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NO. COA11-55
NORTH CAROLINA COURT OF APPEALS

Filed: 18 October 2011

GMAC MORTGAGE, LLC,
Plaintiff,

v.

Surry County
No. 07 CVS 1501

WILLIAM MILLER; RUSSELL D.
GROGAN, JR.; STEPHANIE GROGAN;
KELLAM & PETTIT, P.A.; as
Substitute Trustee; CMG
MORTGAGE, INC., a/k/a LAWYERS
TITLE INSURANCE, INC., n/k/a
LANDAMERICA FINANCIAL GROUP,
INC., as Trustee; FIRST CITIZENS
BANK & TRUST COMPANY; JERRY V.
VENABLE, as Trustee; FOUNDATION
FINANCIAL GROUP, LLC; and
NETWORK CLOSING SERVICES, INC.,
as Trustee, *And* WELLS FARGO
BANK, N.A., AS TRUSTEE FOR
CARRINGTON MORTGAGE LOAN TRUST,
SERIES2006-NC2 ASSET BACKED
PASS-THROUGH CERTIFICATES,
Defendants.

Appeal by defendants from order and judgment entered 7
September 2010 by Judge Vance Bradford Long in Surry County
Superior Court. Heard in the Court of Appeals 18 August 2011.

*Brooks, Pierce, McLendon, Humphrey & Leonard, L.L.P., by
Robert J. King, III and Kathleen A. Gleason, for plaintiff-
appellee.*

Hatfield, Mountcastle, Deal, Van Zandt & Mann, LLP, by John P. Van Zandt, III, and Marc H. Eppley, for defendant appellants.

STEELMAN, Judge.

Where the four corners of the Deed of Trust and extrinsic evidence presented at trial showed that the parties intended to encumber the entirety of Tracts I and II, the trial court properly concluded that it was a valid first lien on the property. Where the trial court awarded GMAC post-judgment interest upon the principal amount of the debt and also on the pre-judgment accrued interest in violation of N.C. Gen. Stat. § 24-5, this case must be remanded for modification of the judgment.

I. Factual and Procedural Background

In 1997, William Miller, Russell Grogan, Jr., and Stephanie Grogan, Miller's daughter, (collectively, owners) purchased a 21.394 acre tract of land (Tract I) in Surry County. Subsequently, owners purchased a 0.15 acre tract (Tract II) to provide access to Tract I from Armstrong Road, a public road. Owners constructed two residences on Tract I, and constructed a paved roadway over Tract II and a portion of Tract I, creating a private roadway named "Jaguar Way."

In February 2003, owners obtained a loan in the amount of \$237,900.00 from GMAC Mortgage, LLC (GMAC). Owners executed a promissory note and a Deed of Trust (GMAC Deed of Trust). The property referenced in the Deed of Trust was described as tax parcel number 595800013803. This tax parcel number encompassed both Tract I and Tract II. The description of the property also included a reference to a deed recorded at Book 662, Page 415, Surry County Registry, which was the deed for Tract II.

In 2005, owners subdivided Tract I into Tract IA (northern 10.932 acre parcel) and Tract IB (southern 10.389 acre parcel). Owners collectively retained title to Tract IA, and Miller conveyed his interest in Tract IB to the Grogans. The parcel identified as Tract IA is 230 Jaguar Way while the parcel identified as Tract IB is 202 Jaguar Way. After Tract I was subdivided, owners granted a non-exclusive perpetual access easement to Tract IA over Tract IB and Tract II, which is recorded at Book 1089, Page 649 of the Surry County Registry.

On 18 February 2006, owners obtained another loan in the amount of \$158,000.00 from Foundation Financial Group, LLC (Foundation). A promissory note and Deed of Trust (Foundation Deed of Trust) were executed. The Foundation Deed of Trust encumbered Tract IA. Foundation assigned its interest in the

Deed of Trust to New Century Mortgage Corporation on 18 February 2006, which subsequently assigned its interest to Wells Fargo Bank, N.A. (Wells Fargo).

Owners subsequently defaulted on the GMAC loan. On 16 November 2007, GMAC filed this action for judicial foreclosure against owners; Kellam & Pettit, P.A., as Substitute Trustee of the GMAC Deed of Trust; CMG Mortgage, Inc.; Lawyers Title of North Carolina, Inc., a/k/a Lawyers Title Insurance, Inc., n/k/a LandAmerica Financial Group, Inc., as Trustee under the CMG Mortgage Deed of Trust; First Citizens Bank & Trust Company; Jerry V. Venable, as Trustee under the First Citizens Deed of Trust; Foundation; and Network Closing Services, Inc., as Trustee of the Foundation Deed of Trust. GMAC alleged that owners intended to grant it a first-priority lien upon Tract IA and an appurtenant right to use Jaguar Way, and that owner's default justified GMAC foreclosing upon their interest in the intended collateral.¹ GMAC requested judgment against owners in the principal amount of \$229,409.59, plus interest.

On 10 September 2009, Wells Fargo filed a motion to intervene as a party-defendant. This motion was granted and

¹ GMAC initially sought reformation of the Deed of Trust at issue. However, GMAC abandoned its claim for reformation before the commencement of trial.

Wells Fargo filed an answer denying GMAC's assertion that it had a superior lien to that of its Deed of Trust. The basis of this assertion was that the description of the property contained in the GMAC Deed of Trust did not include Tract IA.

This matter was heard before Judge Long, sitting without a jury, on 8 February 2010. Owners, Foundation, and Wells Fargo were the only defendants who appeared before the trial court.² On 7 September 2010, the trial court entered an order containing findings of fact and conclusions of law, and held that the GMAC Deed of Trust encumbered all of Tracts IA, IB (collectively, Tract I), and Tract II based upon the "four corners" of the document and the extrinsic evidence admitted at trial. The trial court ruled that GMAC was entitled to judicial foreclosure of Tract IA and all easements, appurtenances, and fixtures associated therewith, including the above-referenced easement over Tract IB and Tract II, and that GMAC's lien on this property was a first priority lien. The trial court further held that GMAC was judicially estopped from foreclosing on Tracts IB and II, because its complaint only sought foreclosure on Tract IA. GMAC did not challenge this ruling. GMAC was also

² A number of defendants failed to answer in this case and the trial court entered default judgment against them. None of these defendants have appealed.

awarded judgment against owners in the amount of \$304,091.14, together with interest thereon from 8 March 2010 at the legal rate of eight percent per annum until the judgment was paid in full.

Wells Fargo and Foundation (collectively, defendants) appeal.

II. Standard of Review

Our standard of review from a judgment entered upon a non-jury trial is "whether there is competent evidence to support the trial court's findings of fact and whether the findings support the conclusions of law and ensuing judgment." *Sessler v. Marsh*, 144 N.C. App. 623, 628, 551 S.E.2d 160, 163 (citation omitted), *disc. review denied*, 354 N.C. 365, 556 S.E.2d 577 (2001). "Where such competent evidence exists, this Court is bound by the trial court's findings of fact even if there is also other evidence in the record that would sustain findings to the contrary. The trial court's conclusions of law, by contrast, are reviewable *de novo*." *Willen v. Hewson*, 174 N.C. App. 714, 718, 622 S.E.2d 187, 190 (2005) (internal citations omitted), *disc. review denied*, 360 N.C. 491, 631 S.E.2d 520 (2006).

III. Construing GMAC Deed of Trust

In their first argument, defendants contend that the trial court erred in finding the terms of the GMAC Deed of Trust to be ambiguous and construing it to be a valid encumbrance on the entirety of Tract I and Tract II against subsequent purchasers for value. We disagree.

At the outset, we note that defendants fail to argue that any of the trial court's findings of fact are not supported by the evidence. Rather, defendants take issue with the weight given by the trial court to certain evidence and its credibility determinations. See *Knutton v. Cofield*, 273 N.C. 355, 359, 160 S.E.2d 29, 33 (1968) (holding that the trial judge "passes upon the credibility of the witnesses and the weight to be given their testimony and the reasonable inferences to be drawn therefrom. If different inferences may be drawn from the evidence, he determines which inferences shall be drawn and which shall be rejected." (citation omitted)). Thus, the issue before us on appeal is whether the trial court correctly concluded that the description of the property in the GMAC Deed of Trust encumbered Tracts I and II.

It is well-established that "[a] deed purporting to convey an interest in land is void unless it contains a description of

the land sufficient to identify it or refers to something extrinsic by which the land may be identified with certainty." *Overton v. Boyce*, 289 N.C. 291, 293, 221 S.E.2d 347, 349 (1976) (citations omitted). "A deed of trust containing a defective description of the subject property is a defective deed of trust and provides no notice, actual or constructive, under our recordation statutes." *Fifth Third Mortgage Co. v. Miller*, ___ N.C. App. ___, ___, 690 S.E.2d 7, 9-10 (citation omitted), *disc. review denied*, ___ N.C. ___, 703 S.E.2d 445 (2010).

Defendants cite *Fifth Third Mortgage Co.* for the proposition that the GMAC Deed of Trust should be deemed void for lack of clarity in the description of the property encumbered by the deed of trust. However, the facts of *Fifth Third Mortgage Co.* are materially different from the facts of the instant case.

In *Fifth Third Mortgage Co.*, "Fifth Third acknowledge[d] that the deed of trust it filed on 21 March 2007 fail[ed] to name a Trustee and 'failed to contain a proper description of the real property to be conveyed to the Trustee'" *Id.* at ___, 690 S.E.2d at 10. The deed of trust erroneously identified the encumbered property as being "all of Lot 4 in Block 1 of LEACROFT SUBDIVISION, PHASE 1, MAP 1, as same is

shown on a map thereof recorded in Map Book 26 at Page 163 in the Mecklenburg County Public Registry." *Id.* at ___ n.2, 690 S.E.2d at 10 n.2. The property that the plaintiff sought to have encumbered by its deed of trust was Lot 151 of McGee Valley as shown in Plat Cabinet 1 at files 104 thru 106 of the Union County Registry. *Id.* Because the deed of trust identified the *wrong lot* in the *wrong county*, it was regarded as a nullity as to subsequent purchasers or encumbrances. *Id.* at ___, 690 S.E.2d at 10.

In the instant case, the GMAC Deed of Trust does not contain a totally erroneous description of the property encumbered by the deed of trust as did the deed of trust in *Fifth Third Mortgage Co.* The description at issue contains two separate references: (1) tax parcel number 595800013803; and (2) the Frye Deed conveying Tract II to owners. The GMAC Deed of Trust describes the encumbered property as follows:

The Assessor's Parcel Number (Property Tax ID#) for the Real Property is 595800013803. ALL THAT PARCEL OF LAND IN TWP OF SOUTH WESTFIELD, SURRY COUNTY, STATE OF NORTH CAROLINA. AS MORE FULLY DESCRIBED IN DEED BOOK 662, PAGE 415, ID#595800013803, BEING MORE PARTICULARLY DESCRIBED AS A METES AND BOUNDS PROPERTY.

BY FEE SIMPLE DEED FROM VALLIE REDMAN FRYE AND LOMA G. FRYE, WIFE AND HUSBAND AS SET FORTH IN BOOK 662, PAGE 415 DATED 10/02/1997

AND RECORDED 10/07/1997, SURRY COUNTY
RECORDS, STATE OF NORTH CAROLINA.

Parcel ID Number: 595800013803 which
currently has the address of 230 Jaguar Way
Pilot Mountain, North Carolina 27041
("Property Address") [.]

The trial court found that the description of the real
property encumbered by the GMAC Deed of Trust was ambiguous.

This Court has held:

To resolve cases in which a deed contains an
ambiguous description, the courts have
formulated various rules of construction and
techniques to locate the boundaries of deeds
whose descriptions are less than ideal. The
most common rule of construction used by the
courts is to gather the intention of the
parties from the four corners of the
instrument. The courts seek to sustain a
deed if possible on the assumption that the
parties intended to convey and receive land
or they would never have been involved in
the first place.

Chicago Title Ins. Co. v. Wetherington, 127 N.C. App. 457, 462,
490 S.E.2d 593, 597 (1997) (internal quotations omitted), *disc.*
review denied, 347 N.C. 574, 498 S.E.2d 380 (1998); *see also*
Pearson v. Chambers, 18 N.C. App. 403, 406, 197 S.E.2d 42, 44
(1973) ("In the interpretation of the provisions of a deed, the
intention of the grantor must be gathered from the whole
instrument and every part thereof given effect, unless it
contains conflicting provisions which are irreconcilable, or a

provision which is contrary to public policy or runs counter to some rule of law." (quotation omitted)).

Defendants argue that the GMAC Deed of Trust encumbered only the 0.15 acre Tract II based upon the metes and bounds description referenced in the Frye deed. Contrary to defendants' assertion, the "four corners" of the document show that the intent of the parties was for the GMAC Deed of Trust to encumber both Tracts I and II.

Four Corners of the Document

First, the tax parcel number 595800013803 is a reference to a Surry County tax map which cites to a Plat that is recorded at the Surry County Register of Deeds at Plat Book 5, Page 41. The recorded Plat contains a survey for Tract I. The Frye deed referenced in the GMAC Deed of Trust also contains a metes and bounds description for Tract II. Thus, when viewed together, the tax parcel number and the Frye Deed identify the entirety of Tract I and Tract II as the property encumbered by the GMAC Deed of Trust.

Second, the GMAC Deed of Trust is a "single family Fannie Mae/Freddie Mac uniform instrument, which means it is a type that is used for single family residential homes." Paragraph 6 of the Uniform Covenants contained in the Deed of Trust stated

that "Borrower shall occupy, establish, and use the Property as Borrower's principal residence within 60 days after the execution of this Security Instrument and shall continue to occupy the Property as Borrower's principal residence for at least one year after the date of occupancy" There were two residences built on Tract I. There was no residence built on the 0.15 acre access parcel, Tract II. Given the fact that Tract II was 25 feet by about 266 feet, a residence could not have been erected thereon.

Third, the amount of the loan secured by the GMAC Deed of Trust was \$237,900.00. The tax revenue stamps affixed to the deed of trust conveying Tract II indicated that owners purchased that property for approximately \$1000.00 to \$2,000.00.

We hold that the trial court properly concluded that the parties intended for the GMAC Deed of Trust to encumber both Tract I and Tract II based upon the four corners of the document.

Extrinsic Evidence

[I]n some situations it is necessary to look beyond the four corners of the deed to ascertain the intent of the parties. Intention, as a general rule, must be sought in the terms of the instrument; but if the words used leave the intention in doubt, resort may be had to the circumstances attending the execution of the instrument

and the situation of the parties at that time -- the tendency of the modern decisions being to treat all uncertainties in a conveyance as ambiguities to be explained by ascertaining in the manner indicated the intention of the parties.

Mason-Reel v. Simpson, 100 N.C. App. 651, 654, 397 S.E.2d 755, 757 (1990) (quotation and alteration omitted).

In the instant case, the trial court found that "[a]lthough not necessary to resolve the ambiguity in the Description, there is reliable extrinsic evidence available to the Court to assist in determining the [owners'] intent at the execution of the Deed of Trust."

The trial court heard testimony from numerous witnesses on behalf of both GMAC and defendants. Miller and Grogan both testified that it was their intention to encumber only Tract II with the GMAC Deed of Trust. The trial court found that this testimony was "unbelievable." The trial court also heard from defendants' and GMAC's expert witnesses, and assigned "considerably more weight" to the testimony of GMAC's expert who opined that the Deed of Trust encumbered Tracts I and II.

Looking at the extrinsic evidence presented, the trial court determined that the intentions of the owners were to encumber both Tracts I and II in the GMAC Deed of Trust. As discussed above, the weight assigned to the evidence and

credibility determinations are the province of the trial court. *Knutton*, 273 N.C. at 359, 160 S.E.2d at 33.

The trial court did not err by construing the GMAC Deed of Trust to be a valid encumbrance on the entirety of Tract I and Tract II against defendants. This argument is without merit.

IV. Judicial Estoppel

In their second argument, defendants contend that the trial court erred "in applying judicial estoppel to effectively grant Plaintiff-Appellee GMAC reformation of its 'ambiguous' Deed of Trust."

Defendants have misconstrued the trial court's application of judicial estoppel. The trial court ruled that the GMAC Deed of Trust encumbered the entirety of Tract I and Tract II. After the Deed of Trust was executed, Tract I was subdivided into Tracts IA and IB. GMAC's complaint only sought foreclosure on Tract IA. The trial court only applied judicial estoppel to limit GMAC to foreclosing on Tract IA. GMAC has not appealed any of the trial court's rulings.

This argument is without merit.

V. Defendants' Requested Relief

In their third argument, defendants argue that the trial court erred in denying their requested relief. We disagree.

We first note that any answer of Foundation to the complaint or amended complaint is not contained in the record. The only relief sought by Wells Fargo was to join in GMAC's request for a declaration of the lien rights of the parties, asserting that it had the first lien on the property.

Defendants argue that the trial court erred in "reforming" the GMAC Deed of Trust based upon the applicable statute of limitations, laches, and other equitable theories. These arguments are predicated upon the assumption that the trial court "reformed" the GMAC Deed of Trust. However, as stated above, GMAC abandoned its claim for reformation prior to the commencement of trial. The trial court was construing an ambiguous description of real property to determine what property the parties intended to encumber by the execution of the GMAC Deed of Trust. The trial court correctly held that because GMAC's claim for reformation was abandoned, it should not reach the issue of whether that claim was time-barred.

Defendants further contend that GMAC had the "burden of showing Appellants had adequate notice" of the encumbrance as it was a purchaser for value. However, the trial court made the following findings of fact that are unchallenged on appeal: (1) "Defendants Foundation Financial and Wells Fargo are

sophisticated business entities whose businesses consist in part of loaning monies and obtaining secured interest in real estate to protect those loans[;]" (2) "The Defendant financial institutions knew or could have reasonably ascertained that the Plaintiff loaned \$237,900.00 to the Borrowers and that the deed referenced in the Deed of Trust to secure the \$237,900.00 was for 0.15 acre of property with a purchase price of no more than \$2,000.00[;]" (3) "The Defendant financial institutions knew or could have reasonably ascertained that the Deed of Trust was a Fannie Mae Deed of Trust which is used only in residential real estate transactions and the parcel described by the deed reference in the Deed of Trust did not contain a residence[;]" and (4) "The Defendant financial institutions knew or could have reasonably ascertained that Paragraph Six of the Deed of Trust required the Borrowers to establish their primary residence on the encumbered property and that there was no residence on the 0.15 acre tract (Tract II)."

Defendants finally argue that there was no evidence to support the amount of the lien. However, the amount was supported by the testimony of Juan Aguirre, a Litigation Analyst with GMAC, and the Payoff Statement, which showed that the amount due under the note as of 16 November 2009 was

\$300,747.48, with interest accruing on the principal amount of \$229,409.59 at the rate of \$36.93 per diem thereafter. The trial court awarded GMAC a judgment against owners in the amount of \$304,091.14, an amount that included both the principal amount due under the note and the pre-judgment interest accrued up to the date the order was entered. The trial court then ordered that post-judgment interest (8 percent per annum) accrue on that amount from 8 March 2010 until it was satisfied.

We note that the trial court awarded GMAC "interest on interest." This Court has stated, "Equity dictates that a party should not be forced to pay interest on interest." *NCNB v. Robinson*, 80 N.C. App. 154, 157, 341 S.E.2d 364, 366 (1986). The legal rate of interest may only be applied to the principal amount due in the judgment. See N.C. Gen. Stat. § 24-5(a) (2009) (mandating that the "fact finder in an action for breach of contract shall distinguish the principal from the interest in the award, and the judgment shall provide that the principal amount bears interest until the judgment is satisfied."). The trial court improperly awarded GMAC post-judgment interest on the entire amount due, \$304,091.14. N.C. Gen. Stat. § 24-5(a) mandates that post-judgment interest may only be awarded on the principal amount of \$229,409.59. We therefore remand this issue

to the trial court for modification of the judgment consistent with this opinion. *See NCNB, supra.*

AFFIRMED IN PART; REMANDED IN PART.

Judges CALABRIA and ELMORE concur.

Report per Rule 30(e).