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NO. COA10-572

NORTH CAROLINA COURT OF APPEALS

Filed: 15 February 2011

WACHOVIA MORTGAGE, FSB f/k/a/  
WORLD SAVINGS BANK, FSB,  
Plaintiff,

v.

Wake County  
No. 08 CVS 3304

WALTER K. DAVIS and wife,  
SHELVIA J. DAVIS, BRANCH BANKING  
AND TRUST COMPANY and JERONE C.  
HERRING, Trustee,  
Defendants.

Appeal by defendants Walter K. Davis and Shelvia J. Davis from order entered 28 January 2010 by Judge Donald W. Stephens in Wake County Superior Court. Heard in the Court of Appeals 15 November 2010.

*Pendergrass Law Firm, PLLC, by James K. Pendergrass, Jr., for plaintiff-appellee.*

*Berman & Associates, by Gary K. Berman, for defendants-appellants Davis.*

MARTIN, Chief Judge.

Defendants Walter K. Davis and his wife Shelvia J. Davis (collectively "defendants") appeal from the trial court's order granting summary judgment in favor of plaintiff Wachovia Mortgage, FSB, formerly known as World Savings Bank, FSB ("plaintiff"), and imposing an equitable lien against the property identified in the deed of trust recorded in the Wake County Register of Deeds in

Book 8499 on Page 254 ("the Deed of Trust"). For the reasons stated herein, we affirm.

Our recitation of the facts is limited to those deemed relevant to the issues and parties before us on appeal. On 7 January 2000, a deed conveying property to defendants Walter Davis and his wife Shelvia Davis was recorded in the Wake County Registry in Book 8499 on Page 251 ("the Deed"). The Deed of Trust securing the Note<sup>1</sup> on the property for the principal amount of \$265,780.00 was recorded in the Wake County Registry on the same day. This Deed of Trust identified the borrower as defendant "Walter K. Davis, A Married Man," and identified the lender as plaintiff. The Deed of Trust contained two sets of initials at the bottom corner of eleven of its twelve pages. The last page contained one signature line with the designation "Walter K. Davis" and one signature line with the designation "Shelvia Davis"; each line was affixed with signatures corresponding to the names designated below them.

Defendant Walter Davis admits to defaulting under the terms of the Note after failing to make payments since 2005, and further admits to continuing to reside on the property with his wife throughout the period of nonpayment. On 28 February 2008, plaintiff filed a complaint and notice of lis pendens against defendants alleging that defendant Shelvia Davis was unjustly enriched by "acquir[ing] her interest in the [p]roperty without executing the Promissory Note evidencing the [loan] as Defendant

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<sup>1</sup>A copy of the Note is not included in the record before us.

Walter K. Davis was the sole and only borrower on the [loan]." As a result, plaintiff asked the court to impose an equitable lien against the property or, in the alternative, to declare that defendant Shelvia Davis "holds her interest in the title to the Property as [either] Constructive Trustee" or "on resulting trust for the benefit of Plaintiff to the extent of the outstanding balance owed on the [loan] intended to be secured by the [Deed of Trust] upon the same terms and conditions as are set forth and contained in the [Deed of Trust]." Defendants filed answers and asserted counterclaims for unfair debt collection, unfair trade practice, and fraud, alleging that plaintiff "was enriched unjustly through its collection of mortgage payments on an unperfected lien," that defendant Shelvia Davis's signature on the loan documents was "forged," and that defendants were "entitled to recover all monies in the form of loan payments . . . paid unjustly to said [p]laintiff."

On 23 November 2009, plaintiff filed a motion for summary judgment, in support of which it offered defendant Walter Davis's deposition and an affidavit from Carey L. Ewing, who was the closing attorney responsible for obtaining signatures on the Deed of Trust. Ms. Ewing's affidavit is included in the record before us and attests that both defendants were present at the closing and that each affixed their signature to the Deed of Trust in her presence.

According to a court calendar prepared on 16 December 2009 and included in the record, this case and plaintiff's summary judgment

motion were calendared to be heard on 19 January 2010. On 11 January 2010, almost two months after plaintiff served defendants with notice of its summary judgment motion, plaintiff filed and served on defendants a Notice of Hearing for its summary judgment motion, which indicated that plaintiff's motion would be heard "at the time the matter [wa]s called for trial" eight days later. Defendants filed a "Motion to Deny Summary Judgment Response" at 4:46 p.m. on 15 January 2010. There is nothing in the record to indicate that defendants' responsive filing was served upon plaintiff prior to the hearing.

The matter was called for hearing on 19 January 2010, at which time the trial court reviewed plaintiff's motion for summary judgment and reviewed the "unfiled and unserved Affidavit of [Durward C.] Matheny offered by Defendants Davis at the hearing in opposition to Plaintiff's Motion for Summary Judgment." After considering arguments from the parties, including defendant Shelvia Davis's admissions that she was present at the closing with her husband and that she signed some of the documents at the closing, the trial court entered an order allowing plaintiff's motion for summary judgment and imposing an equitable lien against the property which "may be foreclosed in the same manner as the Deed of Trust." After the trial court denied defendants' motion for reconsideration, defendants appealed.

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Defendants first contend the trial court erred by granting summary judgment in favor of plaintiff because defendants were not

served with timely notice that plaintiff's motion would be heard when the matter was called for trial on 19 January 2010.

N.C.G.S. § 1A-1, Rule 56(c) provides that a motion for summary judgment "shall be served at least 10 days before the time fixed for the hearing." N.C. Gen. Stat. § 1A-1, Rule 56(c) (2009). "Although Rule 56 makes no direct reference to *notice of hearing* [for a summary judgment motion], this Court has held that such notice also must be given at least ten (10) days prior to the hearing." *Barnett v. King*, 134 N.C. App. 348, 350, 517 S.E.2d 397, 399 (1999) (emphasis added). "Failure to comply with this mandatory 10 day notice requirement will ordinarily result in reversal of summary judgment obtained by the party violating the rule," because "[i]t is possible . . . that if plaintiff is given the opportunity, which proper notice of the motion for summary judgment would provide, he might by affidavit develop more fully the facts as to what actually occurred . . . ." *Zimmerman's Dep't Store, Inc. v. Shipper's Freight Lines, Inc.*, 67 N.C. App. 556, 557-58, 313 S.E.2d 252, 253 (1984) (omissions in original) (quoting *Ketner v. Rouzer*, 11 N.C. App. 483, 488-89, 182 S.E.2d 21, 25 (1971)). Nevertheless, since "[t]he notice required by this rule is procedural notice as distinguished from constitutional notice required by the law of the land and due process of law," "[t]he 10-day notice required by Rule 56 can be waived by a party." *Raintree Corp. v. Rowe*, 38 N.C. App. 664, 667, 248 S.E.2d 904, 907 (1978) (citing *Story v. Story*, 27 N.C. App. 349, 352, 219 S.E.2d 245, 247 (1975)). The non-moving party can waive this procedural

notice “[b]y attending the hearing of the motion . . . and participating in it and failing to request a continuance or *additional time to produce evidence.*” *Id.* at 667–68, 248 S.E.2d at 907 (emphasis added). In order to establish reversible error when a non-moving party receives “shortened” notice or less than ten days’ notice of a motion or of a hearing on a motion for summary judgment in violation of N.C.G.S. § 1A-1, Rule 56(c), the non-moving party must demonstrate that the shortened notice caused it to be “unduly prejudiced.” *See Symons Corp. v. Quality Concrete Constr., Inc.*, 108 N.C. App. 17, 20–21, 422 S.E.2d 365, 367 (1992); *see also id.* (concluding that “defendants have failed to demonstrate any prejudice caused them by the untimely notice” and that “it was apparent . . . that defendants were not unduly prejudiced by the untimely notice”); *see, e.g., Northland Cable Television, Inc. v. Highlands Cable Grp.*, 197 N.C. App. 629, 680 S.E.2d 271 (2009) (unpublished) (citing *Symons* and other cases for the proposition that, in order to prevail where “[d]efendants objected to the [summary judgment] motion on the basis that [d]efendants had not received ten days’ notice, but did not provide any argument to the trial court as to how the shortened notice would prejudice them in any manner, or what, if any, additional evidence they would be able to produce were the hearing to be continued,” defendants “must show that [p]laintiff’s failure to provide the full ten days’ notice prejudiced them [because] . . . a new trial [or hearing] will not be granted for a mere technical error” (last alteration in original) (internal quotation marks

omitted)); *Eaker v. Naber Chrysler Dodge Jeep, Inc.*, 193 N.C. App. 246, 666 S.E.2d 890 (2008) (unpublished) (citing *Symons* for the proposition that "[t]his Court has since established . . . that when, as here, the issue is not a complete absence of notice [under N.C.G.S. § 1A-1, Rule 56(c)], but rather shortened notice, there must be a showing of prejudice" in order to reverse a grant of summary judgment entered against the non-moving party).

In the present case, defendants received notice of plaintiff's motion for summary judgment at the end of November 2009, almost two months before the motion was heard. Plaintiff's Notice of Hearing on the motion was filed and served on defendants by regular mail eight days before the matter was called for trial, even though plaintiff's motion appeared on the court calendar as scheduled to be heard one month before the hearing date. Thus, while defendants did receive timely notice of plaintiff's motion for summary judgment, plaintiff did not serve notice of the hearing on its motion in accordance with the ten-day procedural notice requirement of N.C.G.S. § 1A-1, Rule 56(c). Defendants suggest that plaintiff's failure to strictly comply with the notice requirements of N.C.G.S. § 1A-1, Rule 56(c) is reversible *per se*, and provide argument asserting only that they did not waive their right to such notice. Nevertheless, even assuming *arguendo* that defendants did not waive their right to procedural notice under N.C.G.S. § 1A-1, Rule 56(c), defendants provide no argument that they suffered any prejudice as a result of receiving plaintiff's shortened notice of the hearing on the motion.

At the hearing, defendants appeared *pro se*, stating that they wanted a continuance in order to "provide as much information as possible about the signing of this—the—the proof that this signature is not [that of defendant Shelvia Davis]," and "to get an attorney to help [defendants] out as far as these forged documents." Yet defendants' 15 January 2010 filed response to plaintiff's motion for summary judgment included the 2006 affidavit of forensic document examiner Durward C. Matheny, which concluded that, upon examination of the signature on the Deed of Trust, "the author of . . . three known signatures" on other documents said to be signed by defendant Shelvia Davis was "not the author of the questioned signature and initials" on the Deed of Trust. In other words, based on defendants' allegations in their responsive filing to plaintiff's motion and based on their arguments to the trial court below, Mr. Matheny's affidavit "confirm[ed] the forgery" of defendant Shelvia Davis's signature on the Deed of Trust that defendants sought to prove, and so obviated the need for a continuance to produce additional evidence to fully develop the facts in accordance with defendants' representation of "what actually occurred." See *Zimmerman's Dep't Store*, 67 N.C. App. at 558, 313 S.E.2d at 253 (internal quotation marks omitted). Thus, while the transcript indicates that defendants requested a continuance when the matter was called for hearing, defendants did not assert at the hearing and do not argue in their brief that they required additional time to produce evidence, and failed to demonstrate any way in which plaintiff's shortened notice of the



hearing on its motion for summary judgment caused defendants to be prejudiced. Therefore, we conclude the trial court did not err by granting plaintiff's motion for summary judgment.

Defendants next contend the trial court erred by imposing an equitable lien on the property identified in the Deed of Trust, because defendants assert that "[t]he record on appeal contains nothing that would lead to a conclusion that [plaintiff] does not have an adequate remedy at law—foreclosure on the original deed of trust." However, defendants fail to direct our attention to any relevant facts or law establishing that, in the present case, plaintiff had an adequate remedy at law, and thus fail to present argument as to how the trial court below erred by imposing an equitable lien on the property. Accordingly, we decline to address this issue on appeal and deem it abandoned. See N.C.R. App. P. 28(a).

Affirmed.

Judges MCGEE and ERVIN concur.

Report per Rule 30(e).