IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA19-69

Filed: 1 October 2019

Cabarrus County, No. 2010-SP-1813

IN RE: MOOREHEAD I, LLC, Foreclosure of that Deed of Trust dated March 8, 2007, recorded in Book 7393 at Page 19, Cabarrus County Registry, Under Foreclosure By: H.L. Ruth, III, Substitute Trustee.

Appeal by intervenors from order entered 10 October 2017 by Judge Joseph N. Crosswhite in Cabarrus County Superior Court. Heard in the Court of Appeals 6 August 2019.

Ferguson, Hayes, Hawkins & Demay, PLLC, by James R. DeMay, and Mills Law, P.A., by William L. Mills, III, for Jeffery Henley, Beverly Henley, and Estate of Timothy Alan Hurst-appellants.

Pendergrass Law Firm, PLLC, by James K. Pendergrass Jr., and Woodson, Sayers, Lawther, Short, Parrott and Abramson, LLP, by Andrew J. Abramson, for Farmers and Merchants Bank-appellees.

BERGER, Judge.

Jeffery Henley, Beverly Henley, and the Estate of Timothy Alan Hurst (collectively, "Intervenors") appeal from an order authorizing the foreclosure and sale of property pursuant to a power of sale in a deed of trust secured by Farmers & Merchants Bank ("F&M Bank"). Intervenors argue that the deed of trust is invalid

because it was materially altered and that the power of sale foreclosure was procedurally barred. We affirm.

Factual and Procedural Background

Intervenors collectively owned seventy-five acres of real property ("the property") in Cabarrus County, North Carolina. In June 2006, Intervenors entered into an agreement to sell approximately seventy-two acres of the property to Cramer Mountain Development Company, LLC ("Cramer") for $4,700,000.00. Agents for both Cramer and Intervenors executed special warranty deeds for the property to Moorehead I, LLC ("Moorehead"), where Moorehead provided Intervenors with a promissory note in the amount of $4,500,000.00 secured by a recorded deed of trust against the property ("Henley Deed of Trust"). Moorehead obtained a loan from F&M Bank in the amount of $3,400,000.00, evidenced by a promissory note and secured by the property through a recorded deed of trust ("F&M Deed of Trust"). Moorehead defaulted on its obligations under both promissory notes.

On July 29, 2008, Intervenors commenced a civil action in the Superior Court for Cabarrus County, against, among others, Moorehead and Cramer. On June 1, 2009, while the civil action was pending, the trustee for F&M Bank commenced a power of sale foreclosure proceeding due to Moorehead's failure to pay off the entire principal and accrued interest pursuant to the promissory note's deadline of September 8, 2008. Intervenors filed a motion to intervene and an objection to the

right of foreclosure on July 6, 2009. The substitute trustee filed a voluntary dismissal without prejudice of the first foreclosure action on July 14, 2009.

On December 7, 2010, the substitute trustee for F&M Bank commenced a second power of sale foreclosure action based upon Moorehead's failure to pay off the entire principal and accrued interest before September 8, 2008. Following a hearing, the clerk of court entered an order authorizing foreclosure on March 14, 2011. Intervenors filed a motion to intervene and for relief from judgment on March 24, 2011. The assistant clerk of Superior Court entered an order granting motion to intervene and for relief from judgment on April 8, 2011.

On April 18, 2011, F&M Bank filed an appeal from the order granting the motion to intervene and for relief from judgment to the Superior Court. Intervenors filed a response with an attachment containing an affidavit from a forensic document examiner, who had found purported alterations to the Henley Deed of Trust. Specifically, the report found that the document was originally recorded at Cabarrus County Book 7393, pages 19 through 24, but was altered to reflect pages 29 through 34. Further, the first page of the document originally reflected document number 8880 but was altered to 8881, and the recording time was altered to 4:25 p.m. The Superior Court entered an order dismissing the appeal as interlocutory.

On May 25, 2015, the substitute trustee for F&M Bank noticed the foreclosure for re-hearing before the clerk of court. Intervenors filed an affidavit containing the

report of another forensic document examiner. The affidavit stated that the forensic examiner had identified handwritten alterations of the page numbers, document number, and recording time of the F&M Deed of Trust. This evidenced that the document was originally recorded at Cabarrus County Book 7393, pages 25 through 34, but was altered to reflect pages 19 through 28. Further, the first page of the document originally reflected document number 8881 but was altered to 8880, and the recording time was altered to 4:24 p.m.

Following a hearing, the assistant clerk of Superior Court denied the foreclosure sale in an order on March 14, 2016, finding that F&M Bank must proceed through a judicial foreclosure action. On March 22, 2016, F&M Bank filed a notice of appeal from the order denying foreclosure sale as well as the order granting intervenor's motion to intervene and relief from judgment. Intervenors filed a motion to dismiss on September 14, 2017. Following the hearing on September 25, 2017, the Superior Court entered an Order Authorizing Foreclosure on October 10, 2017. Intervenors filed a notice of appeal from the Order Authorizing Foreclosure to this Court on October 20, 2017.

Analysis

Intervenors argue that the F&M Deed of Trust is unenforceable and that F&M Bank is barred from bringing this action. We disagree, and affirm the Order Authorizing Foreclosure.

"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." *In re Adams*, 204 N.C. App. 318, 320-21, 693 S.E.2d 705, 708 (2010) (citation and quotation marks omitted). "Competent evidence is evidence 'that a reasonable mind might accept as adequate to support the finding.' " *Id.* at 321, 693 S.E.2d at 708 (citations omitted).

Intervenors first contend that the trial court erred in authorizing the power of sale foreclosure because the F&M Deed of Trust was materially altered. We disagree.

"A power of sale is a contractual arrangement in a mortgage or a deed of trust which confers upon the trustee or mortgagee the power to sell the real property mortgaged without any order of court in the event of a default." *In re Michael Weinman Associates Gen. P'ship*, 333 N.C. 221, 227, 424 S.E.2d 385, 388 (1993) (citation, internal quotation marks, and brackets omitted). "Article 2A of Chapter 45 of the General Statutes sets out the procedure for sale pursuant to a power of sale in a deed of trust." *In re Foreclosure of Goforth Properties, Inc.*, 334 N.C. 369, 374, 432 S.E.2d 855, 858 (1993). Prior to a foreclosure under a power of sale hearing, the trustee must file a notice of hearing with the clerk of superior court and serve that notice on the necessary parties before the clerk can conduct a hearing. N.C. Gen.

Stat. § 45-21.16(a), (d) (2017). At the hearing to determine whether the trustee may proceed with a sale pursuant to a power of sale,

> 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 pursuant to the provisions of this Article.

N.C. Gen. Stat. § 45-21.16(d).

"The clerk's findings are appealable to the superior court for a hearing *de novo*; however, in a section 45-21.16 foreclosure proceeding, the superior court's authority is similarly limited to determining whether the six criteria of N.C. Gen. Stat. § 45-21.16(d) have been satisfied." *In re Foreclosure of Young*, 227 N.C. App. 502, 505, 744 S.E.2d 476, 479 (2013). "The superior court 'has no equitable jurisdiction and cannot enjoin foreclosure upon any ground other than the ones stated in [N.C. Gen. Stat. §] 45-21.16.' " *Id.* (alterations in original) (internal citation omitted).

Here, Intervenors argue that the trial court erred by finding that the third element had been met because there was evidence that material alterations existed

with the recordings of the Henley Deed of Trust and the F&M Deed of Trust. In support of their argument, Intervenors produced affidavits that outlined the alterations made in both deeds and contend that these alterations raise question as to the validity of the F&M Deed of Trust and prevents the authorization of a power of sale foreclosure. We disagree.

The "plain language of element three" of Section 45-21.16(d) requires "the trial court to consider strictly whether 'the instrument' at issue conveys a right to foreclose on petitioner." *Id.* at 506, 744 S.E.2d at 480; *In re Foreclosure of Burgess*, 47 N.C. App. 599, 603, 267 S.E.2d 915, 918 (1980) ("[W]e construe G.S. 45-21.16(d)(iii) to permit the clerk to find a 'right to foreclose under the instrument' 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."). When looking at the instrument, if "the terms of the contract are not ambiguous, the express language of the contract controls in determining its meaning [,] and not what either party thought the agreement to be." *In re Foreclosure by Bonder*, 55 N.C. App. 373, 376, 285 S.E.2d 615, 617 (1982) (alterations in original) (citation and quotation marks omitted).

Moreover, with the respect to recorded deeds of trust, Section 47-20 of the North Carolina General Statutes states the following:

> (a) No deed of trust or mortgage of real or personal property, or of a leasehold interest or other chattel real, or conditional sales contract of personal property in which the title is retained by the vendor, shall be valid to pass any

> property as against lien creditors or purchasers for a valuable consideration from the grantor, mortgagor or conditional sales vendee, but from the time of registration thereof as provided in this Article; provided however that any transaction subject to the provisions of the Uniform Commercial Code (Chapter 25 of the General Statutes) is controlled by the provisions of that act and not by this section. ***Unless otherwise stated either on the registered instrument*** or on a separate registered instrument duly executed by the party whose priority interest is adversely affected, (i) instruments registered in the office of the register of deeds shall have priority based on the order of registration as determined by the time of registration, and (ii) if instruments are registered simultaneously, then the instruments shall be presumed to have priority as determined by:
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> (1) The earliest document number set forth on the registered instrument.
> (2) The sequential book and page number set forth on the registered instrument if no document number is set forth on the registered instrument.

N.C. Gen. Stat. § 47-20(a) (2017) (emphasis added).

Here, the Henley Deed of Trust states within the instrument that it is subordinate to the F&M Deed of Trust. The Henley Deed of Trust contains the following clause:

> Beneficiary acknowledges and agrees that this Deed of Trust is and shall continue to be subordinate to the Deed of Trust on the Premises from Grantor Donald D. Sayers, Trustee, for the benefit of F&M Bank, in the principal amount of $3,400,000.

Given that the Henley Deed of Trust expressly outlines that it was subordinate to the F&M Deed of Trust, it is not necessary to look at the document number or recording

pagination to determine which deed of trust is superior. The express language controls, and the changes did not materially enlarge or abridge the terms of either deed of trust or change any parties' obligations. It is apparent that the handwritten alterations merely capture the correct priority of the deeds of trust, with the F&M Deed of Trust being superior.

"The general rule in this State is that a material alteration of a contract between a principal debtor and creditor without the guarantor's consent will discharge the guarantor from its obligation." *Kirkhart v. Saieed*, 98 N.C. App. 49, 54, 389 S.E.2d 837, 840 (1990). A material alternation may be one that alters the terms of a contract. *Id.* "The general rule does not state that there can be no modifications to the original contract; it simply states that there can be no material alterations without a guarantor's consent[.]" *Id.* at 54-55, 389 S.E.2d at 840 (emphasis removed). Here, the alterations were limited to the page number, document number, and recording time of the document. These modifications to the F&M Deed of Trust do not constitute material alterations as they do not change the terms of the Deed of Trust nor the rights, interests, or obligations of the parties. Furthermore, Intervenors produced no evidence that the text or substance of the F&M Deed of Trust was altered, nor is there evidence that F&M Bank was involved with the alterations.

Thus, competent evidence existed to support the trial court's findings of fact, and its conclusion, authorizing F&M Bank to proceed with the foreclosure by power

of sale described in the F&M Deed of Trust, was proper in light of its findings. Accordingly, we affirm.

Intervenors also argue that F&M Bank is barred procedurally from bringing this second foreclosure action. Specifically, Intervenors look to our Supreme Court's decision in *In re Foreclosure of Lucks*, 369 N.C. 222, 794 S.E.2d 501 (2016) for the contention that F&M Bank is limited to a judicial foreclosure because this power of sale proceeding was brought under the same default as the first foreclosure action. This argument is without merit.

In *Lucks*, the Supreme Court held that the superior court correctly denied the substitute trustee's right to proceed with non-judicial foreclosure because of issues with the substitute trustee's appointment, but determined that "the court erroneously entered a 'dismissal with prejudice.' " *In re Foreclosure of Lucks*, 369 N.C. at 229, 794 S.E.2d at 506-07. In making this determination, the Court stated "[n]on-judicial foreclosure is not a judicial action; the Rules of Civil Procedure and traditional doctrines of res judicata and collateral estoppel applicable to judicial actions do not apply." *Id.* at 229, 794 S.E.2d at 507. The Court also noted the difference between an involuntary dismissal in judicial proceedings and a voluntary "dismissal" in non-judicial proceedings, stating in pertinent part:

> Given the fluid nature of the debtor-collector relationship and the state and federal oversight of foreclosure proceedings, there are multiple reasons why a creditor might choose not to proceed with the hearing. For example,

> a debtor may seek to remit late mortgage payments, or changes in law may alter foreclosure requirements, thus affecting the creditor's ability to proceed. *Such a decision to refrain from proceeding is not a "dismissal" but simply a withdrawal of the notice and has no collateral consequence.*

Id. at 226-27, 794 S.E.2d at 505 (emphasis added).

Here, the first foreclosure action brought by F&M Bank was *voluntarily withdrawn* by the substitute trustee, not involuntarily dismissed by the clerk. Given that the first foreclosure was voluntarily withdrawn, there was no rejection by the clerk of the foreclosure action's ability to proceed. The trustee's previous withdrawal was of "no collateral consequence." *Id.* at 227, 794 S.E.2d at 505. Accordingly, the *Lucks* decision is inapplicable to the case at hand.

Conclusion

Because F&M Bank had a right to foreclose under the F&M Deed of Trust and F&M Bank was not procedurally barred from bringing this power of sale foreclosure proceeding, we affirm the Order Authorizing Foreclosure.

AFFIRMED.

Chief Judge MCGEE and Judge COLLINS concur.

Report per Rule 30(e).