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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA20-223

Filed: 31 December 2020

New Hanover County, No. 12-CVS-2090

CHISUM CONSTRUCTION, LLC, AND SHERMAN LEE, Plaintiffs,

v.

WILLIAM S. ELLIOT, Defendant.

Appeal by Plaintiffs from Order entered 13 August 2019 by Judge R. Kent Harrell in New Hanover County Superior Court. Heard in the Court of Appeals 21 October 2020.

*Law Office of B. Tyler Brooks, PLLC, by B. Tyler Brooks for Plaintiffs.*

*Shipman & Wright, LLP, by William G. Wright for Non-Party Appellee.*

DILLON, Judge.

Chisum Construction, LLC, ("Chisum") and Sherman Lee (collectively, "Plaintiffs") appeal an order denying their motion to direct execution on certain real property located in Onslow County to satisfy a certain judgment. The appellee, who is not a party to the judgment, now owns the property in question and opposes Plaintiffs' attempt to execute on the property.

## I. Background

In 2014, Plaintiffs obtained a judgment against Defendant William S. Elliot in New Hanover County in the total amount of $44,426.73 plus interest. The judgment was docketed in New Hanover County and transcribed in Onslow County.[1]

In May 2019, Plaintiffs filed a motion to direct the Sheriff of Onslow County to execute on two adjacent tracts (referred to hereafter as "Lot 15" and "Lot 15A", and collectively as the "Property"). Non-Party Reginald Beasley ("Appellee") appeared at the hearing through counsel on the matter to oppose the motion. The evidence concerning the Property showed as follows:

In 2012, Defendant was the fee simple owner of both Lot 15 and Lot 15A.

In 2012, Defendant executed two documents relevant to this proceeding, which were duly recorded in Onslow County: (1) Defendant first executed a quitclaim deed conveying a one-half interest in Lot 15A to Appellee and then (2) Defendant executed a deed of trust using his interest in both Lot 15 and Lot 15A to secure a $750,000.00 loan to him from Appellee.

In 2014, Plaintiffs' New Hanover County judgment against Defendant was docketed in New Hanover County and transcribed in Onslow County.

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[1] A judgment, when recorded in a county, attaches as a lien on any real estate owned by the judgment debtor in the county at that time. A judgment is recorded in the county where it has been entered when it is "docketed," and a judgment that has been docketed can be recorded in any other county by "transcribing" it in the judgment docket of the other county. N.C. Gen. Stat. § 1-234 (2014).

In March 2016, Defendant conveyed his remaining interest in both Lot 15 and Lot 15A to Appellee.

In 2019, Plaintiffs moved to execute against the Property, now owned by Appellee. The trial court denied Plaintiffs' motion to execute. Plaintiffs timely appeal.

## II. Analysis

In this action, Plaintiffs sought an order directing the Onslow County Sheriff's Department to execute upon the Property to satisfy their judgment, pursuant to Section 1-234 of our General Statutes. The trial court denied Plaintiffs' motion, concluding that Plaintiffs' exclusive remedy is to bring a separate action under the Uniform Voidable Transfers Act ("UVTA"), codified in Chapter 39 of our General Statutes.

We hold that the trial court erred in denying Plaintiffs' motion to pursue execution against the Property. Section 1-234 provides that a judgment debtor may execute on a judgment against land that was owned by the judgment debtor at or after the time the judgment was indexed in that county, *even if* the debtor subsequently transfers title to any said property to a third party. N.C. Gen. Stat. § 1-234 (2014). Once a judgment is indexed, "[t]he land is not relieved of the judgment lien by a transfer of the debtor's title." *Moses v. Major*, 201 N.C. 613, 615, 160 S.E.2d 890, 891 (1931).

The trial court erred by holding that the UVTA provides Plaintiffs with their exclusive remedy. The UVTA is applicable where a creditor seeks to void a transaction whereby a debtor parts with property for the purpose of keeping the property out of the reach of creditors. However, here, the 2016 transfer by Defendant of his remaining interest in the Property – two years after Plaintiffs indexed their judgment – had no effect on Plaintiffs' ability to seek execution against the Property.

Where execution against property is had, the successful bidder receives whatever interest that was held by the judgment debtor at the time the judgment was indexed in the county and is not affected by any transfer by the debtor thereafter. *See* N.C. Gen. Stat. § 1-234 ("The judgment lien is effective as against third parties from and after the indexing of the judgment as provided in G.S. 1-233."). Here, since Defendant owned Lot 15 and a half-interest in Lot 15A *at the time* Plaintiffs' judgment was indexed in Onslow County, Plaintiffs should have been allowed to proceed with seeking execution against those Lots.

We, therefore, reverse the order of the trial court and remand with instructions to allow Plaintiffs to pursue execution against the Property. However, we note that, assuming the record represents a complete picture of the Property's title, the successful bidder at an execution sale would receive fee simple title in Lot 15 and a one-half interest in Lot 15A, *subject to* any superior liens. Accordingly, bidders are at their peril to discover what superior liens are of record.

For instance, the record shows the 2012 deed of trust in favor of Appellee was recorded two years *before* Plaintiffs' judgment was indexed. Whether the Property is still subject to that deed of trust will greatly affect what someone might be willing to bid on the Property at the execution sale.[2] If the Property is still subject to the 2012 deed of trust and if there was a later default of the underlying $750,000.00 owed by Defendant to Appellee, then Appellee could foreclose and wipe out any interest acquired at the sale executing on Plaintiffs' 2014 judgment.

We note Appellee's contention that his due process rights would be violated by allowing the execution of the judgment. However, it is well settled that

> [a] purchaser of land on which there is a prior security deed acquires his interest in the property subject to the right of the holder of the secured debt to exercise the statutory power of sale. *There is no established principle of law which entitles such a purchaser to notice of the exercise of this power.*

*St. Regis of Onslow County v. Johnson*, 191 N.C. App. 516, 522, 663 S.E.2d 908, 912 (2008) (emphasis added). As such, allowing Plaintiffs to execute on their judgment against the Property does not violate Appellee's due process rights.

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[2] It may be argued that the 2012 deed of trust in favor of Appellee was extinguished when Defendant transferred his interest in the Property to Appellee in 2016. Indeed, "the general rule of law [is] that where one who holds a mortgage on real estate becomes the owner in fee . . . ordinarily the former estate [the mortgagee interest] merges in the latter [fee simple]" thus wiping out the former estate. *Furniture Co. v. Potter*, 188 N.C. 145, 146, 124 S.E. 122, 123 (1924). However, our Supreme Court cautions that this general rule "does not apply where such merger would be inimical to the interests of the owner as, for example, where it would prevent his setting up the mortgage to defeat an intermediate title [such as a subsequent lien or conveyance by the former owner] unless the parties intended otherwise; and this intention will not be presumed contrary to the apparent interest of the owner. *Id.* at 146, 124 S.E. at 123.

## III. Conclusion

Because the trial court erroneously held that Plaintiffs were only afforded redress under the UVTA and did not permit them to execute on their judgment, we reverse the order of the trial court in this respect and remand the matter, directing the trial court to allow Plaintiffs to seek execution of their judgment against the Property. Moreover, we reject Appellee's contention that such execution would violate his due process rights in this case.

REVERSED AND REMANDED.

Judges INMAN and YOUNG concur.

Report per Rule 30(e).