IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA19-343

Filed: 19 November 2019

Wake County, No. 17 SP 3074

IN RE: Foreclosure of Deed of Trust from Carolann Crabtree and Andy Crabtree, to Julie B. Glenn, Echols, Purser & Glenn, PLLC, Trustee, dated March 23, 2009 and recorded March 27, 2009, in Book 013454 at Page 01966 of the Wake County Public Registry by Francis S. White or Rick D. Lail, either of whom may act, substitute trustee

Appeal by petitioner from order entered 9 January 2019 by Judge George B. Collins, Jr., in Wake County Superior Court. Heard in the Court of Appeals 2 October 2019.

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

No brief filed for Respondent-Appellees.

DILLON, Judge

This matter involves the foreclosure of a deed of trust securing a home loan executed by homeowners Carolann and Andy Crabtree in 2009. The Crabtrees continue to live in the home, though they have not made a payment on their loan in over six years. The current noteholder, U.S. Bank, sought to proceed with a foreclosure sale. Such request was denied by the trial court as the court determined

that U.S. Bank failed to prove that the Crabtrees were in default. U.S. Bank appeals. After careful review, we reverse.

I. Background

In March 2009, homeowners Carolann and Andy Crabtree borrowed $137,070.00 from a lender, executing a promissory note (the "Note"). The Note is now held by U.S. Bank. The Note is secured by a deed of trust, also executed by the Crabtrees in 2009, against the Crabtrees' home located in Raleigh (the "Property").

Ten months later, in January 2010, after falling behind on their loan payments, the Crabtrees entered into an agreement with their lender to modify the repayment terms under the Note. The Crabtrees again began making payments towards the Note. However, a disagreement developed between the Crabtrees and their lender as to how those payments were being applied. Accordingly, the lender showed that the Crabtrees had again fallen behind on their payments.

In April 2012, the Crabtrees made their last payment towards the Note balance. The Crabtrees contend that they attempted to make some payments in 2012, which the lender refused to accept because they were merely partial payments and otherwise not sufficient to bring the account current.

In September 2012, the then-holder of the Note initiated a proceeding before the clerk to foreclose on the Property. The matter eventually came on for *de novo* review before a superior court judge. The Crabtrees essentially argued that the

lender had miscalculated the amount owed in light of the 2010 loan modification. After a hearing on the matter, the superior court dismissed the foreclosure proceeding, concluding that the lender had failed in its burden to "present sufficient evidence to establish that the [Crabtrees] had defaulted on their loan[.]" That decision was not appealed. The Crabtrees continued living in the Property.

Some years later, U.S. Bank came to be the holder of the Note. As the Crabtrees had not made any payments nor attempted to make any payments towards the Note for quite some time, in December 2017, U.S. Bank initiated this second foreclosure proceeding.

After a hearing on the matter, the clerk denied U.S. Bank's request to proceed with foreclosure, determining that it had failed "to establish that the [Crabtrees had] defaulted on their loan." U.S. Bank appealed to superior court for *de novo* review.

After a hearing on the matter, the superior court, too, determined that U.S. Bank had not shown that the Crabtrees defaulted on the Note, and thus denied U.S. Bank's request to proceed with foreclosure. U.S. Bank timely appealed to our Court.

II. Analysis

We review the trial court's order for "whether competent evidence exists to support its findings of fact and whether the conclusions reached were proper in light of the findings." *Walker v. First Federal Savings and Loan*, 93 N.C. App. 528, 532, 378 S.E.2d 583, 585, *disc. review denied*, 325 N.C. 230, 381 S.E.2d 791 (1989). We

are bound by the trial court's findings of fact where such competent evidence exists. *See Henderson County v. Osteen*, 297 N.C. 113, 120, 254 S.E.2d 160, 165 (1979). But the trial court's conclusions of law are reviewable *de novo*. *In re Johnson*, 366 N.C. 252, 256, 741 S.E.2d 308, 311-12 (2012).

On appeal, U.S. Bank contends that it met its evidentiary burden to prove each element required to foreclose upon the Property and that the trial court erred in finding and concluding otherwise. We agree.

Where a deed of trust contains a valid "power of sale" provision, as is the case here, the creditor is entitled to an order directing the foreclosure of the collateral if the petitioner proves six things, including that the debtor is in default of the debt. N.C. Gen. Stat. § 45-21.16(d) (2017).

The only issue on appeal is whether the superior court erred in determining that U.S. Bank failed to meet its burden of showing that the Crabtrees were in default. This finding was the sole basis for the court's denial of U.S. Bank's request for an order to proceed with a foreclosure sale, and the Crabtrees have not filed an appellee brief to present any alternate legal grounds to support the court's order.

The superior court expressly found that "[U.S. Bank]'s evidence does not show that the loan is in default by a preponderance of the evidence."

To show that a debtor is in default, the creditor need not prove the exact amount of the default, only that *some* amount is past due. That is, the fact that the

debtor "dispute[s] the [amount of the] balance owed on the note and deed of trust is irrelevant to the required findings under G.S. 45-21.16(d)." *In re Burgess*, 47 N.C. App. 599, 603, 267 S.E.2d 915, 918 (1980).

We conclude that the superior court erred in determining that U.S. Bank had failed to show the existence of a default.

The evidence before the superior court was essentially as follows: The Note as well as the 2010 loan modification were before the court which showed that the Crabtrees were to make monthly payments. U.S. Bank presented an affidavit from a bank officer with the Crabtrees' payment history through March 2018, which showed that the Crabtrees have not made any payments since 2012.

And Mrs. Crabtree testified as follows: She and her husband had made payments from the 2010 modification to 2012 but disagreed with how the then-lender had applied the payments. Sometime in 2012, the lender decided to foreclose and began refusing their payments. During the pendency of the 2012 foreclosure proceeding, which was not resolved until 2015, the Crabtrees did not attempt to make any more payments. When the superior court dismissed the prior foreclosure action in 2015, Mrs. Crabtree attempted to make a payment over the phone, though she did not state the *amount* she tried to pay. The lender told Mrs. Crabtree that she and her husband owed over $70,000, an amount she disputed. Mrs. Crabtree, however,

never testified as to the amount she claimed that was owed or that she tried to pay this amount, but rather that she simply agreed to "make a payment."

It is true that U.S. Bank could not foreclose based on an alleged default, which was the subject of the prior foreclosure as U.S. Bank failed to appeal the determination made in that proceeding. However, any failure by U.S. Bank to prove a default in the prior proceeding does not foreclose U.S. Bank's ability to commence a new proceeding based on a different default. And, here, we conclude that the evidence clearly shows that the Crabtrees have not attempted to make all of the payments that have come due *since that prior foreclosure proceeding*. It may be that the Crabtrees dispute the amount they owe, but they put forth no evidence regarding the amount that they concede they do owe *and* that they attempted to pay that amount. That is, Mrs. Crabtree testified that she did not agree with the lender's accounting that they owed over $70,000 as of 2017, following the first foreclosure proceeding, as the Crabtrees had made no payments in a number of years. But the evidence showed that the amount of their payments they believed had been misapplied in and prior to 2012 appears to be less than $5,000[1], suggesting that they still owed at least $65,000 as of 2017. Mrs. Crabtree also testified that she and her

[1] The record shows that the Crabtrees filed a separate action in 2015 against U.S. Bank, as the current noteholder, concerning what they claim is the mishandling of their mortgage payments in 2012 by the prior noteholder. However, the mishandling alleged in their Complaint was $2,902.55 and $93.78 worth of the payments made from 2009 to 2012. We note that this action was dismissed with prejudice.

husband had spent the money that should have gone towards mortgage payments from 2012 until after the first foreclosure had concluded, and she did not otherwise testify that she and her husband had offered to pay or had the ability to pay anywhere near the $65,000, but had only offered to make "a payment."

This case is different from *In re Bigelow*, 185 N.C. App. 142, 146-47, 649 S.E.2d 10, 13-14 (2007), where we held that there could be no default if the lender refused to accept *full* payments of what was owed. In the present case, there is no evidence that the Crabtrees attempted to tender the full amount that they claim they owed. *See Davis v. Dillard Nat'l Bank*, 2003 U.S. Dist. LEXIS 9420, *8 (2003) (holding that under North Carolina law, "tender occurs when an actual presentment of funds sufficiently extinguishes the entire [amount owed]. . . . Merely offering to produce payment or showing a readiness to perform is insufficient to establish tender; actual production of payment is necessary") (citing *Parks v. Jacobs*, 259 N.C. 129, 130, 129 S.E.2d 884, 885 (1963)).

III. Conclusion

The evidence conclusively establishes that the Crabtrees have not made any monthly payments due under the Note since well before the conclusion of the prior foreclosure proceeding in 2015. The Crabtrees presented no evidence that they attempted to tender an amount that they claimed was actually owed. Rather, at best, the Crabtrees' evidence merely shows that U.S. Bank refused to accept a partial

payment of the amount that even the Crabtrees thought they owed under the Note. Therefore, there is undisputed evidence of a default, though the *amount* may be in dispute. Accordingly, the superior court erred in not allowing the foreclosure to proceed. We, therefore, reverse and remand with instructions to enter an order allowing U.S. Bank to foreclose on the Property.

REVERSED AND REMANDED.

Judges STROUD and YOUNG concur.

Report per Rule 30(e).