An unpublished opinion of the North Carolina Court of Appeals does not constitute controlling legal authority.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. COA11-1226
NORTH CAROLINA COURT OF APPEALS

Filed: 5 June 2012

IN RE:
Foreclosure of Real Property Under Deed of Trust from DOROTHY P. VOGLER, in the original amount of $118,000.00, payable to Bank of America, N.A., dated October 16, 2003 and recorded on November 12, 2003 in Book 985, at Page 263, Surry County Registry Trustee Services of Carolina, LLC, Substitute Trustee

Surry County
No. 11 SP 20

Appeal by petitioner from order entered 6 June 2011 by Judge Patrice A. Hinnant in Surry County Superior Court. Heard in the Court of Appeals 22 February 2012.

The Law Firm of Hutchens, Senter & Britton, P.A., by Hilton T. Hutchens, Jr., and Natasha M. Barone, for Petitioner-appellant.

Lowe & Williams, PLLC, by Sharon H. Lowe, for Respondent-appellee.

ERVIN, Judge.

Petitioner Bank of America, N.A., appeals from an order denying a motion filed pursuant to N.C. Gen. Stat. § 1A-1, Rule 60 seeking to have an order enjoining the foreclosure of a deed of trust applicable to certain real property set aside. On appeal, Bank of America argues that the trial court erred by enjoining its effort to foreclose upon the property in question

and by ruling that certain estate administration costs were entitled to priority over the lien arising from its deed of trust, and that the issue of whether Bank of America properly sought relief from alleged errors of law by means of a motion lodged pursuant to N.C. Gen. Stat. § 1A-1, Rule 60, is not properly before us. After careful consideration of Bank of America's challenges to the trial court's order in light of the record and the applicable law, we conclude that the trial court did not err by denying Bank of America's motion.

I. Factual Background

On 25 May 2010, Dorothy P. Vogler died testate. Subsequently, Chris Vogler qualified as executor of Ms. Vogler's estate. As a result of the fact that Ms. Vogler's debts exceeded the total value of the personal and real property that she owned at the time of her death, Mr. Vogler initiated a special proceeding entitled "*Chris Vogler, et. al. vs. Frederic G. Vogler, et. al.*," on 30 July 2010 for the purpose of obtaining authorization to sell the real estate that Ms. Vogler owned at the time of her death and to use the proceeds to pay her debts.[1] On 9 September 2010, the Clerk of Superior Court entered an order authorizing the sale of Ms. Vogler's real estate for that purpose. A public auction was held on 6

[1]Bank of America was not a party to this special proceeding.

November 2010, after which several upset bids were filed. Ultimately, the highest bid received for the property was $79,655.50. The sale of Ms. Vogler's real property was confirmed by the Clerk in an Order of Confirmation on 12 January 2011. The Clerk ordered the Commissioner to pay, among other things, the costs of the proceeding as well as the remaining balance owed on the mortgage secured by the property.

On 18 January 2011, Bank of America initiated a separate special proceeding for the purpose of foreclosing upon the deed of trust applicable to Ms. Vogler's real property. On 26 January 2011, Bank of America filed an Amended Notice of Hearing. On 21 February 2011, Mr. Vogler, who claimed to own the property through Ms. Vogler, filed a motion in the foreclosure proceeding seeking to have the proposed foreclosure enjoined pursuant to N.C. Gen. Stat. § 45-21.34 in order to allow Ms. Vogler's estate to use the proceeds derived from the sale of the real property to satisfy the cost of administering her estate.

On 14 March 2011, the trial court heard Mr. Vogler's motion. On 29 March 2011, the trial court entered an order concluding that "this foreclosure sale should be enjoined so that the estate may proceed with its sale of the real property to satisfy, first the costs and expenses of administering the

estate, and then the claims against the estate as by law provided." Although Bank of America did not appeal the trial court's order, it filed a "Motion to Set Aside Order to Enjoin Foreclosure" pursuant to N.C. Gen. Stat. § 1A-1, Rule 60(b) on 11 April 2011. In its motion and at the ensuing hearing, Bank of America argued that a perfected lien took priority over estate administration expenses and that the proceeds from the sale of the property should be applied, in the first instance, to satisfy Bank of America's claim against Ms. Vogler. After hearing Bank of America's motion on 23 May 2011, the trial court entered an order on 6 June 2011 in which it refused to set aside its previous order. On 29 June 2011, Bank of America gave "notice of appeal to the Court of Appeals of North Carolina from the Order entered on June 3rd, 2011 in Superior Court of Surry County."[2]

II. Legal Analysis

A. Scope of Review

As a preliminary matter, we note that N.C. Gen. Stat. § 45-21.34 provides, in pertinent part, that:

> Any owner of real estate, or other person, firm or corporation having a legal or equitable interest therein, may apply to a judge of the superior court, prior to the time that the rights of the parties to the

[2]The trial court's 6 June 2011 order had been signed on 3 June 2011.

> sale or resale becoming fixed pursuant to G.S. 45-21.29A to enjoin such sale, . . . upon any . . . legal or equitable ground which the court may deem sufficient[.] . . . [I]n other respects the procedure shall be as is now prescribed by law in cases of injunction and receivership, with the right of appeal to the appellate division from any such order or injunction.

Although the plain language of N.C. Gen. Stat. § 45-21.34 authorizes an appeal from an order enjoining a foreclosure sale, Bank of America did not appeal the trial court's original order precluding it from foreclosing upon Ms. Vogler's property, choosing instead to seek relief pursuant to N.C. Gen. Stat. § 1A-1, Rule 60.

"As a general rule, the appellate court obtains jurisdiction only over the rulings specifically designated in the notice of appeal as the ones from which the appeal is being taken." *Chee v. Estes*, 117 N.C. App. 450, 452, 451 S.E.2d 349, 350 (1994) (citing *Von Ramm v. Von Ramm*, 99 N.C. App. 153, 156, 392 S.E.2d 422, 424 (1990)).

> As this Court has held, "[n]otice of appeal from denial of a motion to set aside a judgment which does not also specifically appeal the underlying judgment does not properly present the underlying judgment for our review." In the case *sub judice*, [Bank of America] filed notice of appeal only from the trial court's order denying her Rule 60(b) motion[.] . . . Accordingly, we do not reach [Bank of America's] arguments concerning the [order enjoining the foreclosure sale].

Croom v. Hedrick, 188 N.C. App. 262, 270, 654 S.E.2d 716, 722 (2008) (quoting *Von Ramm*, 99 N.C. App. at 156, 392 S.E.2d at 424). As a result, the only issue that is properly before us in this case is the extent, if any, to which the trial court erred by denying Bank of America's motion that the order enjoining the foreclosure of the deed of trust applicable to Ms. Vogler's property be set aside pursuant to N.C. Gen. Stat. § 1A-1, Rule 60.

B. Standard of Review

"[T]he standard of review of a trial court's denial of a Rule 60(b) motion is abuse of discretion." *Davis v. Davis*, 360 N.C. 518, 523, 631 S.E.2d 114, 118 (2006) (citation omitted). "An abuse of discretion is a decision manifestly unsupported by reason or one so arbitrary that it could not have been the result of a reasoned decision." *Briley v. Farabow*, 348 N.C. 537, 547, 501 S.E.2d 649, 656 (1998) (citing *White v. White*, 312 N.C. 770, 777, 324 S.E.2d 829, 833 (1985) (other citation omitted)).

C. Validity of Trial Court's Ruling

At trial and on appeal, Bank of America has argued that, in light of its understanding of the applicable statutory provisions and judicial decisions relating to the foreclosure of a deed of trust and the sale of real property for the purpose of

satisfying the debts of a decedent's estate, the trial court committed an error of law by denying its motion to set aside the order enjoining its attempt to foreclose upon the deed of trust applicable to Ms. Vogler's real property. In essence, Bank of America argues that, at the hearing on its motion to set aside the order enjoining the foreclosure, it "established clear and controlling law regarding the superiority of a perfected lien on the Property over the debts of the Estate" and that the trial court erroneously gave priority to estate administration expenses compared to the lien arising pursuant to its deed of trust. We do not find Bank of America's challenge to the trial court's order persuasive.

The fundamental problem with Bank of America's argument is that it overlooks the well-established rule that a motion lodged pursuant to N.C. Gen. Stat. § 1A-1, Rule 60 is not the proper procedural vehicle with which to obtain redress for errors of law. As the Supreme Court has noted, N.C. Gen. Stat. § 1A-1, "Rule 60(b) provides no specific relief for errors of law. 'The appropriate remedy for errors of law committed by the [trial] court is either appeal or a timely motion for relief under N.C. [Gen. Stat. §] 1A-1, Rule 59(a)(8).' 'Motions pursuant to [N.C. Gen. Stat. § 1A-1,] Rule 60(b) may not be used as a substitute for appeal.'" *Davis*, 360 N.C. at 523, 631 S.E.2d at 118

(quoting *Hagwood v. Odom*, 88 N.C. App. 513, 519, 364 S.E.2d 190, 193 (1988), and *Jenkins v. Richmond County*, 118 N.C. App. 166, 170, 454 S.E.2d 290, 293, *disc. rev. denied*, 340 N.C. 568, 460 S.E.2d 318 (1995)). As a result, given that Bank of America attempted to use a motion lodged pursuant to N.C. Gen. Stat. § 1A-1, Rule 60, as a substitute for an appeal, we conclude that the trial court did not abuse its discretion by denying that motion.

In its reply brief, Bank of America asserts that Mr. Vogler failed to preserve the issue of the proper scope of a motion lodged pursuant to N.C. Gen. Stat. § 1A-1, Rule 60 for purposes of appellate review. However, the legal principle that a motion lodged pursuant to N.C. Gen. Stat. § 1A-1, Rule 60 may not be used as a substitute for appeal is nothing more than justification for upholding the trial court's decision to deny Bank of America's motion rather than a free-standing legal issue which must be preserved for purposes of appellate review through the making of an appropriate objection. "'If the correct result has been reached, the judgment will not be disturbed[.]'" *Hejl v. Hood, Hargett & Assocs.*, 196 N.C. App. 299, 303, 674 S.E.2d 425, 428 (2009) (quoting *Shore v. Brown*, 324 N.C. 427, 428, 378 S.E.2d 778, 779 (1989)). For that reason, any failure on the part of Mr. Vogler to rely on the limitations on the trial

court's authority to grant relief pursuant to N.C. Gen. Stat. § 1A-1, Rule 60 before the trial court does not preclude us from considering that legal principle in reaching a decision in this case.

In addition, Bank of America has argued in its reply brief that, since Mr. Vogler's motion to enjoin Bank of America's attempt to foreclose upon Ms. Vogler's property had not been filed in a separate civil action, the trial court lacked subject matter jurisdiction to grant that request for relief. In attempting to persuade us of the validity of this position, Bank of America has cited decisions addressing the distinctions between legal challenges to foreclosure petitions available before the Clerk of Superior Court pursuant to N.C. Gen. Stat. § 45-21.16 and equitable challenges that must be asserted pursuant to N.C. Gen. Stat. § 45-21.34.[3] However, Bank of America has

[3]For example, Bank of America has cited *In re Foreclosure of Godwin*, 121 N.C. App. 703, 705, 468 S.E.2d 811, 813 (1996), in which this Court held that, in a proceeding conducted pursuant to N.C. Gen. Stat. § 45-21.16, neither the Clerk of Superior Court nor the trial court on appeal from the clerk has the authority to consider evidence of incompetency, and *Meehan v. Cable*, 127 N.C. App. 336, 489 S.E.2d 440 (1997), in which we held that the Clerk of Superior Court did not have jurisdiction over a case in which the debtor demanded an accounting on the grounds that he did not owe the amount demanded by the lienholder. Although we are aware that "a court is without jurisdiction unless the issue is brought before the court in a proper proceeding," *In re Watts*, 38 N.C. App. 90, 94, 247 S.E.2d 427, 429 (1978) (citations omitted), neither of the decisions upon which Bank of America relies holds that a trial court's

failed to cite any authority or advance any argument establishing that the trial court's decision to enjoin the proposed foreclosure on the basis of a motion filed in the special proceeding which had been convened as the result of Bank of America's decision to attempt to foreclose upon the property that Ms. Vogler owned at the time of her death and that explicitly cited N.C. Gen. Stat. § 45-21.34 constituted a jurisdictional defect that rendered the trial court's order void rather than a simple error of law that rendered the trial court's order voidable. "It is not the duty of this Court to supplement an appellant's brief with legal authority or arguments not contained therein." *Goodson v. P.H. Glatfelter Co.*, 171 N.C. App. 596, 606, 615 S.E.2d 350, 358, *disc. review denied*, 360 N.C. 63, 623 S.E.2d 582 (2005). As a result, we conclude that the trial court did not err by denying Bank of America's motion to set aside the order enjoining it from foreclosing upon the property owned by Ms. Vogler prior to her death.

AFFIRMED.

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decision to address issues clearly cognizable pursuant to N.C. Gen. Stat. § 45-21.34 by ruling on a motion that explicitly references the relevant statutory provision and relies upon equitable, rather than legal, grounds for enjoining a foreclosure that was filed in a special proceeding rather than in a separate civil action renders the trial court's order void, rather than merely voidable.

Judges CALABRIA and THIGPEN concur.

Report per Rule 30(e).