

An unpublished opinion of the North Carolina Court of Appeals does not constitute controlling legal authority. Citation is disfavored, but may be permitted in accordance with the provisions of Rule 30(e)(3) of the North Carolina Rules of Appellate Procedure.

NO. COA11-1487
NORTH CAROLINA COURT OF APPEALS

Filed: 1 May 2012

In the Matter of the Foreclosure Mecklenburg County
of Deed of Trust executed by No. 10 SP 9920
Jennifer L. Wilson in the original
amount of \$94,900.00 dated January
16, 2007, recorded in Book 21672,
Page 355, Mecklenburg County
Registry; Substitute Trustee
Services, Inc., Substitute Trustee

Appeal by Petitioner from order entered 1 June 2011 by
Judge Robert T. Sumner in Mecklenburg County Superior Court.
Heard in the Court of Appeals 3 April 2012.

*The Law Firm of Hutchens, Senter & Britton, P.A., by Andrew
Cogbill and J. Scott Flowers, for Petitioner-appellee.*

Jennifer L. Wilson, pro-se.

HUNTER, JR., Robert N., Judge.

Jennifer L. Wilson ("Respondent") appeals from an order (1)
denying her motion to dismiss a foreclosure action, (2)
dismissing her appeal of the foreclosure action to the superior

court, and (3) ordering that the substitute trustee could proceed with the foreclosure of her property. We dismiss Respondent's appeal as moot.

I. Facts & Procedural Background

On 16 January 2007, Respondent borrowed \$94,900 from SunTrust Mortgage, Inc. d/b/a Sun America Mortgage, a Virginia Corporation ("SunTrust"), the predecessor in interest to Nationstar Mortgage, LLC ("Nationstar"). The debt was evidenced by a note executed by Respondent, perfecting a lien on Respondent's property located at 11906 Silvercrest Drive, Charlotte. The debt was secured by a deed of trust of even date in Book 21672, Page 355 of the Mecklenburg County Registry (the "Registry"). Respondent signed and SunTrust endorsed the note. The terms of the note required Respondent to make monthly payments for interest only in the amount of \$553.58 for the first 120 months and for principal and interest in the amount of \$735.76 thereafter. Respondent made such payments until the payment period ending 1 November 2009 and was thereafter in default.

On 4 March 2010, SunTrust appointed Substitute Trustee Services, Inc. ("STS") as substitute trustee through an Appointment of Substitute Trustee recorded in the Registry. STS

commenced the foreclosure action by filing a Notice of Hearing and a Notice of Sale on 11 October 2010. Effective 1 December 2010, SunTrust had its rights and interest in the note transferred to Nationstar.

On 7 December 2010, a foreclosure hearing was held before the Mecklenburg County Assistant Clerk of Superior Court. STS submitted original affidavits of service containing certified mail receipts, original sheriff's returns of service, an original affidavit of default provided by SunTrust, and copies of the note and the deed of trust. Respondent appeared at the hearing and filed a motion to dismiss the foreclosure action. The Assistant Clerk of Court found sufficient facts to conclude as a matter of law that the foreclosure could proceed. Respondent appealed to Mecklenburg County Superior Court.

On 8 February 2011, Judge Forrest D. Bridges conducted a hearing on the foreclosure appeal. However, STS moved for a continuance to which Respondent agreed, and Judge Bridges continued the matter. The matter again came on for hearing on 29 March 2011 before Judge F. Lane Williamson. Nationstar presented evidence to supplement the court's record, and Respondent appeared and filed another motion to dismiss. Because new evidence was presented that indicated Nationstar was

the holder of the note and not SunTrust, Judge Williamson continued the matter to allow Respondent time to respond to the new evidence.

On 23 May 2011, the foreclosure appeal came before Judge Robert Sumner. Judge Sumner denied Respondent's motion to dismiss the foreclosure action, dismissed Respondent's notice of appeal to the Superior Court, and held the requisite elements to allow a foreclosure under power of sale had been met. Judge Sumner held that a valid debt existed and that Nationstar was the holder of the note at the time of the hearing. On 11 July 2011, Respondent entered notice of appeal to this Court. However, Respondent did not file a motion to stay the foreclosure proceeding while the appeal was pending.

On 14 July 2011, STS filed and posted at the Mecklenburg County Courthouse an Amended Notice of Foreclosure Sale, listing the date of the sale of Respondent's property as 4 August 2011 at 12:30 p.m. STS mailed the amended notice to Respondent at three different addresses. The property was sold at the foreclosure sale on 4 August 2011 to the highest bidder, Nationstar, for \$115,093.55. On 16 August 2011, Nationstar assigned its bid to Federal National Mortgage Association ("Fannie Mae"). On 29 August 2011, a trustee's deed conveying

the property from STS to Fannie Mae was recorded in Book 26700, Page 832 in the Registry. After the bid, no upset bids were filed, and the sale was confirmed. On 20 September 2011, STS filed a Final Report and Account of Foreclosure Sale with the Mecklenburg County Clerk of Court, reflecting that the proceeds of the sale were \$115,093.55 and the name of the purchaser was Fannie Mae.

II. Jurisdiction

Respondent appeals from the final judgment of a superior court, and appeal therefore lies with this Court pursuant to N.C. Gen. Stat. § 7A-27(b) (2011).

III. Analysis

Respondent argues the trial court erred in (1) relying on unauthenticated document copies proffered by Petitioner to determine Nationstar was the holder of the note with the right to foreclose, (2) determining Nationstar was in possession of the note with the right to foreclose, and (3) determining it possessed jurisdiction to proceed on the merits. In addition to addressing Respondent's arguments on appeal, Petitioner raises the additional argument that respondent's appeal is moot and should be dismissed. We agree.

"Even though it is raised by [Petitioner], we first address the issue of mootness as this issue is dispositive and generally, an 'appeal presenting a question which has become moot will be dismissed.'" *In re Hackley*, __ N.C. App. __, __, 713 S.E.2d 119, 121, *rev. denied*, __ N.C. __, 718 S.E.2d 377, and *rev. dismissed as moot*, __ N.C. __, 718 S.E.2d 376 (2011) (citation omitted). Petitioner argues that subsequent to the order allowing foreclosure of Respondent's property, Respondent appealed the order but did not move to enjoin the foreclosure while the appeal was pending. STS then gave amended notice of foreclosure and sold the property at issue as provided by law. Accordingly, Petitioner argues Respondent's appeal regarding the foreclosed property is now moot and should be dismissed.

"Our Supreme Court has stated that '[a] case is considered moot when a determination is sought on a matter which, when rendered, cannot have any practical effect on the existing controversy.'" *Id.* at __, 713 S.E.2d at 121 (quoting *Lange v. Lange*, 357 N.C. 645, 647, 588 S.E.2d 877, 879 (2003)) (citation and quotation marks omitted) (alteration in original). When the questions originally at issue in a case are no longer at issue when the case is on appeal, the appeal is moot and should be dismissed. *N.C. Press Assoc., Inc. v. Spangler*, 87 N.C. App.

169, 171, 360 S.E.2d 138, 139 (1987). N.C. Gen. Stat. § 45-

21.34 provides that:

Any owner of real estate . . . may apply to a judge of the superior court, prior to the time that the rights of the parties to the sale or resale becoming fixed pursuant to [N.C. Gen. Stat. § 45-21.29A] to enjoin such sale, upon the ground that the amount bid or price offered therefor is inadequate and inequitable and will result in irreparable damage to the owner or other interested person, or upon any other legal or equitable ground which the court may deem sufficient.

N.C. Gen. Stat. § 45-21.34 (2011).

If the judgment appealed from directs the sale or delivery of possession of real property, the execution is not stayed, unless a bond is executed on the part of the appellant, with one or more sureties, to the effect that, during his possession of such property, he will not commit, or suffer to be committed, any waste thereon, and that if the judgment is affirmed he will pay the value of the use and occupation of the property, from the time of the appeal until the delivery of possession thereof pursuant to the judgment, not exceeding a sum to be fixed by a judge of the court by which judgment was rendered and which must be specified in the undertaking.

N.C. Gen. Stat. § 1-292 (2011). If no stay is filed for or granted and "an upset bid is not filed following a sale, resale, or prior upset bid within the period specified in this Article, the rights of the parties to the sale or resale become fixed."

N.C. Gen. Stat. § 45-21.29A (2011). "However, even if no upset

bid is submitted, the rights of the parties to a foreclosure sale will not become fixed in the event that a temporary restraining order or preliminary injunction is properly obtained prior to the expiration of the ten-day period for filing upset bids." *Goad v. Chase Home Fin., LLC*, __ N.C. App. __, __, 704 S.E.2d 1, 4 (2010). "As a result, the rights of the parties to a foreclosure sale become fixed upon either the expiration of the period for filing an upset bid, the provision of injunctive relief precluding the consummation of the foreclosure sale, or the occurrence of some similar event." *Hackley*, __ N.C. App. at __, 713 S.E.2d at 125.

Here, the property at issue was sold to Fannie Mae subsequent to an order permitting foreclosure, and the trustee's deed was recorded. There is no indication in the record that Respondent paid a bond to stay the foreclosure sale, see N.C. Gen. Stat. § 1-292, nor was there an upset bid during the ten-day period, see N.C. Gen. Stat. § 45-21.29A, or any indication in the record that Respondent obtained a temporary restraining order or preliminary injunction prior to the end of the ten-day upset bid period. See *Goad*, __ N.C. App. at __, 704 S.E.2d at 4. Therefore, Fannie Mae's rights in the property at issue are fixed, and Respondent's appeal is moot because the questions

Respondent wishes to resolve are merely academic. See *Austin v. Dare County*, 240 N.C. 662, 663, 83 S.E.2d 702, 702-03 (1954) (dismissing the plaintiff's appeal from the trial court's denial of its application for a temporary restraining order to stop the sale and conveyance of a certain piece of real property and noting that the County had already sold and conveyed the land in question and the restraint of the County's sale of the property "is now an academic question" as "[i]t is quite obvious that a court cannot restrain the doing of that which has been already consummated"); *National Surety Corp. v. Sharpe*, 233 N.C. 644, 645, 65 S.E.2d 137, 138 (1951) (dismissing the plaintiff's appeal and noting that it was "conceded here that pending this appeal the sale was had and the property was sold as ordered and advertised. The question the appellant now seeks to present is academic.").

Respondent does not dispute that the sale was completed and that the property was conveyed to the highest bidder from the sale but instead argues the foreclosure sale was invalid because Respondent never received notice of the sale. N.C. Gen. Stat. § 45-21.17(4) requires, "The notice of sale shall be mailed by first-class mail at least 20 days prior to the date of sale to each party entitled to notice of the hearing provided by [N.C.

Gen. Stat. § 45-21.16] whose address is known to the trustee or mortgagee[.]” N.C. Gen. Stat. § 45-21.17(4) (2011). Petitioners sent the amended notice of sale to three possible addresses for Respondent, including the address at which Respondent initially received notice of hearing. Respondent claims she never received the amended notice of sale and that Petitioners knew her last known mailing address but did not mail the notice to this address. However, Respondent never filed a motion with the trial court to invalidate the foreclosure sale due to inadequate notice. The Court of Appeals is a court of review and has no jurisdiction to determine facts not conclusively established at the trial court level. “[T]he Court of Appeals [has] jurisdiction to review upon appeal decisions of the several courts of the General Court of Justice . . . upon matters of law or legal inference.” N.C. Gen. Stat. § 7A-26 (2011). As the issue of whether Respondent received the amended notice of sale requires the determination of facts, this Court has no jurisdiction to review this issue. Therefore, Respondent’s argument is overruled.

IV. Conclusion

For the foregoing reasons, Respondent’s appeal is Dismissed.

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Judges MCGEE and STEPHENS concur.

Report per Rule 30(e).