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NO. COA14-655
NORTH CAROLINA COURT OF APPEALS

Filed: 2 December 2014

IN THE MATTER OF THE
FORECLOSURE OF A DEED OF TRUST
EXECUTED BY WILLIAM J. BOBER
AND VICTORA A. BOBER DATED
MAY 19, 2006 AND RECORDED IN
BOOK 1173 AT PAGE 24 IN THE
CARTERET COUNTY PUBLIC
REGISTRY, NORTH CAROLINA

Carteret County
No. 12 SP 392

WILLIAM J. BOBER and wife,
VICTORIA A. BOBER, and VACATION
HOMES OF THE WORLD, INC a
Wyoming Corporation,
Plaintiffs,

v.

Carteret County
No. 13 CVS 75

THE FORD FIRM, PLLC, Substitute
Trustee, THE BANK OF NEW YORK,
MELLON, as Successor Trustee
for the Holders of SAMI II
Trust 2006-AR-6, Mortgage Pass-
Through Certificates, Series
AR 6 And SPECIALIZED LOAN
SERVICING, LLC,
Defendants.

Appeal by Plaintiffs from orders entered 9 October 2013 by
Judge Phyllis M. Gorham in Superior Court, Carteret County.

Heard in the Court of Appeals 3 November 2014.

Ewing Law Center, P.C., by Carey L. Ewing, for Plaintiffs-Appellants.

Bradley Arant Boult Cummings LLP, by Brian M. Rowlson, for Defendants-Appellees The Ford Firm, PLLC, Specialized Loan Servicing, LLC, and Nationstar Mortgage, LLC; and Manning Fulton & Skinner, P.A., by Natalie M. Rice, for Defendant-Appellee The Bank of New York, Mellon.

McGEE, Chief Judge.

William J. Bober ("Mr. Bober") and Victoria A. Bober ("Mrs. Bober") appeal from an order dismissing with prejudice their appeal from an order of the Carteret County Clerk of Superior Court ("the clerk") that determined The Bank of New York Mellon f/k/a The Bank of New York, as Successor Trustee to JPMorgan Chase Bank, N.A., as Trustee for the Structured Asset Mortgage Investments II Trust, Mortgage Pass-Through Certificates, Series 2006-AR6 ("Mellon Bank") had the right to foreclose under the power of sale on real property located at 1507 Ocean Drive in Emerald Isle, North Carolina ("the property"). Mr. and Mrs. Bober, along with Vacation Homes Of The World, Inc. ("Vacation Homes"), also appeal from an order dismissing with prejudice their complaint and two amended complaints seeking a declaratory judgment and injunctive relief pursuant to N.C. Gen. Stat. § 45-21.34 to prohibit Mellon Bank, The Ford Firm, PLLC ("Ford

Firm"), and Specialized Loan Servicing, LLC ("SLS") from instituting a foreclosure proceeding against the property. Because the property that is the subject of the underlying actions was conveyed at a foreclosure sale, and because the foreclosure was completed, we dismiss the present appeal as moot.

The property was conveyed to Mr. and Mrs. Bober as tenants by the entirety on 16 May 2005. A year later, Mr. Bober executed an Adjustable Rate Note ("the Note"), dated 19 May 2006, in the principal amount of \$840,000.00 secured by the property; Mrs. Bober did not sign the Note. The terms of the Note provided that payments would be due on the first day of each month beginning on 1 July 2006, and that failure to pay the minimum payment due each month on the date the payment was due would render Mr. Bober in default. One day before Mr. Bober executed the Note, Mrs. Bober personally appeared before a notary and executed a Power of Attorney ("POA"), in which she appointed Mr. Bober to act as her attorney-in-fact to "[d]o every act, deed and thing necessary or advisable to be done to effect the refinancing and/or conveyance of [the property]." The Note was secured by a Deed of Trust ("the Deed of Trust") representing a total indebtedness of \$840,000.00 on the property, and the Deed of Trust named Mr. and Mrs. Bober as the

borrowers. The Deed of Trust was executed by "William J. Bober" and "Victoria A. Bober By Power of Attorney William J. Bober," and the notarial certificate on the Deed of Trust indicated that "William Bober personally appeared" before the notary and acknowledged the due execution of the instrument. The POA and the Deed of Trust were each recorded with the Carteret County Register of Deeds on 24 May 2006.

The parties do not dispute that Mr. Bober defaulted on the Note when he failed to make installment payments beginning on 1 June 2010. Mr. and Mrs. Bober conveyed the property that was subject to the Deed of Trust to Vacation Homes - of which Mr. Bober was president and registered agent - by general warranty deed recorded on 28 December 2010. Two years later, the then-substitute trustee for the holder of the Note initiated a foreclosure proceeding against the property. A Notice of Hearing was served on Vacation Homes as record owner of the property, as well as on Mr. and Mrs. Bober. A foreclosure hearing was held on 6 December 2012 and the clerk entered an order on 13 December 2012 permitting Mellon Bank, as the holder of the Note, to foreclose on the property pursuant to a power of sale in accordance with the terms of the Deed of Trust. The clerk made the following findings in accordance with the requirements of N.C. Gen. Stat. § 45-21.16(d): (1) each person

entitled to notice was duly served; (2) Mellon Bank was the holder of the Note; (3) the balance due on the Note constituted a valid debt; (4) Mellon Bank had the right to foreclose under the power of sale contained in the Deed of Trust; (5) the debtor was in default under the terms of the Note and of the Deed of Trust; and (6) the debt was not a home loan. The parties acknowledge that on 13 December 2012, the clerk advised them by telephone of the decision to permit the foreclosure. Mr. and Mrs. Bober filed a notice of appeal to superior court on 28 December 2012, in which they sought review of the clerk's 13 December 2012 order. Vacation Homes did not appeal from the clerk's order.

In late January 2013, Mr. and Mrs. Bober filed a separate action in superior court seeking a declaratory judgment and injunctive relief. Mr. and Mrs. Bober's original complaint and amended complaints (hereinafter "the Complaint") - which added Vacation Homes as a party to the action - alleged that the Deed of Trust did not constitute a valid lien and was void and "must be treated as if unrecorded." The Complaint alleged that, although the notary's acknowledgement expressly recognized that Mr. Bober personally appeared before him to execute the Deed of Trust, the notary's acknowledgement was defective and the Deed of Trust was not a valid encumbrance on the property because the

notary did not also expressly indicate that Mr. Bober appeared before him as Mrs. Bober's attorney-in-fact. The Complaint then requested that the superior court declare that the holder of the Note did not have a right to foreclose on the property under the power of sale contained in the Deed of Trust, and sought to enjoin any further action with respect to the underlying foreclosure proceeding.

Substitute trustee Ford Firm, holder Mellon Bank, and servicing agent SLS moved to dismiss the Complaint pursuant to N.C. Gen. Stat. § 1A-1, Rule 12(b)(6), and Ford Firm and Mellon Bank further moved to dismiss Mr. and Mrs. Bober's appeal from the clerk's 13 December 2012 order permitting foreclosure. After hearing the motions to dismiss regarding both matters in August 2013, the superior court dismissed with prejudice both Mr. and Mrs. Bober's appeal from the clerk's order and the Complaint seeking declaratory and injunctive relief. The trial court determined it had no jurisdiction to consider Mr. and Mrs. Bober's appeal from the clerk's 13 December 2012 order and dismissed the appeal with prejudice based on the following findings: (1) the clerk considered and rejected the Bobers' assertion that the manner in which the notary acknowledged the Deed of Trust rendered the instrument void; (2) the clerk entered an order permitting foreclosure against the property and

notified the parties of the decision on the same day; (3) Mr. and Mrs. Bober appealed from the clerk's order, but that such appeal was not timely filed in accordance with N.C. Gen. Stat. § 45-21.16(a); and (4) Vacation Homes, as the record owner of the property, did not appeal from the clerk's order, and that its failure to file a timely appeal was inexcusable. The trial court also dismissed with prejudice the Complaint on the grounds that the action "constitute[d] an impermissible collateral attack" of the clerk's order permitting foreclosure. Mr. and Mrs. Bober and Vacation Homes appeal from the orders dismissing both actions.

Mellon Bank, Ford Firm, and Nationstar Mortgage, LLC ("Nationstar")¹ moved this Court to dismiss the present appeal on the grounds that it presents questions that have been rendered moot by the sale of the property at a foreclosure proceeding. We now consider whether the appeal from the trial court's dismissal of the appeal from the clerk's 13 December 2012 order permitting foreclosure, and from its dismissal of the Complaint as an impermissible collateral attack on the clerk's same order, are now moot.

¹ By order of this Court entered 19 September 2014 pursuant to a motion filed by SLS with the consent of all parties, Nationstar – the entity that has since acquired the Note from servicing agent SLS and has a right to prosecute the action in this appeal – has been substituted for SLS as an appellee in this appeal.

“‘[A] case is considered moot when a determination is sought on a matter which, when rendered, cannot have any practical effect on the existing controversy.’” *In re Hackley*, 212 N.C. App. 596, 599, 713 S.E.2d 119, 121 (quoting *Lange v. Lange*, 357 N.C. 645, 647, 588 S.E.2d 877, 879 (2003)), *disc. reviews denied and dismissed as moot*, 365 N.C. 351, 718 S.E.2d 376-77 (2011). “[G]enerally, an appeal presenting a question which has become moot will be dismissed.” *Id.* at 598, 713 S.E.2d at 121 (internal quotation marks omitted); see also *id.* at 599, 713 S.E.2d at 121 (“When the questions originally at issue in a case are no longer at issue when the case is on appeal, the appeal is moot and should be dismissed.”).

“‘[T]he rights of the parties to a foreclosure sale become fixed upon either the expiration of the period for filing an upset bid, the provision of injunctive relief precluding the consummation of the foreclosure sale, or the occurrence of some similar event.’” *In re Hackley*, 212 N.C. App. at 605, 713 S.E.2d at 125 (quoting *Goad v. Chase Home Fin., LLC*, 208 N.C. App. 259, 263, 704 S.E.2d 1, 4 (2010)). Further, “when the trustee’s deed has been recorded after a foreclosure sale, and the sale was not stayed, the parties['] rights to the real property become fixed, and any attempt to disturb the foreclosure sale is moot.” *In re Cornblum*, __ N.C. App. __, __,

727 S.E.2d 338, 342, *disc. reviews denied and dismissed as moot, appeal dismissed, and cert. and supersedeas denied*, 366 N.C. 404, 734 S.E.2d 864-66 (2012). For example, this Court dismissed as moot the appeal in *In re Hackley* after determining that the rights of the parties were fixed because "the subject real property was sold and the Trustee's Deed was recorded," *In re Hackley*, 212 N.C. App. at 605, 713 S.E.2d at 125, "[t]here [wa]s no indication in the record that respondent paid a bond to stay the foreclosure sale," *id.*, "nor was there an upset bid during the 10 day period, or any indication in the record that respondent obtained a temporary restraining order or preliminary injunction prior to the end of the ten-day upset bid period." *Id.* (citation omitted).

In the present case, the superior court ordered on 26 July 2013 that any foreclosure sale against the property was stayed pending the hearing of Mr. and Mrs. Bober's appeal from the clerk's December 2012 order permitting the foreclosure. However, the record does not reflect that Mr. and Mrs. Bober or Vacation Homes sought to enjoin the institution of a foreclosure sale following the superior court's dismissals of the Complaint and of Mr. and Mrs. Bober's appeal from the clerk's order. Consequently, on 17 December 2013, Ford Firm, as Mellon Bank's substitute trustee, foreclosed upon the Deed of Trust and sold

the property to Mellon Bank, the last and highest bidder for the property, at a price of \$561,000.00. Because the sale remained open for ten days and no upset bid was filed, the rights of the parties to the sale became fixed pursuant to N.C. Gen. Stat. § 45-21.27(a) and § 45-21.29A. A trustee's deed was then recorded with the Carteret County Register of Deeds on 9 January 2014 conveying the property to Mellon Bank, and a notice of foreclosure was also recorded in accordance with the requirements of N.C. Gen. Stat. § 45-38. We take judicial notice of these recorded documents submitted by appellees in the appendix of their respective briefs, as permitted in accordance with *In re Hackley*. See *In re Hackley*, 212 N.C. App. at 601-02, 713 S.E.2d at 123 (“[T]his Court can take judicial notice of certain documents even though they were not included in the record on appeal. . . . [W]e are able to take judicial notice of . . . the recorded ‘Trustee’s Deed’ which was done as a result of the foreclosure sale in this same case and as directed by the foreclosure order. . . . [T]he fact that the foreclosure sale did occur and the property was conveyed by the trustee is capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.” (citation and internal quotation marks omitted)).

Because these documents establish that the foreclosure sale

had been completed and that interests in the property had been transferred to Mellon Bank as a purchaser, see *In re Cornblum*, __ N.C. App. at __, 727 S.E.2d at 342, we conclude that the parties' rights are fixed and that appellants' arguments with respect to the trial court's dismissal of Mr. and Mrs. Bober's appeal from the 13 December 2012 order of the clerk permitting foreclosure are now moot. Accordingly, we grant the motion to dismiss the appeal with respect to this order.

We further conclude that the completed foreclosure also renders moot the appeal from the trial court's dismissal of the Complaint as an impermissible collateral attack on the 13 December 2012 order of the clerk. The relief sought by the Complaint was to enjoin any foreclosure proceeding against the property and to declare that Mellon Bank, as the holder of the Note, did not have a right to foreclose under the power of sale contained in the Deed of Trust. However, a determination on these matters cannot now have a practical effect on this controversy, see *In re Hackley*, 212 N.C. App. at 599, 713 S.E.2d at 121, because, as we discussed above, the foreclosure sale has been completed, and when "the parties['] rights to the real property become fixed, . . . any attempt to disturb the foreclosure sale is moot." See *In re Cornblum*, __ N.C. App. at __, 727 S.E.2d at 342. We therefore also grant the motion to

dismiss the appeal with respect to the order dismissing the
Complaint.

Dismissed.

Judges HUNTER, Robert C. and BELL concur.

Report per Rule 30(e).