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IN THE COURT OF APPEALS OF NORTH CAROLINA

2021-NCCOA-705

No. COA21-311

Filed 21 December 2021

Brunswick County, No. 19-CVS-1338

AMERICAN SOUTHWEST MORTGAGE CORP. and AMERICAN SOUTHWEST MORTGAGE FUNDING CORP., Plaintiffs,

v.

MARY ELLEN O'MEARA; FIRST MORTGAGE COMPANY, LLC; and WELLS FARGO BANK, N.A., Defendants.

Appeal by Plaintiffs from order entered 15 January 2021 by Judge Jason C. Disbrow in Brunswick County Superior Court. Heard in the Court of Appeals 17 November 2021.

Alexander Ricks PLLC, by Louis G. Spencer, for Plaintiffs-Appellants.

Offit Kurman, P.A., by Zipporah Basile Edwards, for Defendant-Appellee Wells Fargo Bank, N.A.

Nexsen Pruet PLLC, by Lisa P. Sumner, for Defendant-Appellee Mary Ellen O'Meara.

GRIFFIN, Judge.

¶ 1

Plaintiffs, American Southwest Mortgage Corp. (“ASMC”) and American Southwest Mortgage Funding Corp. (“ASMFC”), appeal from an order denying their motion for summary judgment and granting the motions for summary judgment of

Defendants, Mary Ellen O'Meara and Wells Fargo Bank, N.A. ("Wells Fargo"). Plaintiffs argue that they conclusively established to the trial court that First Mortgage Company ("FMC") was not authorized to file the Satisfaction of Mortgage relating to Ms. O'Meara's loan and that Defendants failed to meet their burden to establish that FMC was Plaintiffs' authorized agent. Our review reveals no genuine dispute that FMC was the loan servicer of Ms. O'Meara's loan, and we conclude that Plaintiffs' own neglect enabled FMC's recording of the Satisfaction of Mortgage. We affirm the trial court's order.

I. Procedural History

¶ 2 On 2 July 2019, Plaintiffs filed a complaint in Brunswick County Superior Court against Ms. O'Meara, FMC, and Interstate Mortgage Corporation. Wells Fargo was later substituted for Interstate Mortgage Corporation by consent motion. Ms. O'Meara and Wells Fargo filed cross-claims and counter-claims against Plaintiffs.

¶ 3 Ms. O'Meara and Wells Fargo each filed a motion for summary judgment on 16 November 2020. Plaintiffs filed a motion for summary judgment, together with supporting affidavits and exhibits, on 20 November 2020.

¶ 4 On 15 January 2021, the trial court entered an order granting Ms. O'Meara's and Wells Fargo's motions for summary judgment and denying Plaintiffs' motion for summary judgment. Ms. O'Meara and Wells Fargo dismissed their remaining cross-claims and counter-claims. Plaintiffs timely appealed.

II. Factual Background

¶ 5 “Admittedly, there are many facts about which the parties disagree, however, none of these facts are material to our decision.” *Dull v. Mutual of Omaha Ins. Co.*, 85 N.C. App. 310, 314, 354 S.E.2d 752, 754 (1987). The Record tends to establish the following uncontested facts:

¶ 6 On or about 3 August 2000, ASMC and FMC entered into a loan agreement whereby ASMC operated as a warehouse lender to fund residential home loans originated by FMC. On or about 5 September 2013, ASMFC and FMC likewise entered into a loan agreement, in which ASMFC operated as a second warehouse lender to fund residential home loans originated by FMC. FMC used these lines of credit from ASMC and ASMFC to originate residential home loans.

¶ 7 On or about 22 May 2017, FMC made a construction and permanent mortgage loan in the amount of \$325,000 (the “O’Meara Loan”), evidenced by a promissory note (“Note”), to Ms. O’Meara. The loan was secured by a deed of trust (“Original DOT”), which was duly recorded in the Brunswick County Register of Deeds.

¶ 8 The Note stated that “any notice that must be given to [Ms. O’Meara] under this Note will be given by delivering it or by mailing it by first class mail to [Ms. O’Meara.]” The Original DOT similarly provided that “[a]ny notice to [Ms. O’Meara] in connection with this Security Instrument shall be deemed to have been given to [Ms. O’Meara] when mailed by first class mail or when actually delivered to [Ms.

O'Meara's] notice address if sent by other means.” The Original DOT specifically contemplated that

[t]he Note . . . can be sold one or more times without prior notice to [Ms. O'Meara]. 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. . . . If there is a change of the Loan Servicer, [Ms. O'Meara] will be given written notice of the change which will state the name and address of the new Loan Servicer, the address to which payments should be made and any other information RESPA requires in connection with a notice of transfer of servicing.

¶ 9 Subsequently, FMC entered into cross-collateralization agreements with Plaintiffs on or about 29 June 2017. Pursuant to these agreements, FMC assigned all rights and interests in certain loans, including the O'Meara Loan, to Plaintiffs. The cross-collateralization agreements provided that “[e]ach borrower (on the Notes) will be notified that the Note has been assigned to ASMC [and to ASMFC] and that payments on the Note will be made directly to ASMC [and to ASMFC].” The agreements did not specify which party(s) would provide this notice to the borrower.

¶ 10 Plaintiffs recorded the assignment of the O'Meara Loan in the Brunswick County Register of Deeds. The assignment stated on its face:

ATTENTION – IMPORTANT INSTRUCTION ON HOW TO CONFIRM AMOUNTS REQUIRED TO PAY OFF THE MORTGAGE OBLIGATION RELATED TO THIS ASSIGNMENT:

Unless assignee has further transferred ownership of the mortgage related to this assignment, you must confirm payoff information directly with the office of the Controller, American Southwest Mortgage Corp. Toll Free 1-888-593-1003 or email to Accounting@amswmtg.com.

Plaintiffs do not claim that they provided any notice of the O'Meara Loan assignment to Ms. O'Meara, other than its recordation in the register of deeds.

¶ 11 On 6 December 2017, Ms. O'Meara refinanced the O'Meara Loan. The refinance was secured by a deed of trust, which was recorded in the Brunswick County Register of Deeds. Ms. O'Meara sent closing funds to FMC to pay off the original loan. Ron McCord, purportedly on behalf of Mortgage Electronic Registration Systems, Inc., signed and recorded a satisfaction of mortgage for the O'Meara Loan ("Satisfaction of Mortgage") in the Brunswick County Register of Deeds. FMC was named as the mortgagee on the Satisfaction of Mortgage. Plaintiffs stated that no one informed them of the refinance.

¶ 12 Plaintiffs admitted on multiple occasions that FMC was the servicer of the O'Meara Loan. Specifically, Plaintiffs stated that "Plaintiffs did not service the [O'Meara] Loan" and that "FMC was the servicer of the [O'Meara] Loan from the date of execution of the Original Note through the Closing of the Refinance." Plaintiffs "made numerous demands upon FMC to relinquish its loan servicing rights" and argued that "FMC has not transferred the servicing rights on the Pledged Collateral

as required by the Cross-Collateralization Agreements.” Plaintiffs made these various statements in their answers to the cross-claims and counter-claims of Ms. O’Meara and Wells Fargo; in their discovery responses to Wells Fargo; in their exhibits supporting their motion for summary judgment; and in litigation against FMC and other parties in the Oklahoma County District Court.

¶ 13 ASMC filed lawsuits in the Oklahoma County District Court against Ron McCord, FMC, and other parties. On 17 April 2019, the Oklahoma County District Court entered partial summary judgments in ASMC’s favor against Ron McCord and FMC. Among other findings, the court found that FMC was liable to ASMC under the cross-collateralization agreements. Nearly a year later, on 15 April 2020, ASMC moved to remove FMC’s liability for breaching the cross-collateralization agreements, in order to “seek damages in the North Carolina matter regarding the Cross-Collateralization Agreements and not seek damages regarding them in this case.” The Oklahoma County District Court entered judgments in ASMC’s favor against Ron McCord and FMC on 29 April 2020 and 7 May 2020. Pursuant to ASMC’s request, the judgments did not include damages for FMC’s alleged breach of the cross-collateralization agreements.

III. Analysis

A. Standard of Review

¶ 14 “The instant case presents cross-motions for summary judgment. . . . The

standard of review for summary judgment is de novo.” *Forbis v. Neal*, 361 N.C. 519, 523-24, 649 S.E.2d 382, 385 (2007) (citation omitted).

¶ 15 Summary judgment shall be granted “if the pleadings, depositions, 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. R. Civ. P. 56(c). “When considering a motion for summary judgment, the trial judge must view the presented evidence in a light most favorable to the nonmoving party. Moreover, the party moving for summary judgment bears the burden of establishing the lack of any triable issue.” *Dalton v. Camp*, 353 N.C. 647, 651, 548 S.E.2d 704, 707 (2001) (citations omitted). “If there is any question as to the weight of evidence, summary judgment should be denied.” *Marcus Bros. Textiles, Inc. v. Price Waterhouse, LLP*, 350 N.C. 214, 220, 513 S.E.2d 320, 325 (1999) (citation omitted).

¶ 16 As there is no genuine issue of any material fact in this case, the next question is “whether any party is entitled to a judgment as a matter of law.” *Kessing v. Nat’l Mortg. Corp.*, 278 N.C. 523, 535, 180 S.E.2d 823, 830 (1971).

B. FMC was Plaintiffs’ Authorized Agent.

¶ 17 Plaintiffs argue that FMC was not authorized to file the Satisfaction of Mortgage relating to Ms. O’Meara’s loan, therefore entitling Plaintiffs to a first-priority lien encumbering the O’Meara property. Ms. O’Meara and Wells Fargo argue

that FMC, as the servicer of the O'Meara Loan, was authorized to receive its payoff and that the debt secured by the Original DOT was extinguished upon this payment. We agree with Ms. O'Meara and Wells Fargo that the debt secured by the Original DOT was extinguished by payoff of the loan to FMC and that Plaintiffs are not entitled to a lien encumbering the O'Meara property.

¶ 18 Ms. O'Meara and Wells Fargo met their burden to prove that FMC was Plaintiffs' authorized agent. There was no genuine factual dispute that FMC was the servicer of the O'Meara Loan at all times pertinent to this case. Plaintiffs admitted that FMC was the servicer of the O'Meara Loan "from the date of execution of the Original Note through the Closing of the Refinance." As the servicer of the O'Meara Loan, FMC was authorized to receive payments of the loan on behalf of Plaintiffs. See N.C. Gen. Stat. § 45-101(1) (2019) (defining "[a]ct as a mortgage servicer" to include "receiving any scheduled periodic payments from a borrower pursuant to the terms of any mortgage loan").

¶ 19 Plaintiffs argue that they did not authorize FMC to file the Satisfaction of Mortgage, and that therefore they are entitled to a priority lien encumbering Ms. O'Meara's property. Plaintiffs cite *Union Central Life Insurance Co. v. Cates*, 193 N.C. 456, 462, 137 S.E. 324, 327 (1927), for the proposition that "[t]he discharge of a perfected mortgage upon public record by the act of an unauthorized third party entitles the mortgagee to restoration of its status as a priority lienholder over an

innocent purchaser for value.” *First Fin. Sav. Bank, Inc. v. Sledge*, 106 N.C. App. 87, 88, 415 S.E.2d 206, 207 (1992) (citing *Union Central*, 193 N.C. at 462, 137 S.E. at 327).

¶ 20 However, Plaintiffs omit an overarching caveat to this rule. The Supreme Court in *Union Central* went on to state that

[i]f, however, the owner of the mortgage is responsible for the mortgage being released of record, as when the entry of satisfaction is *made possible by his own neglect*, or misplaced confidence, or his own mistake, or where he is shown to have received actual satisfaction, or to have accepted the benefit of the transaction which resulted in the release, *he will not be permitted to establish his lien* to the detriment of one who has innocently dealt with the property in the belief that the mortgage was satisfied.

193 N.C. at 462, 137 S.E. at 327 (emphasis added) (citation and internal quotation mark omitted).

¶ 21 Assuming *arguendo* that FMC and Ron McCord were unauthorized third parties, Plaintiffs’ own neglect would preclude a reinstatement of their lien priority on Ms. O’Meara’s property. Here, Plaintiffs were under a statutory duty to provide written notice to Ms. O’Meara that the O’Meara Loan had changed ownership. See 15 U.S.C. § 1641(g) (2017) (requiring the new assignee of a mortgage to notify the borrower in writing within thirty days after the assignment). Plaintiffs failed to provide such notice. Plaintiffs’ breach of this statutory duty contributed to Ms.

O'Meara's sending payoff of the loan to FMC, which in turn enabled FMC to file the Satisfaction of Mortgage.

¶ 22 Plaintiffs cite *Household Realty Corp. v. Lambeth*, 188 N.C. App. 545, 549-50, 656 S.E.2d 336, 339-40 (2008), as authority for restoration of the Original DOT and reinstatement of Plaintiffs' priority lien, but the present case is factually distinguishable. In *Household Realty*, the mortgagee was not negligent in any way concerning a third party's unauthorized cancellation of a deed of trust. *See id.* at 552, 656 S.E.2d at 341 (reinstating the mortgagee's priority lien and reasoning that the mortgagee "was in no way negligent for the [unauthorized third party's] act"). Further, the cancellation in *Household Realty* was fraudulently entered by a third party who falsely represented that full payment of the underlying debt had been received. *Id.* at 547, 656 S.E.2d at 338.

¶ 23 Since Ms. O'Meara had in fact paid off the O'Meara Loan to an authorized agent of Plaintiffs, the debt secured by the Original DOT was extinguished. "[W]here a mortgage or deed of trust is given to secure a specific debt, payment of the debt extinguishes the power of sale and terminates the title of the mortgagee or trustee, and all outstanding interests in the land revert immediately to the mortgagor by operation of law." *Barbee v. Edwards*, 238 N.C. 215, 218-19, 77 S.E.2d 646, 649 (1953). Although FMC may have breached its duty to remit this payment to Plaintiffs, that question is outside the quiet title issue decided by summary judgment.

Ms. O'Meara was entitled to a judgment in her favor to quiet title, subject to Wells Fargo's deed of trust.

¶ 24 Plaintiffs have not demonstrated that they are entitled to a lien encumbering Ms. O'Meara's property. Ms. O'Meara and Wells Fargo have demonstrated entitlement to a quiet title judgment in Ms. O'Meara's favor.

IV. Conclusion

¶ 25 For the foregoing reasons, summary judgment in favor of Defendants Ms. O'Meara and Wells Fargo was proper. We affirm the order of the trial court.

AFFIRMED.

Judges DIETZ and TYSON concur.

Report per Rule 30(e).