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NO. COA12-944  
NORTH CAROLINA COURT OF APPEALS

Filed: 19 March 2013

Foreclosure of Real Property Under  
Deed of Trust from Robert T.  
Perry, Willoree Perry, in the  
original amount of \$92,500.00, and  
dated August 31, 2005 and recorded  
on September 6, 2005 in Book 4942  
at Page 901, Durham County  
Registry Trustee Services of  
Carolina, LLC, Substitute Trustee

Durham County  
No. 11 SP 683

Appeal by respondent from order entered 11 April 2012 by  
Judge Lindsey R. Davis, Jr., in Durham County Superior Court.  
Heard in the Court of Appeals 9 January 2013.

*K&L Gates LLP, by Brian C. Fork, for CitiMortgage, Inc.,  
petitioner appellee.*

*The Law Office of Benjamin D. Busch, PLLC, by Benjamin D.  
Busch, for respondent appellant.*

McCULLOUGH, Judge.

Respondent appellant Robert T. Perry ("Perry") appeals from  
the superior court's order denying appeal of the Clerk's order  
denying his Rule 59(a)(4) motion for a new trial. For the  
following reasons, we affirm.

I. Background

Perry executed a promissory note in favor of American Home Mortgage ("AHM") in the original amount of \$92,500.00 on 31 August 2005 to evidence repayment of a loan made by AHM to Perry. In connection with the promissory note, Perry also executed a deed of trust to secure the note. The deed of trust conveyed real property to Douglas Douglas and Connie Iampieri as trustees with power of sale. Mortgage Electronic Registry Systems, Inc. ("MERS") was named the beneficiary under the deed of trust "solely as nominee for [AHM] and [AHM's] successors and assigns." Thereafter, CitiMortgage, Inc. ("petitioner"), acquired the rights of AHM when AHM endorsed the promissory note to petitioner on 14 February 2006. On 17 November 2010, petitioner informed Perry of his default on the note.

Following default, on 25 January 2011, petitioner removed Douglas Douglas and Connie Iampieri as trustees and appointed Trustee Services of Carolina, LLC ("TSC") as substitute trustee. Then, on 31 March 2011, MERS assigned its beneficial interest under the deed of trust to petitioner.

By letter dated 20 April 2011, TSC notified Perry that it had been asked as substitute trustee to initiate foreclosure on the deed of trust and informed Perry of his rights. On 25 April 2011, after both the appointment of substitute trustee and assignment of deed of trust were recorded in Durham County, TSC filed notice of hearing in accordance with N.C. Gen. Stat. § 45-21.16 to initiate foreclosure on the deed of trust under power of sale. The matter came on for hearing before the Honorable Archie L. Smith, III, Clerk of Durham County Superior Court (the "Clerk"), on 3 January 2012. Following the hearing, the Clerk filed an order allowing TSC to proceed with foreclosure on the deed of trust under power of sale.

Perry appealed the Clerk's 3 January 2012 order to the superior court on 17 January 2012. However, on 30 January 2012, petitioner moved to dismiss Perry's appeal as untimely. In response, Perry withdrew his appeal on 9 February 2012.

On 14 February 2012, Perry filed a motion for a stay of the Clerk's order while he sought relief from the order. Then, on 21 February 2012, Perry filed a motion for relief from the judgment pursuant to Rule 60(b) on the ground that petitioner failed to disclose material information negating its right to

foreclose on the deed of trust.<sup>1</sup> In support of his Rule 60(b) motion, Perry submitted a memorandum arguing that newly discovered evidence was obtained as a result of a 24 January 2012 subpoena issued to Fannie Mae while his appeal of the Clerk's 3 January 2012 order was pending, before the appeal was withdrawn. Perry further argued that the newly discovered evidence revealed that Fannie Mae acquired the promissory note from petitioner on 1 May 2006 and, therefore, petitioner was not the real party in interest.

Perry's Rule 60(b) motion for relief from judgment came on for hearing on 6 March 2012 before the Clerk. At the hearing, Perry argued his motion for relief from judgment pursuant to Rule 60(b)(2) and additionally argued for a new trial pursuant to an oral Rule 59(a)(4) motion. Both arguments were predicated on the alleged newly discovered evidence. On 9 March 2012, the Clerk issued an order denying Perry's motions under Rules 59 and 60 on the grounds that the alleged newly discovered evidence "could have been discovered through reasonable diligence and produced at the time of trial, and could have been discovered by due diligence in time to move for a new trial under Rule 59(b)."

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<sup>1</sup> Unless stated otherwise, all references to Rules in this opinion refer to the North Carolina Rules of Civil Procedure, N.C. Gen. Stat. § 1A-1 (2011).

Furthermore, the Clerk stated that the newly discovered evidence "would not have altered the Clerk's findings of fact and conclusions of law in entering the Order."

Perry only appealed the Clerk's denial of his Rule 59(a)(4) motion for a new trial to the superior court. Perry's appeal to the superior court came on for hearing at the 9 April 2012 term of Durham County Superior Court before the Honorable Lindsey R. Davis, Jr. After a *de novo* review of the case, the superior court filed an order on 11 April 2012 finding that "[petitioner] is the holder of the promissory note subject to foreclosure" and therefore denied Perry's Rule 59 motion for a new trial.

Perry gave notice of appeal to this Court from the 11 April 2012 order of the superior court on 4 May 2012.

## II. Analysis

Perry initially proposed two issues on appeal: (1) whether the superior court erred in denying his Rule 59(a)(4) motion for a new trial; and (2) whether the Clerk had subject matter jurisdiction to enter the order allowing foreclosure. However, Perry explicitly abandoned his first proposed issue in his brief on appeal. Consequently, the sole issue now before this Court is whether the Clerk had subject matter jurisdiction. Perry contends that the Clerk lacked subject matter jurisdiction

because petitioner did not have standing to foreclose on the deed of trust.

Before reaching the merits, we first address whether the standing issue is properly before this Court on appeal. As described above, Perry withdrew his appeal of the Clerk's order allowing foreclosure on the deed of trust after it became evident that his appeal was untimely. Perry then attempted to seek relief from the Clerk's order pursuant to Rule 60(b)(2) and Rule 59(a)(4). The Clerk denied both motions and Perry appealed the denial of his Rule 59(a)(4) motion to the superior court. The superior court also denied Perry's Rule 59(a)(4) motion and Perry appealed to this Court. After abandoning his first proposed issue on appeal challenging the superior court's denial, it now appears that Perry is using this appeal of the superior court's denial of his Rule 59(a)(4) motion to raise issues that should have been brought in an appeal of the Clerk's original order allowing foreclosure.

Nevertheless, despite the facts that this case is on appeal from the superior court's order denying Perry's Rule 59(a)(4) motion for a new trial and Perry has abandoned the issue relating to the superior court's denial of his Rule 59(a)(4) motion, we proceed to the merits because, as noted by Perry, the

issue of standing and the basis on which the superior court denied Perry's Rule 59(a)(4) motion involve a common inquiry: specifically, whether evidence of ownership of the note matters in this foreclosure on a deed of trust under power of sale. Perry asserts that the newly discovered evidence in this case reveals that Fannie Mae is the owner of the promissory note. Therefore, Perry contends that petitioner lacked standing and the Clerk lacked subject matter jurisdiction.

Pursuant to N.C. Gen. Stat. § 45-21.16(d), "the clerk shall authorize the . . . trustee to proceed under the instrument, and the . . . trustee can give notice of and conduct a sale pursuant to the provisions of this Article[]" if the clerk finds:

(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 under subsection (b), (v) that the underlying mortgage debt is not a home loan as defined in G.S. 45-101(1b), or if the loan is a home loan under G.S. 45-101(1b), that the 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, and (vi) that the sale is not barred by G.S. 45-21.12A[.]

N.C. Gen. Stat. § 45-21.16(d) (2011). Perry's argument in this case is that petitioner is not a holder entitled to seek

foreclosure on the note because Fannie Mae acquired ownership of the note. We disagree.

"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. § 45-21.16 for foreclosures under powers of sale." *In re Adams*, 204 N.C. App. 318, 322, 693 S.E.2d 705, 709 (2010). Under the UCC, as adopted by North Carolina, "holder" is defined to mean "[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(21)(a) (2011). "'Person' means an individual, corporation, . . . or any other legal or commercial entity." N.C. Gen. Stat. § 25-1-201(27). Furthermore, "[u]nder the UCC, as adopted by North Carolina, '[a]n instrument is transferred when it is delivered by a person other than its issuer for the purpose of giving to the person receiving delivery the right to enforce the instrument.'" *In re David A. Simpson, P.C.*, \_\_\_ N.C. App. \_\_\_, \_\_\_, 711 S.E.2d 165, 171 (2011) (quoting N.C. Gen. Stat. § 25-3-203(a) (2009)).

In this case, the evidence produced at trial demonstrated that petitioner maintained possession of the original promissory



note. Furthermore, although "[p]roduction of an original note at trial does not, in itself, establish that the note was transferred to the party presenting the note with the purpose of giving that party the right to enforce the instrument[,]" *id.*, here, the note was endorsed from AHM to the order of petitioner. Under the UCC and applicable North Carolina law, this evidence was sufficient to demonstrate that petitioner was the holder of the promissory note and entitled to enforce the instrument and seek foreclosure pursuant to N.C. Gen. Stat. § 45-21.16.

Perry concedes that petitioner is a holder of the note under North Carolina's adaptation of the UCC. Yet, Perry cites to Connecticut case law to argue that there is a distinction between rights of a mere holder of a note and an owner of a note. See *RMS Residential Properties, LLC v. Miller*, 303 Conn. 224, 32 A.3d 307 (2011). We, however, find no such distinction in N.C. Gen. Stat. § 45-21.16. Based on the language of N.C. Gen. Stat. § 45-21.16 and the UCC definitions that this Court has determined applicable to the statute, we determine petitioner is a holder entitled to seek foreclosure.

Perry further argues that policy reasons support requiring proof of ownership in order to foreclose. While Perry may have valid contentions regarding policy, these contentions are better

sued for the General Assembly. Here, the language of N.C. Gen. Stat. § 45-21.16 is clear that a holder of a valid debt may seek foreclosure.

III. Conclusion

For the reasons discussed above, and in agreement with both the Clerk and the superior court, petitioner is the holder of the note and has standing to foreclose on the deed of trust. Thus, we affirm the order of the superior court.

Affirmed.

Judges STEELMAN and STEPHENS concur.

Report per Rule 30(e).