IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA18-1302

Filed: 17 September 2019

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 13 August 2018 by Judge Hugh B. Lewis in Mecklenburg County Superior Court. Heard in the Court of Appeals 7 August 2019.

Bradley Arant Boult Cummings LLP, by Brian M. Rowlson, for Petitioner-Appellee.

Scarbrough & Scarbrough, PLLC, by Madeline J. Trilling, for Respondents-Appellants.

BROOK, Judge.

Rebecca and Greg Worsham ("Respondents") appeal the trial court's order allowing foreclosure of their home to proceed. In a prior appeal, we reversed the order of the trial court allowing foreclosure of Respondents' home to proceed, remanding the matter for further proceedings. *See In re Worsham*, ___ N.C. App. ___, 815 S.E.2d 746, 2018 WL 3233086 (2018) (unpublished) ("*Worsham I*"). The present appeal originates from those proceedings. For the reasons that follow, we affirm the order of the trial court.

I. Background

The facts of this dispute are set out more fully in our opinion in *Worsham I* and we recount only those necessary to resolve the instant appeal. On 12 April 2005 Respondents purchased a home located at 3501 Providence Road, in Charlotte, North Carolina, financing the purchase with a loan secured by a deed of trust. On 8 January 2007, Respondents refinanced the home, securing the refinancing with a deed of trust. The deed of trust from the 2007 refinancing was recorded with the Mecklenburg County Register of Deeds. Respondents have not made any payments on the note from the 2007 refinancing since 2012.

The note provides in relevant part that if the borrower is "in default, the Note Holder may send [] a written notice telling [the borrower] that if [the borrower] do[es] not pay the overdue amount by a certain date, the Note Holder may require [the borrower] to pay immediately the full of amount of Principal which has not been paid and all the interest that [the borrower] owe[s] on that amount." On 21 March 2016 Respondents were notified that they were in default and that foreclosure proceedings would be initiated if the default was not cured.

On 19 July 2016 the substitute trustee initiated foreclosure proceedings with the clerk of Mecklenburg County Superior Court. The matter was dismissed by the clerk on 6 December 2016 because the clerk did not believe there was sufficient evidence of the substitute trustee's authority to foreclose under the deed of trust. On

8 December 2016, HSBC Bank USA, N.A. ("Petitioner") appealed the clerk's order for a *de novo* hearing in superior court.

Judge Hugh B. Lewis presided over a hearing on 13 March 2017, during which the original note, a certified copy of the deed of trust, and a certified copy of the assignment of the deed of trust were submitted to the court. On 12 April 2017, the court entered an order allowing foreclosure to proceed. Respondents timely appealed.

In an unpublished opinion, this Court on 3 July 2018 reversed the trial court's order and remanded the matter for further proceedings. *See Worsham I*, at *1. In our opinion we explained that reversal was required because the trial court had not found in the 12 April 2017 order that Petitioner was the holder of the debt evidenced by the note, as N.C. Gen. Stat. § 45-21.16(d) requires. *Id.* at *3. We therefore remanded the matter for further proceedings because the trial court had "*summarily* concluded that Petitioner had the right to foreclose on the property without first having made a finding whether Petitioner was the holder of the debt at issue." *Id.* (emphasis added). We noted in conclusion that "[o]n remand, the trial court *may* . . . make additional findings based on the existing record." *Id.* at *4 (emphasis added).

After the mandate of our 3 July 2018 opinion had issued, on 13 August 2018, without further hearing on remand, the trial court entered an order allowing the foreclosure to proceed, finding as follows:

> 1. That Respondent Rebecca Worsham originally executed a promissory note in the amount of $249,000 in

favor of lender Delta Funding Corporation.

2. That the promissory note was secured by a Deed of Trust executed by both Respondents, with such Deed of Trust being an encumbrance on the real property located at 3501 Providence Road, Charlotte, North Carolina 28211 ("Property"). The Deed of Trust contains a valid and enforceable power of sale provision.

3. That Petitioner is currently in possession of the original promissory note and presented the original promissory note to the court at the hearing without objection by the Respondents.

4. That the original promissory note provided by Petitioner contains a chain of valid and complete indorsements from Delta Funding Corporation to Petitioner HSBC Bank USA, N.A., as Indenture Trustee for the Registered Noteholders of Renaissance Home Equity Loan Trust 2007-1.

5. That Petitioner produced certified copies of the recorded 1) Deed of Trust securing the Property, 2) the assignment of the deed of trust to Petitioner, and 3) appointment of substitute trustees.

6. That the evidence provided by Petitioner, including the affidavit, loan payment history and correspondence, and by Respondents' own admission at the hearing, show that the Respondents have repeatedly failed to make each of the monthly payments as required by the promissory note for several years. Respondents did not provide evidence at the hearing refuting this evidence of this continuing and ongoing default.

7. That Petitioner sent Respondent Rebecca Worsham a pre-foreclosure notice dated March 21, 2016, advising of Petitioner's intent to foreclose if the ongoing and continuing default was not corrected within 45 days. Respondent failed to correct the default.

> 8. That the Respondents are not in the military and received the required notice of hearing.

The trial court therefore made the following conclusions of law:

> 1. Service. Each person/entity entitled to notice was duly served with proper notice as provided by law.
>
> 2. Holdership of Note and Validity of Debt: That Petitioner HSBC Bank USA, N.A., as Indenture Trustee for the Registered Noteholders of Renaissance Home Equity Loan Trust 2007-1 is the holder of said promissory note and Deed of Trust to be foreclosed, and that the promissory note evidences a valid debt owed by Respondents.
>
> 3. Default: That Respondents are now in default of the promissory note, and the Deed of Trust gives Petitioner the right to foreclose under a power of sale and is enforceable according to its terms.
>
> 4. Home Loan Status: That the underlying promissory note is a home loan as provided by N.C. Gen. Stat. § 45-101(1b), the requisite pre-foreclosure notice was provided in all material respects, and that all relevant periods of time have elapsed prior to the filing of a notice of hearing in this foreclosure proceeding.
>
> 5. Military Status: That the foreclosure sale is not barred by N.C.G.S. § 45-21-12A because the provisions of N.C.G.S. § 45-21-12A are inapplicable to this current proceeding and Respondents do not challenge this statutory element.
>
> 6. That no valid defense or evidence was presented to the Court by the Respondents as to why the foreclosure should not proceed.
>
> 7. Per the July 3, 2018 decision of the North Carolina

> Court of Appeals, this Order is intended to replace and supersede the Order Authorizing the Foreclosure of the Property Through the Power of Sale Authorized by the Deed previously entered by this Court on April 12, 2017.

Respondents timely appealed the trial court's 13 August 2018 order.

II. Analysis

Respondents raise a number of arguments on appeal, which we address in turn. We begin, however, with an overview of the relevant law. We go on to hold (1) that the trial court's challenged findings were supported by competent evidence; (2) that the trial court's findings were made with adequate specificity, and included the findings necessary to support the conclusions the trial court reached; (3) that the trial court's findings did, in fact, support its conclusions of law; and (4) that the trial court's conclusions of law were not erroneous. We therefore affirm the trial court's order.

A. Standard of Review

> 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 and whether the conclusions reached were proper in light of the findings. . . . The trial court, in an appeal of a foreclosure action, was to conduct a *de novo* hearing to determine the same four issues determined by the clerk of court: (1) the existence of a valid debt of which the party seeking foreclosure is the holder, (2) the existence of default, (3) the trustee's right to foreclose under the instrument, and (4) the sufficiency of notice of hearing to the record owners of the property.

Trustee Servs., Inc. v. R.C. Koonts and Sons Masonry, Inc., 202 N.C. App. 317, 321, 688 S.E.2d 737, 740-41 (2010) (internal marks and citation omitted).

> Competent evidence is evidence that a reasonable mind might accept as adequate to support the finding. . . . Findings of fact made by the trial judge are conclusive on appeal if supported by competent evidence, even if there is evidence to the contrary. . . . Conclusions of law drawn by the trial court from its findings of fact are reviewable *de novo* on appeal.

City of Asheville v. Aly, 233 N.C. App. 620, 625-26, 757 S.E.2d 494, 499 (2014) (internal marks and citation omitted).

B. Legal Framework for Power of Sale Foreclosures

A power of sale is a contractual provision in a deed of trust conferring upon the trustee the power to sell real property pledged as collateral for a loan in the event of default. *In re Adams*, 204 N.C. App. 318, 321, 693 S.E.2d 705, 708 (2010) (internal marks citation and omitted). The benefit of power of sale foreclosure is the avoidance of "lengthy and costly foreclosure[] by action . . . in favor of a private contractual remedy[.]" *Id.*

Chapter 45 of the North Carolina General Statutes sets out the requirements that must be met for a power of sale foreclosure to proceed:

> 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) . . . , and (vi) that the sale is not barred by

> G.S. 45-21.12A, [the military status exception,] 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.

N.C. Gen. Stat. § 45-21.16(d) (2017). As the Supreme Court has observed, the General Assembly enacted Chapter 45 to be the "comprehensive and exclusive statutory framework governing non-judicial foreclosures by power of sale." *In re Lucks*, 369 N.C. 222, 226, 794 S.E.2d 501, 505 (2016).

Chapter 45 prescribes certain minimal judicial procedures, including a hearing in front of the clerk of the court to protect the debtor's interest "for the sole purpose of requiring a creditor to establish its right to proceed with the foreclosure." *Id.* During the hearing, the debtor is free to raise evidentiary objections that would negate any of the findings required under N.C. Gen. Stat. § 45-21.16. *In re Goforth Props.*, 334 N.C. 369, 374-75, 432 S.E.2d 855, 859 (1993).

A party to the proceeding can challenge the clerk's determination in superior court and the trial judge will determine the competency, admissibility, and sufficiency of the evidence. *See In re Lucks*, 369 N.C. at 227-28, 794 S.E.2d at 506 (internal marks and citation omitted). After reviewing the determination of the clerk of court, the trial judge must, in writing, (1) "find the facts on all issues of fact joined on the pleadings; (2) [] declare conclusions of law arising on the facts found; and (3) [] enter judgment accordingly." *In re Garvey*, 241 N.C. App. 260, 265, 772 S.E.2d 747, 751

(2015) (internal marks and citation omitted). The purpose of these requirements is to enable appellate review. *Id.* at 265, 772 S.E.2d at 751 (citation omitted).

C. The Trial Court's Findings and Conclusions

Respondents first challenge the trial court's finding that they were in default on the note from the 2007 refinancing. Respondents also challenge the trial court's findings regarding Petitioner's authority to foreclose. Respondents then argue alternatively that even if they were in default, Petitioner was barred from proceeding with foreclosure based on the Supreme Court's decision in *In re Lucks*, 369 N.C. 222, 794 S.E.2d 501 (2016). Respondents finally argue that foreclosure was not authorized as a matter of law, and that the record lacks the support required for the trial court to conclude that foreclosure was authorized. We reject these arguments in turn.

1. Default

Respondents first challenge the trial court's finding that they were in default based on the terms of several loan modifications and the alleged failure of their mortgage servicer to accept several payments attempted in early 2012. However, it is undisputed that Respondents have not made any payments on the note since early 2012. The assertion by Respondents that they "never defaulted and [they] made payments in accordance with the Third Mod even after [their mortgage servicer] began wrongfully rejecting [their] payments" is belied by their failure to present any evidence at the 13 March 2017 hearing that they had made a single payment since

2012. None of Respondents' arguments on appeal about the amount due under the terms of the allegedly operative loan modification is truly responsive to the question of whether Respondents were in default at the time of the 13 March 2017 hearing. This is so because none of the iterations of Respondents' positions about the meaning of the terms of the various loan modifications explains how their failure to make *any* payments since 2012 did not constitute a default on the obligation owing under the note.[1]

"[W]hether a party is in default on a contract is a question of fact." *In re Manning*, 228 N.C. App. 591, 597, 747 S.E.2d 286, 291 (2013) (citation omitted). The question dispositive of Respondents' arguments related to whether they were in default at the time of the March 2017 hearing is whether "evidence [] a reasonable mind might accept as adequate to support [a] finding," *see Aly*, 233 N.C. App. at 625-26, 757 S.E.2d at 499, "support[ed] the trial court's findings of fact . . . [regarding] the existence of default," *see R.C. Koonts and Sons Masonry, Inc.*, 202 N.C. App. at 321, 688 S.E.2d at 740-41. We hold that it did.

The competent evidence supporting the trial court's finding that Respondents were in default at the time of the March 2017 hearing for "repeatedly fail[ing] to make each . . . monthly payment[] . . . for several years" included "the evidence provided by

[1] The best Respondents have done to answer this question is to suggest that Petitioner should not be allowed to benefit from a default manufactured by the refusal of its mortgage servicer to accept certain payments in 2012. But this suggestion ignores a five-year period of non-payment between early 2012 and March 2017; Respondents do not dispute that no payments have been made since 2012.

Petitioner, including the affidavit, loan payment history[,] and correspondence, and by Respondents' own admission at the hearing," as the trial court noted in its 13 August 2018 order. The 27 January 2017 affidavit referenced by the trial court, for example, contained averments that "the last payment applied to the Loan was received January 13, 2012 and was applied to the payment due November 1, 2011"; that "Borrower remains in default under the terms of the Note and Deed of Trust due to nonpayment"; that "[t]he account is due for payment from December 1, 2011, and subsequent months"; that "[t]he outstanding principal balance is $265,522.15"; and that "[n]o further payments have been applied to the Loan, and the Loan remains due for December 1, 2011 and subsequent months." These averments are consistent with the payment history and the correspondence referenced by the trial court, all of which was evidence "a reasonable mind might accept as adequate to support the finding." *Aly*, 233 N.C. App. at 625-26, 757 S.E.2d at 499. Respondents presented no contrary evidence at the 2017 hearing. Accordingly, "[a]s [R]espondents ceased making payments on a valid debt, we conclude that there is competent evidence of a default." *In re Manning*, 228 N.C. App. at 597, 747 S.E.2d at 291.

2. Holder of Debt and Indorsements

Despite faulting the trial court on appeal for not crediting what they contend is evidence suggesting otherwise, Respondents did not present any evidence at the 13 March 2017 hearing that the assignment to the substitute trustee was ineffective,

nor did Respondents present any evidence at the March 2017 hearing that the allonges containing the indorsements from the originator of the loan to Petitioner were improperly made or altered. Neither did Respondents dispute the authenticity of the original promissory note at the March 2017 hearing. Instead, Respondents disputed the effectiveness and validity of the allonges to transfer the note to Petitioner because of the three allonges affixed to the note, one was marked "void," one was not dated, and the other post-dated the date the originator of the loan declared bankruptcy. Respondents reiterate these challenges on appeal.

These challenges, however, are "tantamount to attacks on the credibility of the evidence, which we will not review." *In re Frucella*, ___ N.C. App. ___, ___, 821 S.E.2d 249, 253 (2018) (citation omitted). "In the context of a superior court's *de novo* hearing on nonjudicial foreclosure under power of sale, the competency, admissibility, and sufficiency of the evidence is a matter for the trial court to determine." *In re Clayton*, ___ N.C. App. ___, ___, 802 S.E.2d 920, 924 (2017) (internal marks and citation omitted). We therefore hold that that the trial court's findings that Petitioner was "currently in possession of the original promissory note" and that the note "contain[ed] a chain of valid and complete indorsements from Delta Funding Corporation to Petitioner HSBC Bank USA, N.A." were supported by competent evidence, as the weight to afford the evidence in support of these findings was properly determined by the trial court.

3. Same Default

Respondents contend in the alternative that even if there was a default at the time of the March 2017 hearing, it was the same default upon which the earlier, 12 April 2017 order allowing foreclosure to proceed was predicated, and under the Supreme Court's holding in *In re Lucks*, 369 N.C. 222, 794 S.E.2d 501 (2016), Petitioner cannot foreclose twice based on the same default. We disagree with Respondents' reading of *In re Lucks*. We hold that the Supreme Court's decision in *In re Lucks* is not implicated by the trial court's order to allow foreclosure to proceed in this case based on this Court's decision in *Gray v. Federal Nat'l Mortgage Assoc.*, ___ N.C. App. ___, ___ S.E.2d ___, 2019 WL 2528575 (2019).

In re Lucks involved a power of sale foreclosure that both the clerk of court and the trial court on appeal from the clerk's decision had *dismissed*. *See* 369 N.C. at 223-24, 794 S.E.2d at 503-04. The petitioner appealed and a divided panel of this Court reversed the trial court's dismissal, remanding the matter for further proceedings. *In re Lucks*, 246 N.C. App. 515, 785 S.E.2d 185 (2016) (unpublished opinion), *rev'd*, 369 N.C. 222, 794 S.E.2d 507. The Supreme Court then reversed the opinion of this Court. *See In re Lucks*, 369 N.C. at 229, 794 S.E.2d 501. The trial court's dismissal, and the Supreme Court's reversal of this Court, centered on the authenticity and reliability of what the Supreme Court described as "the crucial document at issue in [the case],"

which purported to be a limited power of attorney authorizing appointment of a substitute trustee under the deed of trust. *See id.* at 224, 794 S.E.2d at 504.

The Supreme Court identified a number of issues with this document that led it to conclude that the trial court was correct to dismiss the proceeding. *Id.* at 224-25, 794 S.E.2d at 504. First, the recording stamp on the final page of the document stated that it was recorded three years *prior* to its purported date of execution; and second, the stamp indicated that the document was eleven pages long, when it in fact was fourteen. *Id.* at 225, 794 S.E.2d at 504. Third, the stamp stated that the document was recorded with the Montgomery County Register of Deeds, when the home in question was located in Mecklenburg County, meaning that the document should have been recorded with the Mecklenburg County Register of Deeds. *Id.* The respondents had made a number of objections when this document was presented to the trial court. *Id.*

Amongst other things, the Supreme Court held that the doctrines of res judicata and collateral estoppel do not apply when the clerk of court or the trial court on appeal from the clerk's decision *deny* a request to proceed with a power of sale foreclosure. *Id.* at 227-28, 794 S.E.2d at 506. The Supreme Court noted that when the clerk of court or trial court *refuses* to authorize a foreclosure to proceed, "the creditor is prohibited from proceeding again with a non-judicial foreclosure on the *same* default[.]" *Id.* at 227, 794 S.E.2d at 506 (emphasis in original). "Likewise," the

Supreme Court explained, "the creditor may proceed non-judicially on another default." *Id.* at 228, 794 S.E.2d at 506.

Courts in North Carolina, including this Court, have since grappled with the correct interpretation of the Supreme Court's holding in *In re Lucks*. *See Vicks v. Ocwen Loan Servicing*, *LLC*, No. 3:16-cv-00263, 2017 WL 2490007 (W.D.N.C. June 8, 2017) (unpublished); *In re Burgess*, 575 B.R. 330 (Bankr. E.D.N.C. 2017); *Gray v. Federal Nat'l Mortgage Assoc.*, ___ N.C. App. ___, ___ S.E.2d ___, 2019 WL 2528575 (2019).

Vicks involved a lawsuit against a mortgage servicer and others seeking to collaterally attack and set aside an order entered by the clerk of court in Union County Superior Court that allowed foreclosure of the plaintiffs' property to proceed. 2017 WL 2490007 at *1. In *Vicks*, the plaintiffs cited the Supreme Court's decision in *In re Lucks* in support of their collateral attack on the order entered by the clerk of court in Union County. *Id.* at *2, n. 3. Rejecting this argument, the court explained that it understood the Supreme Court's decision to mean that the doctrines of res judicata and collateral estoppel in a power of sale foreclosure proceeding "do not apply in their 'traditional' sense [] [because] once the clerk or trial court denies authorization [of] a foreclosure sale, a creditor may not seek a non-judicial foreclosure based on the *same default*." *Id.* (emphasis in original). The court concluded, however, that *In re Lucks* did not stand for the proposition that the doctrine of res judicata did

not bar the plaintiffs from collaterally attacking in federal court the decision by the clerk of court in Union County where the clerk had *allowed* the foreclosure to proceed. *See id.*

In re Burgess involved an analogous adversary proceeding in bankruptcy court in which the debtor sought to collaterally attack the clerk of court's order in Wake County Superior Court allowing foreclosure to proceed. *See* 575 B.R. at 338. Citing *Vicks*, the bankruptcy court concluded that the doctrines of res judicata and collateral estoppel prevented a collateral attack via an adversary proceeding in bankruptcy court of the decision by the clerk of court of Wake County Superior Court allowing the foreclosure of the debtor's home to proceed, despite language in *In re Lucks* potentially suggesting otherwise. *Id.* at 342-44 (citing *Hardin v. Bank of America, N.A. et al., LLC*, No. 7:16-CV-75-D, 2017 WL 44709 (E.D.N.C. Jan. 3, 2017) (unpublished)).

Gray similarly involved a lawsuit collaterally attacking the order of the clerk of court of Dare County Superior Court allowing foreclosure of the plaintiffs' home to proceed. ___ N.C. App. ___, ___, S.E.2d ____, ____, 2019 WL 2528575 *4. *Gray*, unlike *Vicks* and *In re Burgess*, was filed in state court, and was appealed to this Court from the trial court's interlocutory order denying one of the defendant's motions for summary judgment as to some of the claims in the case. *Id.* at *1.

Reviewing the federal decisions in *Vicks* and *In re Burgess*, a panel of this Court, noting that these federal decisions were persuasive authority only and not binding, held that while *In re Lucks* was controlling precedent, it "simply stands for the proposition that the doctrines of res judicata and collateral estoppel do not apply in situations where foreclosure was *not* authorized by the clerk of court." *Id.* at *4 (emphasis added). The *Gray* Court explained further that in deciding *In re Lucks*, it "d[id] not believe the Supreme Court intended for its holding to apply . . . where a clerk enters an order authorizing foreclosure." *Id.* "Otherwise," the *Gray* Court reasoned, "a lender would potentially be forced to relitigate basic issues relating to the validity of the foreclosure that had already been decided in its favor, which would be inimical to the goal of establishing with finality the rights of the parties under these circumstances." *Id.* The *Gray* Court therefore concluded that the collateral attack on the clerk's order was barred by the doctrine of collateral estoppel, notwithstanding language in *In re Lucks* potentially suggesting otherwise, and reversed the trial court's denial of a motion for partial summary judgment, remanding the matter with instructions. *Id.* at *5-6.

In the present case, the trial court court's order being appealed allowed the foreclosure of Respondents' home to proceed. The Supreme Court's decision in *In re Lucks*, therefore, by its express language, does not apply. *See* 369 N.C. at 227, 794 S.E.2d at 506 ("If the clerk or trial court does *not* find the evidence presented to be

adequate to 'authorize' the foreclosure sale, this finding does not implicate res judicata or collateral estoppel") (emphasis added). Moreover, as this Court has held, *In re Lucks* "stands for the proposition that the doctrines of res judicata and collateral estoppel do not apply . . . where foreclosure was not authorized by the clerk of court." *Gray* at *4. That is, it does *not* "apply . . . where a clerk enters an order *authorizing* foreclosure." *Id.* (emphasis added).

We therefore hold that *In re Lucks* did not prevent the trial court from entering the 13 August 2018 order allowing foreclosure to proceed based on the same default because the trial court's 12 April 2017 order it superseded also allowed foreclosure to proceed. We do not believe the Supreme Court's decision in *In re Lucks* implies that the simple fact of this Court's earlier remand to the trial court to make the findings and conclusions required by N.C. Gen. Stat. § 45-21.16 prevents the trial court from making those required findings and conclusions, even if no new default has been shown.

4. Sufficiency of Findings

Several of Respondents' challenges to the trial court's findings regarding Petitioner's authority to foreclose are iterations of the argument that the 13 August 2018 order did not contain evidentiary findings of a level of specificity necessary to

support the ultimate findings in the order.[2] However, while under North Carolina law, evidentiary facts – sometimes also referred to as subsidiary facts – are the facts whose proof is required to establish the ultimate facts, a trial court's order need only include "specific findings of the ultimate facts," not the subsidiary or evidentiary facts. *Kelly v. Kelly*, 228 N.C. App. 600, 606-07, 747 S.E.2d 268, 276 (2013) (citation omitted). Importantly, in the 13 August 2018 order being appealed, the trial court made findings necessary to establish that the requirements of N.C. Gen. Stat. § 45-21.16(d) had been met, *i.e.*,

> the existence of (i) a 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) . . . , and (vi) that the sale is not barred by G.S. 45-21.12A[.]"

---

[2] *See, e.g.*, Respondent-Appellants' Brief, p. 31 ("[A]lthough Respondents argued to the trial court that the substitute trustees lacked authority to initiate this action, the 2018 Order lacks findings and conclusions relating to this legal defense and should be reversed."); *id.* ("The 2018 Order also lacks any findings or conclusions relating to the authority of all 'links in the chain' leading to the appointment of the substitute trustees in this action. As a result, the 2018 Order should be reversed."). Respondents reiterate the argument as follows:

> To even reach the conclusion that this action was authorized, the trial court had to make findings relating to, at a *minimum*, (a) Petitioner's authority to substitute trustees, (b) [the mortgage servicer's] authority to act as 'servicer on behalf of' Petitioner in appointing substitute trustees, (c) [the agent of the mortgage servicer's] authority to act as attorney-in-fact for [the mortgage servicer's] acting as servicer on behalf of Petitioner in appointing substitute trustees; and (d) the substitute trustees' own authority and standing to initiate this action.

Id. at 32 (emphasis in original).

N.C. Gen. Stat. § 45-21.16(d) (2017). We hold that it was not necessary for the trial court to make additional evidentiary findings in support of its ultimate findings in the August 2018 order. *See, e.g.*, *Medlin v. Medlin*, 64 N.C. App. 600, 603, 307 S.E.2d 591, 593 (1983) (trial court was "not required to find all facts supported by the evidence, but only sufficient material facts to support the judgment") (citation omitted); *Kelly*, 228 N.C. App. at 608, 747 S.E.2d at 276 ("[B]revity is not necessarily a bad thing[.]") (citing Marcus Tulius Cicero, *On the Laws: Book III*, *in* The Treatises of M.T. Cicero 479 (C.D. Yonge trans., 1878)).

5. Authority to Foreclose

Near the conclusion of the 13 March 2017 hearing the trial court instructed the parties to submit supplemental briefs within fifteen days of the hearing. In a 21 March 2017 supplemental brief filed after the hearing, Ms. Worsham, proceeding *pro se*, disputed for the first time whether foreclosure by the substitute trustee was authorized at the time of the hearing. Citing *In re Lucks*, in which the Supreme Court described a limited power of attorney authorizing appointment of substitute trustees as "the crucial document at issue," Ms. Worsham argued that Petitioner's failure to present a power of attorney authorizing the appointment of substitute trustees at the 13 March 2017 hearing and recording of the appointment of the substitute trustee *after* the date on which the hearing before the clerk of Mecklenburg County Superior Court was noticed demonstrated that foreclosure was not authorized at the time of

the hearing. 369 N.C. at 224, 794 S.E.2d at 504. Expanding upon this argument on appeal, Respondents, now represented by counsel, argue that the absence of a document in the record establishing that the mortgage servicer acting on behalf of Petitioner in appointing the substitute trustee was authorized to appoint substitute trustees under the deed of trust shows that the trial court's findings and conclusions regarding whether foreclosure was authorized were incorrect and unsupported by competent evidence. We disagree.

i. Preservation

We note that these arguments have not been properly preserved for our review. By failing to raise the issue of whether the substitute trustee was authorized to foreclose under the deed of trust at the time of the hearing, Respondents waived appellate review of this issue. *See* N.C. R. App. P. 10(a)(1) ("[T]o preserve an issue for appellate review, a party must have presented to the trial court a timely request, objection, or motion, stating the specific grounds for the ruling the party desired[.]"). However, given the historic policy articulated by the Supreme Court that "foreclosure under a power of sale is not favored in the law, and its exercise will be watched with jealousy," *see In re Goforth Props.*, 334 N.C. at 375, 432 S.E.2d at 859 (internal marks and citation omitted), we will exercise our discretion under Rule 2 of the North Carolina Rules of Appellate Procedure and address the issue, despite Respondents' failure to properly preserve it. *See* N.C. R. App. P. 2 ("[T]o expedite decision in the

public interest, [the] court . . . may . . . suspend or vary the requirements or provisions of any of the[] rules . . . upon its own initiative[.]").

ii. Effectiveness of Substitutions

The substitute trustee at the time of the 13 March 2017 hearing was appointed on 14 September 2016. The previous substitute trustee was appointed on 18 July 2016. Both substitutions were recorded with the Mecklenburg County Register of Deeds. Both substitutions were filed with the clerk of Mecklenburg County Superior Court on 9 November 2016. Certified copies of both were submitted to the trial court at the time of the 13 March 2017 hearing. We hold that both were competent evidence supporting the trial court's finding that "Petitioner produced certified copies of the . . . appointment of substitute trustees" because both are evidence "a reasonable mind might accept as adequate to support [this] finding." *Aly*, 233 N.C. App. at 625-26, 757 S.E.2d at 499.

iii. Substitution of Trustee After Notice of Foreclosure

Two related arguments about the authority of the substitute trustee at the time of the hearing are advanced in Ms. Worsham's *pro se* trial brief and in Respondents' appellate brief. The first is that the substitute trustee at the time of the hearing being a different trustee than the trustee identified in the notice of hearing required that the hearing be re-noticed, preventing the trial court from concluding that the substitute trustee at the time of the hearing was authorized to

foreclose. The second is that the absence of a document in the record demonstrating that the mortgage servicer named in the substitutions as Petitioner's agent was authorized to appoint substitute trustees on behalf of Petitioner shows that the trial court's findings and conclusions related to Petitioner's authority to foreclose were each, respectively, unsupported by competent evidence and erroneous as a matter of law. We reject both arguments.

North Carolina law embraces liberal substitution of trustees under a deed of trust authorizing such substitution. *See* N.C. Gen. Stat. § 45-10 (2017) ("noteholders 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"); *id.* § 45-17 (the right to substitution "may be exercised as often and as many times as the right to make such substitution may arise"). While a notice of foreclosure must identify the trustee at the time the foreclosure is noticed and the trustee at the time foreclosure is noticed may not simultaneously represent the petitioner seeking foreclosure, *see* N.C. Gen. Stat. § 45-21.16(c)(7)(b) (2017), the trustee at the time foreclosure is noticed may be substituted prior to *de novo* review in superior court of the clerk's decision allowing foreclosure to proceed and subsequently represent the petitioner at the hearing in superior court, *see In re Goddard & Peterson, PLLC*, ___ N.C. App. ___, ___, 789 S.E.2d 835, 840-42 (2016).

We hold that the authorized appointment of a substitute trustee after the decision by the clerk to allow foreclosure to proceed does not require the foreclosure to be noticed a second time before the superior court conducts *de novo* review of the clerk's decision. The liberality with which North Carolina law permits substitution of trustees under deeds of trust, and indeed, the expeditious resolution of mortgage defaults facilitated by the system established by the General Assembly through power of sale foreclosures would be significantly undermined by requiring a properly appointed substitute trustee to enter a new notice of foreclosure if the appointment occurred after an order of the clerk of court had been entered allowing foreclosure to proceed but before the hearing in the respondent's appeal of that order on *de novo* review in superior court. We therefore reject Ms. Worsham's argument that the substitute trustee at the time of the hearing being a different trustee than the trustee identified in the notice of hearing required that the hearing be re-noticed, or prevented the trial court from correctly concluding that the substitute trustee at the time of the hearing was authorized to foreclose.

Further, the deed of trust signed by Respondents, a certified copy of which was submitted to the trial court at the March 2017 hearing, provided in relevant part as follows:

> The Note or a partial interest in the Note (together with this Security Instrument) can be sold one or more times without prior notice to Borrower. A sale might result in a change in the entity (known as the "Loan Servicer") that

> collects Periodic Payments due under the Note and this Security Instrument and performs other mortgage loan servicing obligations under the Note, this Security Instrument, and Applicable Law. There also might be one or more changes of the Loan Servicer unrelated to a sale of the Note. . . . If the Note is sold and thereafter the Loan is serviced by a Loan Servicer other than the purchaser of the Note, the mortgage servicing obligations to Borrower will remain with the Loan Servicer or be transferred to a successor Loan Servicer and are not assumed by the Note purchaser unless otherwise provided by the Note purchaser.

The deed of trust also provides for substitution of trustees as follows:

> Lender may from time to time remove Trustee and appoint a successor trustee to any Trustee appointed hereunder by an instrument recorded in the county in which this Security Instrument is recorded. Without conveyance of the Property, the successor trustee shall succeed to all the title, power and duties conferred upon Trustee herein and by Applicable Law.

The deed of trust to which Respondents agreed thus itself not only provides for the appointment of a mortgage servicer to service the indebtedness evidenced by the note, it also specifically provides for substitution of trustees.

Both appointments of substitute trustees presented to the trial court at the March 2017 hearing specifically reference in their recitals the provision of the deed of trust providing for substitution of trustees, and were signed by a mortgage servicer on behalf of Petitioner, as contemplated by the express language of the deed of trust to which Respondents agreed. The deed of trust and appointments of substitute trustees, all of which were properly recorded with the Mecklenburg County Register

of Deeds, are themselves record evidence competent to support the trial court's findings that "the original promissory note . . . contains a chain of valid and complete indorsements," and that "Petitioner produced certified copies of the recorded . . . appointment of substitute trustees." These findings in turn support the trial court's conclusion that "the Deed of Trust gives Petitioner the right to foreclose under a power of sale and is enforceable according to its terms." We hold that there was not an absence of competent record evidence that the mortgage servicer acting on behalf of Petitioner in appointing the substitute trustee was authorized to appoint substitute trustees where the deed of trust itself specifically provided for the appointment of the mortgage servicer and for the appointment of substitute trustees, and the mortgage servicer appointed by Petitioner validly exercised the right of substitution. *See In re Clayton*, ___ N.C. App. at ___, 802 S.E.2d at 924 ("The right to foreclose exists if there is competent evidence that the terms of the deed of trust permit the exercise of the power of sale under the circumstances of the particular case.") (internal marks and citation omitted).

Again, *In re Lucks*, cited by Respondents in support of their argument that the absence in the record of a power of attorney in which Petitioner appointed the mortgage servicer and authorized the mortgage servicer to appoint substitute trustees under the deed of trust, is distinguishable from the present case. First, in *In re Lucks*, the validity of the substitution of trustees was actually contested in the

trial court, unlike in the present case. *See* 369 N.C. at 228, 794 S.E.2d at 506. Second, there were significant issues with the document purportedly appointing the substitute trustee in *In re Lucks* that suggested the document had not been properly recorded, in that its recording purportedly occurred three years *prior* to the date it was executed, and in Montgomery County, North Carolina, when the proper county for recording the deed of trust in question would have been Mecklenburg County, if it had in fact been recorded at all. *Id.* at 228-29, 794 S.E.2d at 506. Finally, the argument that the appointment of the substitute trustee in *In re Lucks* was invalid was actually successful in the trial court: that is, on review of the trial court's decision, the Supreme Court was not answering the question of whether the absence of the document the trial court had excluded would always preclude a trial court from correctly concluding that foreclosure was authorized, but instead whether the exclusion of this document by the trial court was an abuse of discretion. *See id.*

Respondents' reliance on *In re Lucks* in support of this argument thus essentially reads the Supreme Court's decision in that case backwards, extrapolating a rule about what is required to prove authority to foreclose under a deed of trust in every foreclosure from the Supreme Court's decision upholding a trial court's evidentiary ruling on the exclusion of a particular document purportedly showing foreclosure was authorized in an individual case where the document was

problematic, its validity was actually challenged before the trial court, and the trial court ruled that it did not establish what it purported to establish.

III. Conclusion

Respondents have not made any payments on the note from the 2007 refinancing of their home for over seven years. We hold that the trial court's findings of fact were supported by competent evidence, that the findings were sufficient to support the court's conclusions of law, and that the court's conclusions of law were correct, and supported by the findings of fact. We therefore affirm the order of the trial court allowing foreclosure of Respondents' home to proceed.

AFFIRMED.

Judges DILLON and ZACHARY concur.