

An unpublished opinion of the North Carolina Court of Appeals does not constitute controlling legal authority.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. COA12-420

NORTH CAROLINA COURT OF APPEALS

Filed: 5 February 2013

IRIXON R. HAUGHTON,  
Plaintiff,

v.

Mecklenburg County  
No. 11 CVS 14434

HSBC BANKS USA, NATIONAL  
ASSOCIATION, as Trustee for  
Certificate Holders of Nomura Home  
Equity Loan, Inc.  
Asset-Backed Certificates, Series  
2007-3, et al.,  
Defendants.

Appeal by plaintiff from order entered 13 December 2011 by  
Judge H. William Constangy in Mecklenburg County Superior Court.  
Heard in the Court of Appeals 12 September 2012.

*Brent Adams & Associates, by Brenton D. Adams, for  
plaintiff-appellant.*

*Troutman Sanders, LLP, by D. Kyle Deak, for defendant-  
appellees.*

BRYANT, Judge.

Where Plaintiff failed to timely appeal an order entered by  
the Clerk of Court in a special proceeding granting Defendants  
the authority to proceed with foreclosure under power of sale,

we affirm the trial court's order dismissing Plaintiff's complaint. Where Plaintiff improperly included a document as an appendix to his brief in violation of our North Carolina Rules of Appellate Procedure, we dismiss his argument.

On 29 September 2010 an Order for Sale was entered by the Mecklenburg County Clerk of Court in special proceeding number 09 SP 5166. The order authorized a foreclosure sale of property owned by Plaintiff Irixon R. Haughton. There was no appeal from that order.

Almost a year later, on 8 August 2011, Plaintiff filed a complaint in case number 11 CVS 3733 against HSBC Bank USA, National Association, as Trustee for the benefit of the Certificateholders of Nomura Home Equity Loan, Inc. Asset-Backed Certificates, Series 2007-3 ("HSBC Bank USA"), The Caudle Law Firm, P.A. ("The Caudle Law Firm"), Litton Loan Servicing LP, Mortgage Electronic Registration Systems, Inc. ("MERS"), and Marti Noriega ("Noriega") (collectively "Defendants") in Mecklenburg County Superior Court.

Plaintiff alleged that the Clerk of Court premised the findings of fact in the Order for Sale on fraudulent documents, that the parties initiating the foreclosure action lacked any interest in the debt the foreclosure was intended to satisfy,

and that plaintiff received no actual or constructive notice of the hearing.

On 6 September 2011, defendants filed a motion to dismiss plaintiff's complaint pursuant to North Carolina Rules of Civil Procedure, Rule 12(b)(6), "Failure to state a claim upon which relief can be granted." Defendants asserted that Plaintiff could not re-litigate issues which were judicially determined in special proceeding number 09 SP 5166, which resulted in a final order issued by the Mecklenburg County Clerk of Court and from which Plaintiff did not appeal.

"After reviewing the pleadings, all matters of record and briefs and hearing arguments from counsel" during the 15 November 2011 civil session of Mecklenburg County Superior Court, the court granted Defendants' motion and dismissed plaintiff's action with prejudice. Plaintiff appeals.

---

On appeal, Plaintiff raises the following issues: (I) whether the trial court erred in granting Defendant's motion to dismiss, and (II) whether the voluntary dismissal of the special proceeding foreclosure action rendered the findings of the Clerk of Court moot.

Plaintiff argues the trial court erred in granting defendant's motion to dismiss his complaint pursuant to Rule 12(b)(6). Specifically, Plaintiff challenges the finding of the Clerk of Court that HSBC Bank USA is the proper holder of plaintiff's debt and asserts that documents submitted by defendant Noriega as proof of the assignment of plaintiff's deed of trust and notice to plaintiff of default were valid. Plaintiff further asserts that The Caudle Law Firm was not properly appointed as substitute trustee and had no authority to initiate a foreclosure action. We disagree.

The standard of review on a motion to dismiss made pursuant to Rule 12(b)(6) "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).

Dismissal is proper 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.

*Guyton v. FM Lending Services, Inc.*, 199 N.C. App. 30, 33, 681 S.E.2d 465, 469 (2009) (citation and quotations omitted).

If, on a motion asserting the defense [12(b)(6)], to dismiss for failure of the pleading to state a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56 . . . .

N.C. Gen. Stat. § 1A-1, Rule 12(b) (2011).

In his complaint, Plaintiff alleged that he executed a deed of trust encumbering real property he owned in Mecklenburg County. The promissory note for the loan secured by the deed of trust was held by the Resmae Mortgage Company. The deed of trust named the Resmae Mortgage Company as its beneficiary and The Shoaf Law Firm, P.A. as its trustee. Plaintiff then made the following pertinent allegations. Plaintiff alleges that a foreclosure action upon his real property was initiated as a special proceeding before the Mecklenburg County Clerk of Superior Court; The Caudle Law Firm was improperly named substitute trustee; and HSBC Bank USA, on whose behalf the foreclosure action was brought, was not a party-in-interest. Plaintiff further alleged that a fraud was perpetrated upon the court wherein defendant Noriega, acting on behalf of defendant MERS, signed a document which purported to assign the Deed of Trust from Resmae Mortgage Corporation to HSBC Bank USA. Plaintiff also contends that fraud was perpetrated by defendant

Noriega's affidavit submitted to the clerk of court averring that she was "personally familiar" with the records of HSBC Bank USA and that Plaintiff was mailed notice of the amount the holder claimed was owed due to default.

Plaintiff argues on appeal that, based on the foregoing allegations in his complaint, the trial court erred in dismissing his complaint. North Carolina General Statutes, section 45-21.16(d) (2009) (effective until 31 October 2010) sets out the findings of fact required to be made by a Clerk of Court before the clerk may authorize the mortgagee or trustee to proceed under a deed of trust's power of sale:

[The clerk must find] the existence of (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 . . . , and (v) . . . that pre-foreclosure notice under G.S. 45-102 was provided in all material respects, and that the periods of time established by Article 11 of this Chapter have elapsed . . . .

N.C. Gen. Stat. § 45-21.16(d) (2009) (effective until 31 October 2010). "The act of the clerk in so finding or refusing to so find is a judicial act and may be appealed to the judge of the district or superior court having jurisdiction at any time within 10 days after said act." N.C.G.S. § 45-21.16(d1). "On appeal, the superior court reviews *de novo* the same [] issues

described supra.” *In re Foreclosure of a Lien by Five Oaks Rec. Ass’n*, \_\_\_ N.C. App. \_\_\_, \_\_\_, 724 S.E.2d 98, 101 (2012) (citing N.C. Gen. Stat. § 45-21.16 (d1)). “[E]vidence of legal defenses tending to negate any of the [] findings required under N.C.G.S. § 45-21.16 may properly be raised and considered” in such a hearing. *In re Foreclosure of Goforth Properties, Inc.*, 334 N.C. 369, 374-75, 432 S.E.2d 855, 859 (1993).

Our Supreme Court has stated that

[f]or reasons of judicial economy and efficient resolution of disputes, we hold that N.C.G.S. § 45-21.16(d) provides a more appropriate process to resolve who truly is the equitable or legal owner of . . . any property sought to be sold under foreclosure. . . . The Clerk of Court must decide whether the person given the power of sale under the Deed of Trust has a “right to foreclose under the instrument.” . . . We do not see the Clerk of Court in a preforeclosure hearing performing a mere perfunctory role.

*In re Foreclosure of Deed of Trust of Michael Weinman Assoc. Gen. P’ship*, 333 N.C. 221, 230, 424 S.E.2d 385, 390 (1993).

The record before us includes the 29 September 2009 Order for Sale entered by the Mecklenburg County Clerk of Superior Court in special proceeding 09 SP 5166. Nowhere in the record before us does it indicate that plaintiff appealed from the 29 September 2009 order of the Clerk of Superior Court.

The allegations in Plaintiff's complaint, which he argues on appeal, challenge the findings of fact made by the Clerk of Superior Court in 09 SP 5166 regarding two findings required under N.C.G.S. § 45-21.16(d): (i) whether there was a valid debt of which the party seeking to foreclose is the holder; and (iii) whether there was a right to foreclose under the instrument. However, Plaintiff's failure to timely appeal from the Order of Sale entered in special proceeding 09 SP 5166 rendered those findings of fact conclusive. See *In re Foreclosure of Deed of Trust of Michael Weinman Assoc. Gen. P'ship*, 333 N.C. at 230, 424 S.E.2d at 390 ("We do not see the Clerk of Court in a preforeclosure hearing performing a mere perfunctory role."); *Guyton*, 199 N.C. App. at 33, 681 S.E.2d at 469 ("the complaint discloses some fact that necessarily defeats the plaintiff's claim."). Further, we do not find that plaintiff's allegations raise equitable arguments or other legal grounds sufficient to overrule the trial court's dismissal of plaintiff's complaint. See N.C.G.S. § 45-21.34 ("Enjoining mortgage sales on equitable grounds") and N.C.G.S. § 1A-1, Rule 12(b). Accordingly, plaintiff's arguments are overruled.



Plaintiff argues that the Notice of Dismissal of Foreclosure Action filed by the substitute trustee, defendant Caudle Law Firm in the foreclosure action commenced before the Mecklenburg County Clerk of Superior Court, renders moot any findings of fact made by the Clerk of Court as to who holds plaintiff's debt. Plaintiff contends that this Court may take judicial notice of the dismissal though it was not presented to the trial court and was not made a part of the record on appeal. We disagree.

"In appeals from the trial division of the General Court of Justice, review is solely upon the record on appeal . . . ." N.C. R. App. P. 9(a) (2012). This Court has held, "it [is] improper [for a party] to attach a document not in the record . . . in an appendix to its brief." *Horton v. New South Ins. Co.*, 122 N.C. App. 265, 268, 468 S.E.2d 856, 858 (1996). "The rationale for this rule is clear. The role of an appellate court is to review the rulings of the lower court, not to consider new evidence or matters that were not before the trial court. If this were permitted, the appellate process would never end." *Citifinancial, Inc. v. Messer*, 167 N.C. App. 742, 748, 606 S.E.2d 453, 457 (2005) (Steelman, J., concurring).

Here, the record proper on appeal does not include the Notice of Dismissal of Foreclosure Action filed by the substitute trustee in the foreclosure proceeding before the Clerk of Court, and there is no indication this document was presented to the trial court in the current action. Plaintiff did include the document in an appendix to his brief; however, Plaintiff failed to file a motion and obtain permission to supplement the record on appeal with this document to enable our consideration for review. See N.C. R. App. P. 9(b)(5) and 11(c) ("If a party requests that an item be included in the record on appeal but not all other parties to the appeal agree to its inclusion, then that item shall not be included in the printed record on appeal, but shall be filed by the appellant with the printed record on appeal in three copies of a volume captioned 'Rule 11(c) Supplement to the Printed Record on Appeal,' along with any verbatim transcripts, narrations of proceedings, documentary exhibits, and other items that are filed pursuant to Rule 9(c) or 9(d) . . . .").

As the Notice of Dismissal of Foreclosure Action was not properly included in the record, we do not consider it. See N.C.R. App. P. 9(a) ("In appeals from the trial division of the General Court of Justice, review is solely upon the record

on appeal . . . ."); *Horton*, 122 N.C. App. at 268, 468 S.E.2d at 858. Accordingly, plaintiff's argument is dismissed.

Affirmed in part; dismissed in part.

Judges HUNTER, Robert C., and STEELMAN concur.

Report per Rule 30(e).