IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA 18-882

Filed: 2 July 2019

Davidson County, No. 15 SP 567

IN THE MATTER OF: THE FORECLOSURE OF A DEED OF TRUST EXECUTED BY JAMIE K. DAVIS AND RHEA DAVIS AND JOHN W. DAVIS (PRESENT RECORD OWNER(S): IN JOHN W. DAVIS AND JAMIE K. DAVIS IN THE ORIGINAL AMOUNT OF $271,258.00, DATED SEPTEMBER 29, 2008, RECORDED IN BOOK 1888, PAGE 633 DAVIDSON COUNTY REGISTRY. SUBSTITUTE TRUSTEE SERVICES, INC., SUBSTITUTE TRUSTEE.

Appeal by respondents from order entered 27 March 2018 by Judge Anna Mills Wagoner in Davidson County Superior Court. Heard in the Court of Appeals 6 June 2019.

Smith Law Group, PLLC, by Matthew L. Spencer, Jonathan M. Holt, and Steven D. Smith, for respondents-appellants.

Hutchens Law Firm, by Jeffrey A. Bunda, for petitioner-appellee.

ARROWOOD, Judge.

Jamie K. Davis, Rhea Davis, and John W. Davis (collectively, the "respondents") appeal from a trial court order permitting foreclosure of certain real property located at 2434 Happy Hill Road, Lexington, North Carolina (the "Subject

Property") in accordance with Article 2A, Chapter 45 of the North Carolina General Statutes. For the following reasons, we affirm.

I. Background

On 26 September 2007, the Subject Property was conveyed from T. Perrell Construction, LLC to husband and wife John W. Davis and Jamie K. Davis (collectively, the "Davises"). The purchase of the Subject Property was financed with a $250,000.00 loan from HSBC Mortgage Corporation ("HSBC"), which was secured by a deed of trust signed by the Davises and recorded in Book 1818, Page 1029 of the Davidson County Registry.

On 29 September 2008, Jamie K. Davis ("Mrs. Davis") and her mother-in-law Rhea Davis executed a promissory note (the "Note") in favor of Fairway Independent Mortgage Corporation ("Fairway") to evidence a repayment obligation of $271,258.00 (the "Loan"). The proceeds of the Loan were used to refinance the HSBC deed of trust and to "cash-out" $10,409.30 in home equity.

Mrs. Davis and Rhea Davis executed a deed of trust (the "Deed of Trust") encumbering the Subject Property in order to secure the Note. The closing took place at the law offices of Attorney Patti Dobbins. Mr. Davis did not join in the execution of the Deed of Trust; instead, Mrs. Davis signed for him as "attorney-in-fact" using an instrument which appeared to grant her power of attorney (the "Power of Attorney"). In actuality, Mrs. Davis alleged she signed her husband's signature on the Power of Attorney without his knowledge and presented it to a notary, her cousin,

to complete the notarial certificate. Mrs. Davis later testified that Attorney Dobbins instructed her to forge her husband's signature on the Power of Attorney. Attorney Dobbins denied this. The Deed of Trust was then recorded on 3 October 2008 in Book 1888, Page 633 Davidson County Registry.

Fairway sold and transferred the Loan to Branch Banking & Trust Co. ("BB&T) ("petitioner"). The superior court found that petitioner had no reason to suspect the Power of Attorney was not valid as it appeared facially valid and bore the signature of "John W. Davis."

Repayment of the Loan was last current on 31 December 2008. Petitioner received sporadic reduced payments throughout 2009 and 2010, some of which were returned for insufficient funds.

The last payment that petitioner received for the Loan was on 31 January 2011. Thereafter, on 29 March 2011, petitioner issued a pre-foreclosure notice (the "Pre-foreclosure Notice") to Mrs. Davis and Rhea Davis at the Subject Property address. The notice included a list of the past due amounts causing the loan to be in default and informed the recipients that, as of the date of the letter, the total amount to pay the Loan current was $31,940.39. The notice also informed them that they, "may have options available other than foreclosure and [they] may discuss these options with [their] mortgage lender or servicer, [BB&T] or a counselor approved by the U.S. Department of Housing and Urban Development." The notice provided the mailing address and telephone number for BB&T, the telephone number for the U.S.

Department of Housing and Urban Development ("HUD") counseling service, and the contact information for the consumer complaint section of the North Carolina Office of Commissioner of Banks. It also included the contact information for HUD approved counseling agencies such as the address and phone number for the Consumer Credit Counseling Service of Raleigh: Triangle Family Services and the website of the State Home Foreclosure Prevention Project for North Carolina[1].

On 30 September 2011, petitioner filed a complaint based on two claims for relief, Breach of Contract/Breach of Promissory Note and Judicial Foreclosure (11 CVS 3214). Petitioner voluntarily dismissed the Judicial Foreclosure without prejudice on 6 August 2015. On 17 September 2015, Hutchens Law Firm, a trustee of petitioner, mailed Mrs. Davis and Rhea Davis a written statement stating, as of the date of the letter, that the total amount of debt was $416,736.04 ("Statutory Payoff Statement"). On 22 September 2015, petitioner appointed Substitute Trustee Services, Inc. (the "Substitute Trustee") as substitute trustee of the Deed of Trust via instrument duly recorded in Book 2196, Page 432 of the Davidson County Registry.

On 24 September 2015, the Substitute Trustee issued a Notice of Hearing (15 SP 567). The next day, on 25 September, Hutchens Law Firm accessed the

[1] As of the date of this opinion, the website listed in the 2011 Pre-foreclosure Notice (www.ncforeclosurehelp.org/StateForeclosurePreventionProject.aspx) currently leads to a page with an error on the NC Foreclosure Prevention Fund website. However, this website currently includes a different page for the State Home Foreclosure Prevention Project (www.ncforeclosureprevention.gov/shfpp.aspx), which includes contact information in the form of a telephone number and address.

Administrative Office of the Courts (the "AOC") database and obtained a Conditional Certificate of Compliance with Article 11, Chapter 45 of the General Statutes. This Certificate of Compliance certified that on 28 March 2011 the lender mailed to the borrower's last known address a complete itemization of all the information required under N.C. Gen. Stat. § 45-102. It also certified that on that same day the lender provided the statutorily required information to the State Home Foreclosure Prevention Project's electronic database with the AOC, as required per N.C. Gen. Stat. § 45-103.

On 16 August 2016, the Honorable Brian L. Shipwash, Clerk of Superior Court for Davidson County, presided over a hearing to authorize foreclosure as required by N.C. Gen. Stat. § 45-21.16(d). After receiving evidence from both parties, on 7 October 2016 he entered an order permitting foreclosure. Respondents timely filed a notice of appeal for a *de novo* Superior Court hearing.

A hearing was held on 19 February 2018 before the Honorable Anna Mills Wagoner in Davidson County Superior Court. She entered an Order Permitting Foreclosure on 27 March 2018. Among the Conclusions of Law found were that:

> 3. BB&T is entitled to rely on the Power of Attorney and Subject Deed of Trust, as provided for by N.C. Gen. Stat. § 32A-40(a), since it had no actual knowledge that the Power of Attorney may not be valid.
>
> 4. In addition, any technical defects, errors or omissions in the notarial certificate do not affect the enforceability of the Subject Deed of Trust by BB&T against the Respondents, as provided for by N.C. Gen. Stat. § 10B-

68(a).

5. Accordingly, the Subject Deed of Trust is a valid and enforceable first lien against the Real Property against all interests held by the various Respondents.

6. The Loan is in default and contractually due for March 1, 2010 and subsequent months.

7. Notice of the hearing was provided to all parties so entitled.

8. Since the subject Loan is a "home loan," the Pre-Foreclosure Notice was provided in all material respects and the periods of time established by Article 11, Chapter 45 of the North Carolina General Statutes have elapsed.

Respondents timely filed notice of appeal to this Court on 12 April 2018.

II. Discussion

Respondents argue that the Superior Court erred in granting petitioner's foreclosure because: (1) proper pre-foreclosure notice was not provided pursuant to the North Carolina General Statutes, and (2) the Power of Attorney was forged and therefore the Deed of Trust was not valid. We address each of these issues in turn.

A. Standard of Review

> [W]hen the trial court sits without a jury, the standard of review on appeal is whether there was competent evidence to support the trial court's findings of fact and whether its conclusions of law were proper in light of such facts. Upon a finding of such competent evidence, 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. Competent evidence is evidence that a reasonable mind might accept as adequate to support the

> finding. The trial court's conclusions of law, by contrast, are reviewable *de novo*."

Lake Toxaway Cmty. Ass'n, Inc. v. RYF Enterprises, LLC, 226 N.C. App. 483, 487, 742 S.E.2d 555, 559 (2013) (citations and internal quotations omitted) (alteration in original).

B. Insufficient Pre-foreclosure Notice

Respondents first argue that proper notice was not given because they were not given pre-foreclosure notice at least forty-five days prior to the filing of the 2015 foreclosure notice, and petitioner did not file the requisite information with the AOC within three days of mailing the 2011 Pre-foreclosure Notice.

The North Carolina General Statutes have certain requirements for when the Pre-foreclosure Notice should be sent to the debtor and what it must include.

> *At least 45 days prior to the filing of a notice of hearing in a foreclosure proceeding on a primary residence*, mortgage servicers of home loans shall send written notice by mail to the last known address of the borrower to inform the borrower of the availability of resources to avoid foreclosure, including:
>
> (1) An itemization of all past due amounts causing the loan to be in default.
>
> (2) An itemization of any other charges that must be paid in order to bring the loan current.
>
> (3) A statement that the borrower may have options available other than foreclosure and that the borrower may discuss available options with the mortgage lender, the mortgage servicer, or a counselor approved by the U.S. Department of Housing and Urban Development.
>
> (4) The address, telephone number, and other contact

> information for the mortgage lender, the mortgage servicer, or the agent for either of them who is authorized to attempt to work with the borrower to avoid foreclosure.
>
> (5) The name, address, telephone number, and other contact information for one or more HUD-approved counseling agencies operating to assist borrowers in North Carolina to avoid foreclosure.
>
> (6) The address, telephone number, and other contact information for the State Home Foreclosure Prevention Project of the Housing Finance Agency.

N.C. Gen. Stat. § 45-102 (2017) (emphasis added).

On 29 March 2011, petitioner issued its Pre-foreclosure Notice to Mrs. Davis and Rhea Davis. It included a listing of the past due amounts causing the loan to be in default, a statement that the borrowers had options other than foreclosure, the address and telephone number for BB&T, the telephone number for the HUD counseling service, various contact information for HUD approved counseling agencies, including the website for the North Carolina State Home Foreclosure Prevention Project. The notice also indicated that, as of the date of the letter, Mrs. Davis and Rhea Davis had a total past due amount of $31,940.39.

Respondents argue that this amount is what was needed to make the Loan current in conjunction with petitioner's first complaint, which was filed in 2011 and dismissed on 6 August 2015. When petitioner filed a new notice of foreclosure on 25 September 2015, respondents contend that they should have been sent a new pre-foreclosure notice, at least forty-five days prior, with an updated itemization of

charges, now valued at $416,736.04.

However, the Pre-foreclosure Notice sent in 2011 included all of the information required by N.C. Gen. Stat. § 45-102 and was current at the time the notice was sent. The statute states that the pre-foreclosure notice must be sent "[a]t least 45 days prior to the filing of *a notice of hearing in a foreclosure proceeding* on a primary residence[.]" *Id.* (emphasis added). Here, the Pre-foreclosure Notice was sent on 29 March 2011, which is considerably more than forty-five days prior to 24 September 2015 when the present notice of hearing was filed. The statute does not require the lender to issue *a* new pre-foreclosure notice if it dismisses a judicial foreclosure and then files a notice of foreclosure for the same property. It simply states that a pre-foreclosure notice must be sent at least forty-five days prior to the filing of *a* notice of hearing. A notice of hearing was filed in the instant case, and as such, the Pre-foreclosure Notice issued in 2011 is still effective.

Furthermore, under the plain meaning of the text, the purpose of N.C. Gen. Stat. § 45-102 is to "inform the borrower of the availability of resources to avoid foreclosure." *Id.* As such, once the notice has been given once, and the petitioner does not cure the default (indeed in this case made no effort to cure) it does not seem logical to require another notice if the case is dismissed without prejudice and recommenced.

With respect to respondents' argument that they did not have notice of the current amount due, they received an updated outstanding balance in the Statutory

Payoff Statement sent to them on 17 September 2015. The requirements of the Statutory Payoff Statement are included under N.C. Gen. Stat. § 45-21.16, a section entitled "Notice and hearing."

> The holder has confirmed in writing to the person giving the notice [of foreclosure], or if the holder is giving the notice, the holder shall confirm in the notice, that, *within 30 days of the date of the notice*, the debtor was sent by first-class mail at the debtor's last known address *a detailed written statement of the amount of principal, interest, and any other fees, expenses, and disbursements that the holder in good faith is claiming to be due as of the date of the written statement*, together with a daily interest charge based on the contract rate as of the date of the written statement.

N.C. Gen. Stat. § 45-21.16(c) (5a) (2017) (emphasis added). It is clear that the Statutory Payoff Statement is meant to provide the notice that respondents contend they did not receive. Petitioner mailed respondents this Statutory Payoff Statement with the current balance of $416,736.04 within the statutorily required time period of thirty days within sending the notice of hearing; in fact, here, it was within eight days. Respondents therefore had proper statutory notice in the forms of both the Pre-foreclosure Notice and the Statutory Payoff Statement.

Respondents next contend that petitioner failed to file statutorily required information with the AOC within three business days of mailing the Pre-Foreclosure Notice. Respondents argue that the Certificate of Compliance obtained on 25 September 2015 violates N.C. Gen. Stat. § 45-103 because it was filed four years after respondents received the pre-foreclosure notice.

N.C. Gen. Stat. § 45-103(a) (2017) in pertinent part provides:

> Within three business days of mailing the notice required by G.S. 45-102, the mortgage servicer shall file certain information with the Administrative Office of the Courts. The filing shall be in an electronic format, as designated by the Administrative Office of the Courts, and shall contain the name and address of the borrower, the due date of the last scheduled payment made by the borrower, and the date the notice was mailed to the borrower.

Contrary to respondent's argument, petitioner filed this information with the AOC in the provided timeframe. Per the Certificate of Compliance obtained by Hutchens Law Firm in 2015, petitioner provided the requisite information to the AOC on 28 March 2011. One day later, on 29 March 2011, BB&T issued its pre-foreclosure notice[2].

Respondents are confusing *the information* required to be filed by N.C. Gen. Stat. § 45-103(a) with the Certificate of Compliance itself, which was obtained four years later. Per N.C. Gen. Stat. § 45-107, the certificate must provide, "that the pre-foreclosure notice required by G.S. 45-102 and the pre-foreclosure information required by G.S. 45-103 were provided in accordance with this Article and that the periods of time established by the Article have elapsed." N.C. Gen. Stat. § 45-107(a) (2017).

Because the established period of time to file a notice of a hearing per N.C.

[2] On the Conditional Certificate of Compliance filed with the record, Hutchens Law Firm certifies that it mailed the Pre-foreclosure Notice on 28 March 2011 rather than 29 March 2011. Regardless, the notice was still mailed within the requisite 3-day window.

Gen. Stat. § 45-102 is at least forty-five days after the pre-foreclosure notice is filed, the certificate cannot statutorily be obtained within three days of the pre-foreclosure notice. Thus N.C. Gen. Stat. § 45-103(a) is clearly referring to the date the information is filed with the AOC, as opposed to the date that the certificate is obtained. Therefore, petitioner correctly filed the information with the AOC within the required timeframe in March 2011.

C. Validity of the Deed of Trust

Finally, respondents argue that the trial court erred by finding the Deed of Trust to be a valid and enforceable lien against the Subject Property because the deed was forged by Mrs. Davis. We disagree.

"All contracts to sell or convey any lands . . . shall be void unless said contract, or some memorandum or note thereof, be put in writing and signed by the party to be charged therewith, or by some other person by him thereto lawfully authorized." N.C. Gen. Stat. § 22-2 (2017).

> A power of attorney must be (i) signed by the principal or in the principal's conscious presence by another individual directed by the principal to sign the principal's name on the power of attorney and (ii) acknowledged. A signature on a power of attorney is presumed to be genuine if the principal acknowledges the signature before a notary public[.]

N.C. Gen. Stat. § 32C-1-105 (2017).

"A person that in good faith accepts an acknowledged power of attorney without actual knowledge that the signature is not genuine may rely upon the

presumption under G.S. 32C-1-105 that the signature is genuine." N.C. Gen. Stat. § 32C-1-119(b) (2017). "Technical defects, errors, or omissions in a notarial certificate shall not affect the sufficiency, validity, or enforceability of the notarial certificate or the related instrument or document." N.C. Gen. Stat. § 10B-68(a) (2017).

At the time of the execution of the Power of Attorney and Deed of Trust, the now-repealed N.C. Gen. Stat. § 32A-40(a) was in effect, which similarly stated:

> Unless . . . a person has actual knowledge that a writing is not a valid power of attorney, or . . . a person who in good faith relies on a writing that on its face is duly signed, acknowledged, and otherwise appears regular, and that purports to confer a power of attorney, durable or otherwise, shall be protected to the full extent of the powers and authority that reasonably appear to be granted to the attorney-in-fact designated in that writing[.]

N.C. Gen. Stat. § 32A-40(a) (Repealed by Session Laws 2017-153, § 2.8, effective January 1, 2018).

First, there was no evidence presented that the Deed of Trust was forged. There is no evidence that would support a finding that the signatures of Rhea Davis or Mrs. Davis, for herself and in her capacity as Mr. Davis' attorney-in-fact, were forged on the Deed of Trust. Instead, Mrs. Davis contended that the *Power of Attorney* was forged by Mrs. Davis.

The petitioner was not the party that made the loan to Mrs. Davis and her husband. BB&T was assigned the loan from the initial lender. There is no allegation that BB&T as the assignee of the Note and Deed of Trust had any knowledge of or connection with the alleged forged document. Since there is no evidence that

petitioner had actual knowledge that the Power of Attorney was forged, under the provisions of N.C. Gen. Stat. §§ 32C-1-119(b), 32A-40(a), petitioner may rely on the Power of Attorney as genuine, and as such the signatures on the Deed of Trust are valid.

Furthermore, respondents ratified the loan transaction and Deed of Trust by accepting the benefit of using the Loan to pay off the HSBC deed of trust, accepting additional funds from the loan, and by making payments to petitioner on the current Deed of Trust.

> Ratification is defined as the affirmance by a person of a prior act which did not bind him but which was done or professedly done on his account, whereby the act, as to some or all persons, is given effect as if originally authorized by him. Ratification may be express or implied, and intent may be inferred from failure to repudiate an unauthorized act or from conduct on the part of the principal which is inconsistent with any other position than intent to adopt the act.

King Fa, LLC v. Ming Xen Chen, ___ N.C. App. ___, 788 S.E.2d 646, 649-50 (2016) (citations omitted).

In the instant case, respondents acted with the intent to adopt the Deed of Trust when they used the proceeds of the Note to refinance the HSBC deed of trust and to receive $10,409.30 in home equity. They further ratified the Deed by making sporadic payments on it to petitioner throughout 2009 and 2010.

In *Espinosa v. Martin*, this Court found that a bank could not enforce loan documents bearing the borrower's forged signature because:

> [during the trial court proceeding] there was ample evidence, including the testimony of a handwriting expert, tending to show that none of the loan documents . . . were signed or submitted to the Bank by the Espinosas. There was no evidence that the Espinosas received any of the proceeds from either loan, no evidence that [the Bank's trustee] ever talked with the Espinosas at any time about the loans, and no evidence that the Espinosas received, directly or indirectly, any portion of the loan proceeds. There is also no evidence that the Espinosas knew about the loan transactions at any time prior to the institution of this foreclosure action.

Espinosa v. Martin, 135 N.C. App. 305, 307, 520 S.E.2d 108, 110 (1999). Unlike in *Espinosa*, here the majority of the respondents did sign the Loan documents, respondents received the proceeds of the Loan, and were in communication with petitioner about the Loan by sporadically making payments on it. After accepting the benefits of the Deed of Trust, and acting in a manner consistent with recognizing the Deed as legitimate, respondents cannot now rely on the fraudulent actions of one of their own to their advantage. Therefore, the trial court was correct in finding the Deed of Trust as a valid and enforceable lien against the Subject Property.

III. Conclusion

For the following reasons we affirm the trial court's order permitting foreclosure.

AFFIRMED.

Judges INMAN and COLLINS concur.

Report per Rule 30(e).