

An unpublished opinion of the North Carolina Court of Appeals does not constitute controlling legal authority. Citation is disfavored, but may be permitted in accordance with the provisions of Rule 30(e)(3) of the North Carolina Rules of Appellate Procedure.

NO. COA06-617

NORTH CAROLINA COURT OF APPEALS

Filed: 19 December 2006

LEE ORDELL ALLRED and wife,
VANESSA FELICIA HARRELLSON
ALLRED,

Plaintiffs,

v.

Guilford County
No. 04 CVS 5012

FIRST BANK NATIONAL
ASSOCIATION TRUST, FAIRBANKS
CAPITAL CORPORATION, and
PHILIP A. GLASS, SUBSTITUTE
TRUSTEE,

Defendants.

Appeal by plaintiffs from order entered 17 January 2006 by Judge Catherine Eagles in Guilford County Superior Court. Heard in the Court of Appeals 16 November 2006.

Weeks & Roupas, LLP, by James B. Weeks, for plaintiffs-appellants.

The Law Office of John T. Benjamin, Jr., P.A., by John T. Benjamin, Jr. and Devon A. Glick, for defendants-appellees.

JACKSON, Judge.

Plaintiffs Lee Odell Allred and his wife, Vanessa Felicia Harrellson Allred, appeal the trial court's order of 17 January 2006. For the reasons stated below, we dismiss plaintiffs' appeal.

Defendant First Bank National Association Trust held the mortgage on plaintiffs' home, and defendant Fairbanks Capital Corporation serviced plaintiffs' loan. Plaintiffs defaulted on their mortgage, and the property was placed in foreclosure. Plaintiffs commenced a breach of contract action on 17 March 2004 and later amended their complaint to assert numerous claims arising out of their contention that they were not in default of the subject note and deed of trust. Plaintiffs claimed that defendants had not properly credited their account and had not properly provided them with notice of the foreclosure hearing. Plaintiffs' specific claims included fraud, breach of contract, unfair and deceptive trade practices, and actions under the Federal Fair Debt Collection Practices Act.

On 4 April 2005, the trial court granted defendants' motion to dismiss all of plaintiffs' claims, save the breach of contract action, on the ground that plaintiffs did not state a claim upon which relief could be granted. On 15 July 2005, the trial court issued an order granting defendant's motion for summary judgment against plaintiff Lee Allred. The trial court issued an order granting defendants' motion for summary judgment against plaintiff Vanessa Allred on 6 September 2005. With both motions, the trial court determined that plaintiffs did not submit discovery responses in a timely fashion, and as a result, the court deemed defendants' requests for admissions admitted. After determining that there was no genuine issue of material fact remaining, the trial court granted summary judgment against both plaintiffs.

Plaintiffs filed a new motion to set aside the order of foreclosure sale on 21 November 2005. A judgment and order granting defendants' motion for Rule 11 sanctions and denying plaintiffs' new motion was entered on 17 January 2006. Plaintiffs filed and served notice of appeal on 10 February 2006.

Plaintiffs' first and fourth assignments of error arise directly from the trial court's order of 6 September 2005 granting defendants' motion for summary judgment against Vanessa Allred. As there was no timely appeal taken from that court order, these assignments of error are not properly before this court. See N.C. R. App. P. 3 (2006).

In their second and third assignments of error, plaintiffs appeal the 17 January 2006 Order Granting Defendants' Motion for Sanctions and Denying Plaintiffs' Motion to Set Aside Order of Foreclosure Sale. In their Motion to Set Aside Order of Foreclosure Sale, plaintiffs contended that they did not receive notice of the foreclosure hearing and as a result were not present at the hearing. This issue already had been litigated, however, as plaintiffs raised this issue in their complaint. Plaintiffs did not file either a Rule 59 motion for a new trial or a Rule 60 motion for relief from the orders granting summary judgment in favor of defendants. See N.C. Gen. Stat. § 1A-1, Rules 59, 60 (2005). The trial court, therefore, correctly denied plaintiffs' motion to set aside the sale. As plaintiffs attempt to use the instant appeal to revisit previously litigated issues without

having filed a Rule 59 or Rule 60 motion, their second and third assignments of error are not properly before this Court.

Plaintiffs expressly abandon their remaining assignment of error, and therefore, as no assignments are properly before this Court, we dismiss the instant appeal.

DISMISSED.

Judges GEER and LEVINSON concur.

Report per Rule 30(e).