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NO. COA05-336

NORTH CAROLINA COURT OF APPEALS

Filed: 20 December 2005

IN THE MATTER OF THE
FORECLOSURE OF A DEED OF
TRUST FROM RICHARD JORDAN
AND WIFE, TERESA JORDAN,
GRANTORS,

Franklin County
No. 04SP138

F. STUART CLARKE, TRUSTEE,
AS SHOWN IN FRANKLIN COUNTY
REGISTRY, NORTH CAROLINA

RECORD OWNER:
RICHARD JORDAN AND WIFE,
TERESA JORDAN.

Appeal by petitioner from judgment entered 23 August 2004 by Judge Stafford G. Bullock in Franklin County Superior Court. Heard in the Court of Appeals 20 October 2005.

McCoy, Weaver, Wiggins, & Cleveland, PLLC, by Richard M. Wiggins and James McLean, III, for petitioner-appellant.

Boxley, Bolton & Garber, LLP, by Kenneth C. Haywood, for respondents-appellees.

LEVINSON, Judge.

Petitioner (Brock Cabinets & Appliances, Inc.) appeals from an order prohibiting foreclosure on the Deed of Trust recorded in Book 1326, on Page 794, of the Franklin County Register of Deeds.

On 26 May 2004 an order allowing foreclosure on the above-referenced deed of trust was entered by the Clerk of Court of the

Superior Court of Franklin County, North Carolina. A hearing on respondents' appeal from the Clerk of Court's order was held in the Superior Court 2 August 2004. The evidence presented at the hearing may be summarized as follows:

Sometime in 1992 it was discovered that respondent Teresa Jordan had embezzled funds from her employer Brock Cabinets and Appliances, Inc. Teresa Jordan was arrested for embezzlement on 16 July 2002.

The general manager of Brock Cabinets, Nephi Brock, testified that the original sum Teresa Jordan was charged with owing to Brock Cabinets was \$186,000.00. The restitution owed was reduced because of monies recovered from bank accounts of Teresa and Richard Jordan. To further reduce the amount owed by Teresa Jordan, Nephi Brock asked attorney F. Stuart Clarke to draft a promissory note for \$40,000.00 to be paid by Teresa and Robert Jordan to Brock Cabinets, secured by a deed of trust in the Jordans' home. The Jordans agreed to the same, but made no payments on the note. Nephi Brock, therefore, directed trustee F. Stuart Clarke to proceed with foreclosure. Richard Jordan testified that the total amount Teresa Jordan embezzled was \$120,000.00. He stated, "[i]t went from 120 to 186 without me knowing how." Richard Jordan testified that while he never wanted to sign the promissory note and deed of trust, he signed them to prevent his wife from going to jail. It was Richard Jordan's contention at the hearing that the promissory note was signed only in exchange for Teresa Jordan not going to jail. Notwithstanding the fact that Richard and Teresa

Jordan signed the promissory note and deed of trust, Teresa Jordan received a sentence of six years and nine months in prison. Richard Jordan stated neither he nor his wife had ever received anything of value for signing the note and deed of trust.

The trial court made the following relevant findings of fact:

1. That this hearing was scheduled under this proceeding pursuant to North Carolina General Statutes § 45-21.16 to appeal the Order Allowing Foreclosure of the Deed of Trust executed by Richard Jordan and wife, Teresa Jordan on February 13, 2003 as recorded in Book 1326, Page 794, Franklin County Registry.
2. That Richard and Teresa Jordan executed a promissory note in the amount of \$40,000.00 on or about February 13, 2003 in favor of Brock Cabinets & Appliances, Inc. and contemporaneously executed a Deed of Trust to F. Stuart Clarke, Trustee, for the benefit of Brock Cabinets & Appliances, Inc. based upon the understanding and for the specific consideration that Teresa Jordan would not be sentenced to prison by virtue of her embezzlement of certain funds during her employment with Brock Cabinets & Appliances, Inc.
3. The amount of money Teresa Jordan was charged with embezzling from Brock Cabinets & Appliances, Inc. put her into a sentencing classification that would require an active prison sentence. To avoid Teresa Jordan from being sent to prison, Brock Cabinets & Appliances, Inc. proposed to accept a \$40,000 promissory note secured by a deed of trust to lower the embezzled amount to change the sentencing classification so that prison time would not be required under the sentencing guidelines.
4. That based on the fact that Teresa Jordan was sentenced to prison and that she is currently serving a sentence carrying a total term of six years and nine months, the above-described

Note and Deed of Trust are without consideration.

The court then made the following relevant conclusions of law:

4. That there exists no valid indebtedness from Richard Jordan and Teresa Jordan unto Brock Cabinets & Appliances, Inc. evidenced by the above-described Note and Deed of Trust executed by Richard Jordan and Teresa Jordan.
5. That Richard Jordan and Teresa Jordan are not in default under the terms of the above-described Note and Deed of Trust.

The trial court ordered trustee F. Stuart Clarke not to proceed with foreclosure pursuant to the deed of trust and prohibited any future foreclosure on the deed of trust. From this order petitioner appeals.

On appeal petitioner argues the trial court erred by concluding (1) that there was no valid debt owed by respondents to petitioner, and (2) that respondents were not in default under the terms of the note and deed of trust. Central to petitioner's appeal is whether this Court's opinion in *In Re Foreclosure of Kitchens*, 113 N.C. App. 175, 437 S.E.2d 511 (1993) controls, and whether consideration supports the promissory note. We do not reach this issue, however, because it is not preserved.

While petitioner assigned error to the trial court's conclusions of law numbers 4 and 5, petitioner failed to assign error to the trial court's finding of fact number 4.

Paragraph 4 in the findings of fact portion of the trial court order states:

That based on the fact that Teresa Jordan was sentenced to prison and that she is currently serving a sentence carrying a total term of six years and nine months, the above-described Note and Deed of Trust are without consideration.

Though denominated a finding of fact, this paragraph is, instead, a conclusion of law. See *Pierce v. Reichard*, 163 N.C. App. 294, 299, 593 S.E.2d 787, 790 (2004) ("[A]lthough this sentence . . . is denominated a finding of fact, we are not bound by the label used by the trial court.") (citation omitted). "Failure to [assign error to a conclusion of law] constitutes an acceptance of the conclusion and a waiver of the right to challenge said conclusion as unsupported by the facts." *Fran's Pecans, Inc. v. Greene*, 134 N.C. App. 110, 112, 516 S.E.2d 647, 649 (1999). Where there has been a "failure of consideration . . . no valid debt was created between the parties." *In re Foreclosure of Aal-Anubiaimhotepokorohamz*, 123 N.C. App. 133, 136, 472 S.E.2d 369, 371 (1996). "'The mortgage's existence is based on the validity of the debt. If the debt terminates or is invalid, the mortgage is also invalid.'" *Id.* at 135, 472 S.E.2d at 371 (quoting Patrick K. Hetrick and James B. McLaughlin, Jr., *Webster's Real Estate Law in North Carolina*, § 13-4 (4th ed. 1994)).

The conclusion that the note and deed of trust "are without consideration" is tantamount to the trial court's conclusions that the Jordans are "not in default" and that "there exists no valid indebtedness." Thus, even assuming *arguendo* we agreed with petitioner's contention that the trial court erred by making conclusions 4 and 5 set forth in the conclusions of law portion of

the order, this Court would be without the ability to disturb the trial court's directives. Indeed, where there has been no valid consideration supporting the promissory note secured by the deed of trust, there can be no valid debt, or any subsequent default on the same.

Petitioner's assignments of error are overruled.

Affirmed.

Judges McCULLOUGH and ELMORE concur.

Report per Rule 30(e).