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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA15-797

Filed: 10 May 2016

Forsyth County, No. 14 CVS 5603

U.S. Bank National Association, as Trustee for the C-BASS Mortgage Loan Asset-Backed Certificates, Series 2006-RP2, Plaintiff,

v.

Willie Lee Pinkney, Clara Pinkney, Siddco, Inc., Poore Substitute Trustee, LTD, Defendants.

Appeal by plaintiff from order entered 5 March 2015 by Judge Patrice A. Hinnant in Forsyth County Superior Court. Heard in the Court of Appeals 1 December 2015.

Bradley Arant Boult Cummings LLP, by Brian M. Rowson, for plaintiff-appellant.

The Law Office of Benjamin D. Busch, PLLC, by Benjamin D. Busch, for defendant-appellees Willie Lee Pinkney and Clara Pinkney.

McCULLOUGH, Judge.

U.S. Bank National Association, as Trustee for the C-BASS Mortgage Loan Asset-Backed Certificates, Series 2006-RP2 (“plaintiff”) appeals from an order granting Willie Lee Pinkney and Clara Pinkney’s (“the Pinkneys”) motion to dismiss pursuant to Rule 12(b)(6) of the North Carolina Rules of Civil Procedure. Based on the reasons stated herein, we affirm the order of the trial court.

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I. Background

On 10 September 2014, plaintiff filed a complaint against the Pinkneys, Siddco, Inc. (“Siddco”), and Poore Substitute Trustee, LTD (“Poore”) (collectively referred to as “defendants”). Plaintiff alleged as follows: Plaintiff is a national banking association doing business in Forsyth County, North Carolina. The Pinkneys are citizens and residents of Forsyth County, North Carolina. Siddco is a North Carolina corporation doing business in Forsyth County, North Carolina. Poore is a corporation organized and existing under the laws of Delaware and is the substitute trustee of the deed of trust recorded in Book 1978 at Page 2544 of the Forsyth County Public Registry in favor of plaintiff by instrument recorded in Book 3045 at Page 4375 of the Forsyth County Public Registry.

Plaintiff alleged that on or about 29 May 1992, Dr. Ioan T. Thomas and his wife, Theo Patricia Thomas, executed a note in the principal amount of \$57,500.00 made payable to Siddco (“Thomas Note”). The Thomas Note was secured by a Deed of Trust recorded in Book 1746 at Page 771 of the Forsyth County Public Registry (“Thomas Deed of Trust”). The Thomas Note is a first lien which has been satisfied but not canceled in public record, upon the real property located at 1003 Glousman Road, Winston-Salem, NC 27104 (“Subject Property”). Siddco is the beneficiary of the Thomas Deed of Trust.

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On or about 7 December 1995, Dr. Ioan T. Thomas and his wife, Theo Patricia Thomas, conveyed the subject property to the Pinkneys.

On or about 30 September 1996, the Pinkneys executed a note in the amount of \$30,000.00 made payable to Siddco ("Subordinated Siddco Note"). The Subordinated Siddco Note was secured by a Deed of Trust recorded in Book 1920 at Page 1998 of the Forsyth County Public Registry ("Subordinated Siddco Deed of Trust"). Siddco is the current beneficiary of the Subordinated Siddco Deed of Trust.

On or about 12 December 1997, the Pinkneys executed a Note (the "Note") in the principal amount of \$257,256.89, made payable to Ford Consumer Finance Company, Inc. ("Ford"). The Note was secured by a Deed of Trust ("Subject Deed of Trust") recorded in Book 1978 at Page 2544 of the Forsyth County Public Registry.

Thereafter, the Note was indorsed by Associates Home Equity Services, Inc. ("AHES") F/K/A Ford Consumer Finance Company, Inc. ("Ford") to Credit Based Asset Servicing and Securitization ("Credit Asset").

The Note was then assigned from Credit Asset via recorded assignment to U.S. Bank National Association, as Indenture Trustee under the Indenture, dated as 14 December 2001, between Salomon Mortgage Loan Trust 2001-CB4, and U.S. Bank National Association, C-Bass Mortgage Loan Asset-Backed Notes recorded in Book 2255 at Page 1652 ("U.S. Bank Indenture").

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Finally, the Note was specifically indorsed to plaintiff by U.S. Bank Indenture, without recourse.

On or about 22 December 1997, the Pinkneys executed a note in the principal amount of \$30,000.00 ("Second Subordinated Siddco Note"). The Second Subordinated Siddco Note secured by a Deed of Trust recorded in Book 1978 at Page 2546 of the Forsyth County Public Registry ("Second Subordinated Siddco Deed of Trust"). Siddco is the current beneficiary of the Second Subordinated Siddco Deed of Trust. The Subordinated Siddco Note has been subordinated to the Subject Deed of Trust via a Deed of Subordination recorded in Book 1935 at Page 1154.

Plaintiff advanced the following claims for relief: priority of interest; judicial foreclosure; and judgment on the Note. Plaintiff prayed that the trial court would enter an order declaring the Thomas Deed of Trust canceled and the Subject Deed of Trust a first lien on the Subject Property; the trial court would appoint Poore as commissioner to sell the Subject Property secured by the Subject Deed of Trust in satisfaction of a debt due to plaintiff by the Pinkneys; and, that plaintiff have and recover from the Pinkneys the principal sum of \$268,171.13 along with past due interest in the amount of \$118,055.05 with all accrued fees, costs, and interest accruing at 8% from and after 2 September 2014 until judgment, and at the legal rate thereafter until paid, together with the costs of this action to be taxed by the clerk

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including reasonable attorneys' fees in accordance with the Note and Subject Deed of Trust.

On 6 November 2014, the Pinkneys filed a "Motion to Dismiss" pursuant to Rule 12(b)(6) of the North Carolina Rules of Civil Procedure. The Pinkneys presented two bases to the trial court: (1) that plaintiff was not the holder of the note and (2) that the statute of limitations had expired. Specifically, the Pinkneys argued that the Note did not contain the magic words denoting a negotiable instrument, to wit: "Pay to the Order or Pay to bearer" did not appear on the face of the document. As such, the Pinkneys argued that the Note was to be treated as a regular contract, the Note was not executed under seal, and thus, the statute of limitations was three years. The Pinkneys pointed out that there was no allegation included in the complaint demonstrating any payment on the account within the three years preceding the filing of the complaint on 10 September 2014. Therefore, the Pinkneys contended that based on the face of the complaint, plaintiff's claims were barred by the statute of limitations. Additionally, in a 16 February 2015 "Supplement A[r]gument in Support of Defendants' Motion to Dismiss," the Pinkneys argued that if a party in possession is not the original holder of a note, transfer required indorsement by each previous holder of the note. Because the complaint alleged that Credit Asset only assigned the beneficiary interest under the Subject Deed of Trust rather than indorsing the Note, the lack of indorsement from the predecessor in the

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chain of title was fatal to plaintiff's claim of being a holder, entitled to enforce the instrument.

Following a hearing held on 16 February 2015, the trial court entered an order on 5 March 2015, granting the Pinkney's motion to dismiss. Plaintiff's action was dismissed with prejudice. Plaintiff appeals from this order.

II. Standard of Review

"On a motion to dismiss . . . the standard of review is whether as a matter of law, the allegations of the complaint, treated as true, are sufficient to state a claim upon which relief may be granted under some legal theory." *Laster v. Francis*, 199 N.C. App. 572, 575, 681 S.E.2d 858, 861 (2009) (citation omitted).

Rule 12(b)(6) generally precludes dismissal except in those instances where the face of the complaint discloses some insurmountable bar to recovery. Dismissal is proper, however, when one of the following three conditions is satisfied: (1) the complaint on its face reveals that no law supports the plaintiff's claim; (2) the complaint on its face reveals the absence of facts sufficient to make a good claim; or (3) the complaint discloses some fact that necessarily defeats the plaintiff's claim.

Newberne v. Dep't of Crime Control & Pub. Safety, 359 N.C. 782, 784, 618 S.E.2d 201, 203-204 (2005) (citations and quotation marks omitted). Our Court conducts a *de novo* review to determine whether the trial court's ruling was correct. *Ventriglia v. Deese*, 194 N.C. App. 344, 347, 669 S.E.2d 817, 819 (2008).

III. Discussion

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The sole issue on appeal is whether the trial court erred by granting the Pinkneys' Rule 12(b)(6) motion to dismiss.

First, plaintiff argues that it adequately alleged in its complaint that it is the current holder of the Note and has standing to foreclose on the Subject Deed of Trust.

We disagree.

In a foreclosure proceeding under a power of sale, the lender bears the burden of proving four elements that must be established in order for the clerk of court to authorize the mortgagee or trustee to proceed with the foreclosure: (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. . . .

In re Adams, 204 N.C. App. 318, 321, 693 S.E.2d 705, 709 (2010) (citation and quotation marks omitted) (emphasis added); *see* N.C. Gen. Stat. § 45-21.16(d) (2015).

For the trial court to find sufficient evidence that plaintiff is the current holder of the Note in accordance with N.C. Gen. Stat. § 45-21.16(d), “this Court has determined that the following two questions must be answered in the affirmative: (1) is there sufficient competent evidence of a valid debt?; and (2) is there sufficient competent evidence that [the party seeking to foreclose is] the holder[] of the notes [that evidence that debt]?” *In re David A. Simpson, P.C.*, 211 N.C. App. 483, 490, 711 S.E.2d 165, 170 (2011) (citation and quotation marks omitted). “This Court has determined that the definition of ‘holder’ in North Carolina’s adoption of the Uniform Commercial Code (‘UCC’) is applicable to the term as it is used in N.C.G.S. § 45-21.6

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for foreclosures under powers of sale.” *In re Foreclosure of a Deed of Trust Executed by Rawls*, __ N.C. App. __, __, 777 S.E.2d 796, 798-99 (2015) (citation omitted).

“A promissory note is a negotiable instrument under N.C. Gen. Stat. [§] 25-3-104(a).” *Id.* at __, 777 S.E.2d at 799 (citation and quotation marks omitted). The UCC defines the “holder” of a negotiable instrument to be “[t]he person in possession of a negotiable instrument that is payable either to bearer or to an identified person that is the person in possession[.]” N.C. Gen. Stat. § 25-1-201(b)(21)(a) (2015). A “person” under the UCC is defined as “an individual, corporation, business trust, estate, trust, partnership, limited liability company, association, joint venture, government, governmental subdivision, agency, or instrumentality, public corporation, or any other legal or commercial entity.” N.C. Gen. Stat. § 25-1-201(b)(27). A “bearer” is defined as “a person in control of a negotiable electronic document of title or a person in possession of a negotiable instrument, negotiable tangible document of title, or certificated security that is payable to bearer or indorsed in blank.” N.C. Gen. Stat. § 25-1-201(b)(5).

“When the party in possession is not the original holder, if the instrument is payable to an identified person, transfer requires indorsement by each previous holder.” *In re Foreclosure of a Deed of Trust Executed by Bass*, 366 N.C. 464, 468, 738 S.E.2d 173, 176 (2013) (citing to N.C. Gen. Stat. § 25-3-201(b) which provides that “if an instrument is payable to an identified person, negotiation requires transfer of

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possession of the instrument and its indorsement by the holder”). An indorsement is “a signature . . . that alone or accompanied by other words is made on an instrument for the purpose of . . . negotiating the instrument. . . . For the purpose of determining whether a signature is made on an instrument, a paper affixed to the instrument is a part of the instrument.” N.C. Gen. Stat. § 25-3-204 (2015). “The UCC defines ‘signature’ broadly, as ‘any symbol executed or adopted with present intention to adopt or accept a writing.’” *Bass*, 366 N.C. at 468, 738 S.E.2d at 176 (citing N.C. Gen. Stat. § 25-1-201(b)(37)).

In the present case, plaintiff was not the original holder of the Note. Accordingly, “each transfer required indorsement of the Note from one holder to the next.” *Bass*, 366 N.C. at 469, 738 S.E.2d at 176. In their motion to dismiss, the Pinkneys argued that the “third entity in the chain of title[, Credit Asset,] assigned the beneficiary interest under the deed of trust rather than indorsing the note.” Plaintiff’s complaint alleged that on 12 December 1997, the Pinkneys executed the Note in the principal amount of \$257,256.89 to Ford. The Note was secured by the Subject Deed of Trust. The Note was “specifically [i]ndorsed” by AHES F/K/A Ford to Credit Asset. Plaintiff’s complaint further alleged that the Note was then assigned from Credit Asset via recorded assignment to U.S. Bank Indenture. Finally, the Note was specifically indorsed to plaintiff by U.S. Bank Indenture, without recourse.

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Treating the allegations of the complaint as true, we are unable to hold that plaintiff stated a claim upon which relief may be granted. The complaint discloses a fact, that the Note and the allonges attached to the Note lack an indorsement from Credit Asset, which necessarily defeats plaintiff's claim. The face of the complaint as well as the documents incorporated into plaintiff's complaint demonstrate that plaintiff cannot establish that it is the holder of the Note.

Plaintiff argues, relying on *Gregg v. Williamson*, 246 N.C. 356, 98 S.E.2d 481 (1957), that the use of a collateral document such as the recorded assignment from Credit Asset to U.S. Bank Indenture "is alone sufficient to transfer the Note." In *Gregg*, the plaintiff alleged that it was the owner of a lot in Hamlet and the defendants also asserted title to the same lot. The plaintiff and the defendants traced title to a common source. The action in *Gregg* hinged on the applicability of a 1945 statute, G.S. 45-37(5), which applied to mortgages given prior to 1923. The 1945 statute provided that owners of debts secured by subsisting mortgages or deeds of trust may (1) collect their debt by foreclosing by judicial process or under power of sale within one year or (2) make "marginal entry that your debt is still alive and thus avoid the effect of the statute." *Id.* at 361, 98 S.E.2d at 486. If a party "fail[ed] to do either of these things in the time prescribed, any purchaser for value from the mortgagor can assert the presumption created against your right to proceed to his detriment." *Id.*

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However, we do not find the decision in *Gregg* to be controlling here. We hold, as previously discussed, that the present action is governed by the UCC, adopted in North Carolina in 1965 as chapter 25 of the General Statutes. *See Boudreau v. Baughman*, 322 N.C. 331, 336, 368 S.E.2d 849, 854 (1988). The UCC is clear that if a party in possession of a note is not the original holder, if the instrument is payable to an identified person, there needs to be an indorsement by each and every previous holder.

Alternatively, plaintiff argues that the trial court erred in granting the Pinkneys' motion to dismiss because plaintiff adequately alleged that it is a non-holder in possession of the Note and has rights of a holder. We do not agree.

N.C. Gen. Stat. § 25-3-301 provides that a “[p]erson entitled to enforce” an instrument includes:

- (i) the holder of the instrument, (ii) a nonholder in possession of the instrument who has the rights of a holder, or (iii) a person not in possession of the instrument who is entitled to enforce the instrument pursuant to G.S. 25-3-309 or G.S. 25-3-418(d). A person may be a person entitled to enforce the instrument even though the person is not the owner of the instrument or is in wrongful possession of the instrument.

N.C. Gen. Stat. § 25-3-301 (2015). It is well established that “a trial court’s consideration of a motion brought under Rule 12(b)(6) is limited to examining the legal sufficiency of the allegations contained within the four corners of the complaint.”

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Hillsboro Partners, LLC v. City of Fayetteville, 226 N.C. App. 30, 32-33, 738 S.E.2d 819, 822 (2013).

In the present case, plaintiff alleged in its 10 September 2014 complaint that it was the present holder of the Note and Subject Deed of Trust. Yet, at the hearing on the Pinkneys' motion to dismiss, plaintiff's counsel argued that plaintiff was "a holder as we say we are or we're a non-holder in possession of the instrument." Plaintiff's complaint did not allege the alternative theory that plaintiff was a non-holder in possession of the Note and plaintiff did not amend its complaint at any time to allege this additional theory. We conclude that based on the absence of specific allegations regarding a non-holder theory, we need not address plaintiff's arguments concerning the non-holder in possession argument.

Based on the foregoing reasons, we hold that the trial court did not err in dismissing plaintiff's complaint pursuant to N.C. Gen. Stat. § 1A-1, Rule 12(b)(6). Having so held, we need not address plaintiff's remaining argument.

IV. Conclusion

The 5 March 2015 order of the trial court, granting the Pinkneys' motion to dismiss, is affirmed.

AFFIRMED.

Judges BRYANT and GEER concur.

Report per Rule 30(e).