARWOOD HOMES 2016-1 TRUST SINGLE-FAMILY RENTAL PASS-THROUGH CERTIFICATES; TD SERVICE FINANCIAL CORPORATION, Defendants.

Appeal by Defendants from order entered 3 July 2018 by Judge Henry W. Hight in Franklin County Superior Court. Heard in the Court of Appeals 8 May 2019.

The Law Office of John T. Benjamin, Jr., P.A., by John T. Benjamin, Jr. and Jake R. Garris, for Plaintiff-Appellee.

Horack, Talley, Pharr & Lowndes, P.A., by Amy P. Hunt, for Defendant-Appellant, CSH 2016-1 Borrower, LLC.

DILLON, Judge.

This matter concerns the validity of a deed of trust recorded in 2006 in favor of Plaintiff Deutsche Bank National Trust ("Deutsche Bank") encumbering certain real property located in Wake Forest (the "Property"), but which was canceled without Deutsche Bank's knowledge or consent in 2015. Defendant CSH 2016-1 Borrower, LLC ("CSH"), who owned the Property at the commencement of this action, appeals from an order granting summary judgment in favor of Deutsche Bank declaring that its deed of trust still encumbers the Property.

I. Background

In March 2006, Defendant Brian Lamont Ferguson purchased the Property for approximately $227,000.00. Deutsche Bank financed most of Defendant Ferguson's purchase price, securing its loan by filing a deed of trust recorded in Book 1535, Page 293 of the Franklin County Register of Deeds (the "Deutsche Bank Deed of Trust"). The Property is a single-family residence that is part of a homeowners association (the "HOA").

Over the course of time, Mr. Ferguson defaulted on the Deutsche Bank Deed of Trust. Also, Mr. Ferguson fell behind on making payments to the HOA.

On 9 February 2015, the HOA conducted a foreclosure sale of the Property to enforce its statutory lien securing delinquent dues.[1]

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[1] Because the HOA's statutory lien was junior to the Deutsche Bank Deed of Trust, it would be expected that any bidder would not bid an amount anywhere near the Property's market value, as the successful bidder would take subject to the Deutsche Bank Deed of Trust.

At the foreclosure sale, the HOA was the high bidder and was deeded the Property. The HOA immediately sold the Property for a nominal amount to an entity controlled by Defendant Xavier Milton Earquhart. However, sometime that day, Defendant Earquhart fraudulently recorded a Satisfaction of Security Instrument, which purported to cancel the Deutsche Bank Deed of Trust: Deutsche Bank had no knowledge of the cancellation of its Deed of Trust.[2] Defendant Earquhart was not associated with Deutsche Bank and had no authority to cancel the Deutsche Bank Deed of Trust; Mr. Earquhart was subsequently convicted for his role in this fraud scheme.[3]

The next month, in March 2015, an entity controlled by Mr. Earquhart sold the Property to Colfin AH-North Carolina 2, LLC, ("Colfin") for approximately $181,000.00.

In August 2015, Deutsche Bank received a title report concerning the Property which showed the HOA foreclosure.

[2] Appellant CSH admitted to this fact, both in the pleadings as well as specifically stipulating at the Summary Judgment Hearing that CSH was "not here fighting about whether [Deutsche Bank] had a wrongful cancellation. [Deutsche Bank] had a wrongful cancellation. That's – we'll stipulate to that."

[3] The indictment against Mr. Earquhart provides, in pertinent part, that "[b]etween February 2015 and March of 2015, EARQUHART obtained title to 1216 Cantlemere Street in Wake Forest, North Carolina, by causing a North Carolina Trust, known as the Ferguson Family Irrevocable Trust of 2015, to become the highest bidder at an HOA auction. An existing lien on 1216 Cantlemere Street was fraudulently satisfied, and EARQUHART caused the Ferguson Family Irrevocable Trust of 2015 to sell the property to an unwitting third party [under the appearance of clean title]. EARQUHART reaped the proceeds of the sale by withdrawing the funds from a BB&T bank account he opened in the name of the holding company."

In June 2016, Colfin conveyed the Property to CSH, which is an affiliate of Colfin, for no consideration.

In July 2017, Deutsche Bank commenced the present action against a number of parties, including CSH, seeking a declaratory judgment that its Deed of Trust continues to encumber the Property and for similar relief. CSH was the only Defendant to respond and defend against the present action. Deutsche Bank also filed a notice of *lis pendens*.

While the matter was pending, CSH conveyed the Property to another affiliate entity, SRPS, LP, for no consideration.[4]

In June 2018, Deutsche Bank filed a motion for summary judgment. A hearing on the motion was held in Franklin County Superior Court on 3 July 2018. Deutsche Bank was granted summary judgment on all claims.

CSH timely appealed.

II. Analysis

We review an order granting summary judgment *de novo*. *Falk v. Fannie Mae*, 367 N.C. 594, 599, 766 S.E.2d 271, 275 (2014). Section 1A-1, Rule 56(c) of our General Statutes provides that summary judgment is proper "if the pleadings, depositions,

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[4] We acknowledge Deutsche Bank's motion to dismiss, in which it argues that since CSH has transferred its interest in the Property, it "no longer ha[s] any ownership interest, or any other right, title, or beneficial interest in the Property" and may not appeal the trial court's summary judgment ruling. However, we conclude that the appeal is proper since Judge Hight had authority to enter summary judgment against CSH and that any successor in title is bound by our determination on appeal based on the *lis pendens* filing.

answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." N.C. Gen. Stat. § 1A-1, Rule 56(c) (2018).

For the following reasons, we affirm Judge Hight's summary judgment order.

Our Supreme Court has instructed that the discharge of a perfected mortgage by the unauthorized act of a third party entitles the mortgagee to restoration of its priority status, even over an innocent purchaser or mortgagee for value:

> As between a mortgagee, whose mortgage has been discharged of record solely through the act of a third person, whose act was unauthorized by the mortgagee, and for which he is in no way responsible, and a person who has been induced by such cancellation to believe that the mortgage has been canceled in good faith, and has dealt with the property by purchasing the title, or accepting a mortgage thereon as security for a loan, the equities are balanced, and the lien of the prior mortgage, being first in order of time, is superior.

Union Cent. Life Ins. Co. v. Cates, 193 N.C. 456, 462, 137 S.E. 324, 327 (1927).

But, as our Supreme Court has further instructed, if the mortgagee "[i]s responsible for the mortgage being released of record, as when the entry of satisfaction is made possible by his own neglect . . . he will not be permitted to establish" the priority of his lien to the detriment of a subsequent innocent purchaser. *Id.* In such case, "the owner of a mortgage . . . will lose priority over an innocent purchaser if the mortgagee is negligent with respect to the *release* of the mortgage."

First Fin. Sav. Bank, Inc. v. Sledge, 106 N.C. App. 87, 88, 415 S.E.2d 206, 207-08 (1992) (emphasis added).

In this present case, CSH has conceded that Deutsche Bank had no role in the cancellation of the Deutsche Bank Deed of Trust whatsoever. CSH, though, contends that Deutsche Bank should not be entitled to retain its priority over CSH because Deutsche Bank was negligent in not discovering the fraud sooner than it did or not foreclosing on its Deed of Trust sooner. But Deutsche Bank owed no duty to CSH to foreclose within any particular time. And there is no precedent to suggest that a mortgagee can lose priority except where it has been negligent in the *release* of its lien.

In any event, there is no evidence in this case to suggest that Deutsche Bank had induced CSH to believe that the Deutsche Bank Deed of Trust had been properly canceled or had otherwise acted in any way towards CSH to shift the balance in the equities. And, further, the evidence establishes that CSH's affiliate entity which had paid consideration to Mr. Earquhart in reliance on his fraud did so only a month after the fraud occurred, long before Deutsche Bank received a title update showing the HOA foreclosure sale.

CSH further contends that Deutsche Bank's motion for summary judgment was premature. Indeed, this Court has held that "summary judgment is premature when discovery procedures, which might lead to the production of evidence relevant

to the motion, are still pending and the party seeking discovery has not been dilatory in doing so." *Fayetteville Publ'g Co. v. Advanced Internet Techs., Inc.*, 192 N.C. App. 419, 431, 665 S.E.2d 518, 525 (2008) (internal citations omitted). However, this rule emphasizes that summary judgment is only premature when discovery procedures might lead to the production of *relevant* evidence. *See Manhattan Life Ins. Co. v. Lacy J. Miller Mach. Co.*, 60 N.C. App. 155, 159, 298 S.E.2d 190, 193 (1982). But if the "undisputed facts themselves resolve the matter" without the need for any additional evidence, then any further evidence to be gleaned from discovery is unnecessary. *Id.*

We conclude that based on the evidence in the record, there was no relevant evidence yet to be discovered: CSH admitted that the Deutsche Bank Deed of Trust was canceled through the unauthorized act of a third party and that Deutsche Bank did not act negligently in causing the actual cancellation. Any factual inquiries relating to any other conduct by Deutsche Bank in this matter (*e.g.,* its lack of promptness in seeking foreclosure of a deed of trust or in bringing this action sooner) are irrelevant.

CSH also argues that it is an innocent bona fide purchaser for value ("BFPV"), thus rendering summary judgment improper. In so arguing, CSH contends that Deutsche Bank was better positioned to determine the fraud scheme and to prevent the fraudulent cancellation of the Deutsche Bank Deed of Trust. Our Supreme Court's holding in *Union Central* established that a subsequent purchaser's status as

a BFPV is irrelevant, provided that the original lender was not responsible or negligent in causing the cancellation itself. *Union Cent.*, 193 N.C. at 462, 137 S.E. at 327. Where the lienholder is not at fault for the cancellation, "[t]he cancellation is a nullity; it has no force or effect," *id.,* thus, barring any subsequent purchaser from claiming superior title.

Similarly here, it is immaterial whether or not Colfin, who subsequently conveyed the Property to its affiliate CSH, purchased the Property in good faith. Therefore, CSH is not awarded protection as a BFPV where Deutsche Bank was not responsible or negligent in the fraudulent cancellation of its Deed of Trust.

III. Conclusion

We affirm the trial court's order granting summary judgment to Deutsche Bank.

AFFIRMED.

Judges ZACHARY and BERGER concur.

Report per Rule 30(e).