

IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA14-1239

Filed: 21 April 2015

Buncombe County, No. 13 CVS 588

IN RE DISPUTE OVER THE SUM OF \$375,757.47, CONSTITUTING THE SURPLUS CLOSING PROCEEDS FROM THE SALE OF THAT CERTAIN REAL PROPERTY AS DESCRIBED IN A DEED RECORDED IN DEED BOOK 712, AT PAGE 570, RUTHERFORD COUNTY, NORTH CAROLINA, PUBLIC REGISTRY.

Appeal by respondent-third party defendants, from order entered 14 April 2014 by Judge Gary M. Gavenus in Buncombe County Superior Court. Heard in the Court of Appeals 18 March 2015.

Hutchens Law Firm, by J. Scott Flowers and Natasha M. Barone, for respondent-third party plaintiff, HSBC Bank, U.S.A, N.A.

Brooks, Pierce, McLendon, Humphrey & Leonard, LLP, by Joseph A. Ponzi, for third party defendant, Mountain 1st Bank & Trust Company.

Ferikes & Bleynat, PLLC, by H. Gregory Johnson, for respondent-third party defendants Raymond and Judy Chapman.

TYSON, Judge.

Raymond and Judy Chapman (“the Chapmans”) appeal from the trial court’s order granting summary judgment in favor of HSBC Bank USA, N.A. (“HSBC”), and awarding attorneys’ fees in favor of HSBC. We affirm the trial court’s order.

I. Background

In 1998, the Chapmans purchased property located at 304 Seton Road in Lake Lure. They obtained title by general warranty deed recorded in the

Rutherford County Registry. On or about 7 April 2006, the Chapmans refinanced their mortgage loan. They obtained a loan and executed a promissory note in the amount of \$600,000.00 from Mountain 1st Bank (“Mountain 1st”). The note was secured by a deed of trust recorded in the Rutherford County Registry, which pledged the subject property and any proceeds from the sale of the property as collateral for the note.

In the deed of trust, Mountain 1st named Mortgage Electronic Registration Systems, Inc. (“MERS”) as its nominee. MERS maintained an electronic registration system, by which it tracked any assignment of the promissory note and deed of trust.

Mountain 1st assigned the promissory note and deed of trust to Resource Mortgage Solutions, a division of Netbank, on or before 20 April 2006. On 30 June 2006, Netbank assigned the promissory note and deed of trust to Wells Fargo Bank, N.A. (“Wells Fargo”). On 4 June 2010, while Wells Fargo was the holder of the promissory note and deed of trust, Mountain 1st recorded a Certificate of Satisfaction in the Rutherford County Registry, purporting to satisfy and cancel the Chapmans’ obligation under the note.

Mountain 1st had assigned and relinquished being the holder of the promissory note and beneficiary of the deed of trust nearly four years before the Certificate of Satisfaction was recorded. Mountain 1st acknowledges it was without

authority to execute and record the erroneous Certificate of Satisfaction. Wells Fargo assigned the promissory note and deed of trust to HSBC on 30 October 2012.

The Chapmans continued to make payments on the note for more than two years after Mountain 1st's purported Certificate of Satisfaction was recorded. In August 2012, the Chapmans entered into an offer to purchase and contract to sell the property to Sylvia Pflum. Ms. Pflum's attorney performed a title search in preparation for the closing and discovered the Mountain 1st Certificate of Satisfaction. The Chapmans were previously unaware of the Certificate of Satisfaction. Wells Fargo claimed to be the holder of the Chapmans' note and deed of trust, and demanded payment of the sale proceeds.

At the closing of the sale, the Chapmans and the closing attorney deposited \$375,757.47, the balance owed on the note, with an escrow agent pursuant to an Escrow Agreement executed by the Chapmans on 4 September 2012. Pursuant to the Escrow Agreement, the funds are to be held in escrow until either an agreement between the Chapmans and Wells Fargo is reached, or a court order directing the disbursement of funds is issued. The Escrow Agreement states that Wells Fargo asserts the Chapmans owe Wells Fargo \$363,936.00 in unpaid principal, interest and other fees and charges in connection with the mortgage. It further states that a payoff of the purported debt after 27 August 2012 "may include other fees and

charges, including late fees and/or interest.” After Wells Fargo assigned the note to HSBC, it recanted its claim to the funds.

On 15 October 2012, after the property was sold and titled to Pflum, MERS executed and recorded a Document of Rescission, which purported to rescind the Certificate of Satisfaction and reinstate the deed of trust. MERS executed and recorded a Corporate Assignment of Deed of Trust on 30 October 2012, which also assigned Mountain 1st’s beneficial interest under the deed of trust to HSBC. On 3 March 2014, HSBC executed and recorded another Document of Rescission, purporting to rescind the Certificate of Satisfaction and reinstate the deed of trust. HSBC is in possession of the Chapmans’ original note.

The promissory note and deed of trust specifically allow for the lender to collect all expenses, including reasonable attorneys’ fees, from the Chapmans in the event the Chapmans breach their obligations under the promissory note.

After request, the Chapmans refused to release the escrowed funds to HSBC. On 6 February 2013, Daniel L. Strobel, the escrow agent, filed a complaint in Buncombe County Superior Court seeking a court order declaring the rights and interests of the parties to the escrowed funds. HSBC filed a motion to dismiss the complaint, answer, counterclaim against Strobel, cross-claim against the Chapmans, and third party complaint against Pflum and Mountain 1st.

HSBC filed a motion for summary judgment on 17 March 2014. The matter came before the trial court on 14 April 2014. The court granted summary judgment in favor of HSBC. The court entered judgment against the Chapmans in the amount of \$403,902.18, with interest accruing after judgment at the legal rate. The escrow agent was ordered to deliver the escrowed funds to HSBC to be applied toward satisfaction of the judgment. The court awarded attorneys' fees to HSBC in the amount of \$57,162.76, representing fifteen percent of the amount due as provided in the promissory note. The Chapmans appealed.

II. Issues

The Chapmans argue the trial court erred in: (1) granting summary judgment in favor of HSBC; and, (2) ordering them to pay HSBC's attorneys' fees.

III. Summary Judgment

The Chapmans argue the trial court erred in granting summary judgment in favor of HSBC. They assert the escrowed funds belong to them as a result of Mountain 1st's cancellation of the deed of trust, and are not required to satisfy the promissory note from the closing proceeds. We disagree.

A. Standard of Review

Summary judgment is proper where "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show

that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law.” N.C. Gen. Stat. § 1A-1, Rule 56 (2013).

An issue is ‘genuine’ if it can be proven by substantial evidence and a fact is ‘material’ if it would constitute or irrevocably establish any material element of a claim or a defense. A party moving for summary judgment may prevail if it meets the burden (1) of proving an essential element of the opposing party’s claim is nonexistent, or (2) of showing through discovery that the opposing party cannot produce evidence to support an essential element of his or her claim. Generally this means that on ‘undisputed aspects of the opposing evidential forecast,’ where there is no genuine issue of fact, the moving party is entitled to judgment as a matter of law. If the moving party meets this burden, the non-moving party must in turn either show that a genuine issue of material fact exists for trial or must provide an excuse for not doing so.

Lowe v. Bradford, 305 N.C. 366, 369, 289 S.E.2d 363, 366 (1982) (internal citations omitted). “In a motion for summary judgment, the evidence presented to the trial court must be . . . viewed in a light most favorable to the non-moving party.” *Howerton v. Arai Helmet, Ltd.*, 358 N.C. 440, 467, 597 S.E.2d 674, 692 (2004) (citation omitted).

“[O]nce the party seeking summary judgment makes the required showing, the burden shifts to the nonmoving party to produce a forecast of evidence demonstrating specific facts, as opposed to allegations, showing that he can at least establish a *prima facie* case at trial.” *Pacheco v. Rogers and Breece, Inc.*, 157 N.C. App. 445, 448, 579 S.E.2d 505, 507 (2003) (citation omitted) (emphasis supplied).

“To hold otherwise . . . would be to allow plaintiffs to rest on their pleadings, effectively neutralizing the useful and efficient procedural tool of summary judgment.” *Id.* (citation omitted). This Court reviews an order granting summary judgment *de novo*. *In re Will of Jones*, 362 N.C. 569, 573, 669 S.E.2d 572, 576 (2008).

B. Erroneously Recorded Certificate of Satisfaction

The Chapmans assert they are entitled to the escrowed proceeds from the sale of the property and are not required to satisfy any debt from the proceeds. They argue Mountain 1st canceled the promissory note and deed of trust, and the cancellation instrument was not rescinded prior to the closing. We disagree. ‘

It is undisputed Mountain 1st, the Champan’s original lender, purported to cancel the promissory note, secured by the deed of trust, by recording a Certificate of Satisfaction in the Rutherford County Registry on 4 June 2010. The Certificate of Satisfaction states:

I, Jeff Griffin, Vice President of Mountain 1st Bank & Trust certify that Mountain 1st Bank & Trust are the Owners of the aforesaid referenced [promissory note] and that the debt or obligation was satisfied on the 4th day of June, 2010, and request that the certificate of satisfaction be recorded and the above referenced security instrument be canceled of record.

In response to the Chapmans’ interrogatories and through its pleadings, Mountain 1st admits it was no longer the holder of the promissory note when Jeff

Griffin recorded the Certificate of Satisfaction. At the time the certificate was recorded, Mountain 1st was without authority to discharge any obligation under the note. See N.C. Gen. Stat. § 25-3-604(a) (2013).

1. Status of Mountain 1st on 4 June 2010

The Chapmans argue HSBC and Mountain 1st failed to prove as a matter of law Jeff Griffin lacked authority to cancel the note on behalf of Mountain 1st. They assert the banks failed to produce sufficient documentation showing Mountain 1st had assigned, sold, or transferred the note prior to the 4 June 2010 purported cancellation. We disagree.

Mountain 1st's verified pleadings and answers to interrogatories show Mountain 1st registered the loan with MERS on or about 20 April 2006. Mountain 1st assigned the promissory note and deed of trust to RMS, a division of NetBank, on or before the date of registration with MERS. RMS assigned the note and deed of trust to NetBank on or before 11 July 2006. NetBank assigned the promissory note and deed of trust to Wells Fargo on or after 11 July 2006. There is no genuine dispute of the fact that Wells Fargo was the note holder in due course on 4 June 2010.

The Chapmans argue at length that the banks, HSBC and Mountain 1st, did not produce “properly authenticated” documentation evidencing the dates on which the assignments of the note occurred. “A verified complaint may be treated as an

affidavit if it (1) is made on personal knowledge, (2) sets forth such facts as would be admissible in evidence, and (3) shows affirmatively that the affiant is competent to testify to the matters stated therein.” *Rankin v. Food Lion*, 210 N.C. App. 213, 220, 706 S.E.2d 310, 315-16 (1999) (citation and quotation marks omitted).

HSBC’s verified third party complaint incorporates the promissory note and deed of trust, and alleges Mountain 1st was not the holder of the note on 4 June 2010, and it was without authority to execute and record the satisfaction. The pleading meets the three criteria set forth in *Rankin*, and was properly treated as an affidavit for summary judgment by the trial court.

HSBC also submitted verified responses to the Chapmans’ Interrogatories and Requests for Admission, which evidenced transfer of the note and deed of trust, and which are also appropriate for the court’s consideration in ruling on summary judgment. N.C. Gen. Stat. § 1A-1, Rule 56(c) (2013).

Once HSBC produced verified evidence to show it was not the note holder on 4 June 2010, the burden shifted to the Chapmans to “demonstrat[e] specific facts, as opposed to allegations,” to show Mountain 1st remained the note holder and possessed the lawful authority to cancel the note and deed of trust on 4 June 2010. *Pacheco*, 157 N.C. App. at 448, 579 S.E.2d at 507.

The Chapmans attack the authenticity and admissibility of the verified documents relied upon by the trial court in ruling on summary judgment. However,

they produced no forecast of evidence to show Mountain 1st did not assign the note prior to and it was not “the person entitled to enforce the instrument” on 4 June 2010. N.C. Gen. Stat. § 25-3-604(a) (2013). The record demonstrates no genuine issue of fact that Mountain 1st was not the note holder when the purported Certificate of Satisfaction was filed on 4 June 2010.

2. Authority to Cancel the Promissory Note

“Discharge of instruments is controlled by N.C. Gen. Stat. § 25-3-604,” a subsection of the UCC. *G.E. Capital Mortg. Servs., Inc. v. Neely*, 135 N.C. App. 187, 190, 519 S.E.2d 553, 556 (1999); *see also* N.C. Gen. Stat. § 45-37(e) (2013) (“Any transaction subject to the provisions of the [UCC, Chapter 25], is controlled by the provisions of that act and not by this section.”). The statute provides:

(a) A person entitled to enforce an instrument, with or without consideration, may discharge the obligation of a party to pay the instrument (i) by an intentional voluntary act, such as surrender of the instrument to the party, destruction, mutilation, or cancellation of the instrument, cancellation or striking out of the party’s signature, or the addition of words to the instrument indicating discharge, or (ii) by agreeing not to sue or otherwise renouncing rights against the party by a signed writing.

N.C. Gen. Stat. § 25-3-604(a) (2013).

Jeff Griffin, agent of Mountain 1st, was not “a person entitled to enforce [the] instrument” on 4 June 2010. *Id.* The record shows Mountain 1st assigned the note

prior to that date, no longer held or owned the loan, and was not “a person entitled to enforce an instrument.” *Id.* The erroneous satisfaction executed by Mountain 1st is invalid and was of no legal effect.

C. HSBC’s Status as Note Holder

The Chapmans argue a genuine issue of material fact exists of whether HSBC attained holder status of the promissory note. We disagree.

An entity is considered the holder of a promissory note when they are the party in possession of the original note, and the note is “payable either to bearer or to an identified person that is the person in possession.” N.C. Gen. Stat. § 25-1-201(b)(21) (2013). Pursuant to our Uniform Commercial Code (“Code”), a promissory note is payable to bearer when it:

- (1) States that it is payable to bearer or to the order of bearer or otherwise indicates that the person in possession of the promise or order is entitled to payment;
- (2) Does not state a payee; or
- (3) States that it is payable to or to the order of cash or otherwise indicates that it is not payable to an identified person.

N.C. Gen. Stat. § 25-3-109 (2013).

“Except for negotiation by a remitter, if an instrument is payable to an identified person, negotiation requires transfer of possession of the instrument and

its indorsement by the holder. If an instrument is payable to bearer, it may be negotiated by transfer of possession alone.” N.C. Gen. Stat. § 25-3-201(b) (2013).

An indorsement is a signature on the note that is intended to negotiate the instrument. N.C. Gen. Stat. § 25-3-204(a) (2013). The signature may be made on the instrument itself or on a paper affixed to negotiate the instrument, which becomes a part of the instrument. *Id.*

“[A] signature and its accompanying words is an indorsement unless the accompanying words, terms of the instrument, place of the signature, or other circumstances unambiguously indicate that the signature was made for a purpose other than indorsement.” *Id.* We recognize “a strong presumption in favor of the legitimacy of indorsements” to protect the transferees of negotiable instruments. *In re Bass*, 366 N.C. 464, 468, 738 S.E.2d 173, 176 (2013). A signature on an indorsement is presumed valid “until some evidence is introduced which would support a finding that the signature is forged or unauthorized.” *Id.* at 470, 738 S.E.2d at 177 (citation omitted).

Under the Code, the party in possession of a negotiable instrument indorsed in blank is presumptively the holder. N.C. Gen. Stat. § 25-1-201(b)(21) (2013); N.C. Gen. Stat. § 25-3-109 (2013) (emphasis supplied). *See also, In re Manning*, __ N.C. App. __, __, 747 S.E.2d 286, 291-92 (2013) (presentation of the original note to the

court, indorsed in blank, “serves as competent evidence to support the trial court’s finding that [the party] was the present holder.”).

Here, HSBC presented the original note in open court at the summary judgment hearing. The note is unambiguously indorsed in blank by Wells Fargo. The indorsement is made by Joan M. Mills, Vice President of Wells Fargo, and does not identify a person to whom it is payable. HSBC holds physical possession of the note. The law presumes HSBC is the holder of the promissory note.

To attempt to overcome the Code’s legal presumption, the Chapmans argue a genuine issue of fact exists of HSBC’s holder status. They assert the version of the promissory note faxed to their counsel on 24 August 2012 differed from the original note their counsel inspected on 18 December 2012.

Our review of the record shows the only substantive difference between the two “versions” of the note is that the note faxed to the Chapmans’ counsel does not show the blank indorsement made by Wells Fargo. This difference is logical. The note was transferred by Wells Fargo to HSBC on 30 October 2012, in between the time of the fax and the in-person inspection by counsel. The faxed copy of the note also establishes that the blank indorsement by Wells Fargo was the most recent indorsement to and negotiation of the note, which also supports HSBC’s holder status.

The Chapmans also argue MERS, the nominee of Mountain 1st under the deed of trust, was without authority to assign the promissory note. They allege the note and deed of trust are separate legal contracts and the note did not incorporate the terms of the deed of trust.

The Chapmans cite no law or authority to support this bald position. The record shows MERS was merely the nominee under the deed of trust, and the note was never negotiated or transferred to MERS. The parties do not dispute that MERS was never the holder of the note. Moreover, a transfer of the promissory note or other instrument secured by the deed of trust “shall be an effective assignment of the deed of trust.” N.C. Gen. Stat. § 47-17.2 (2013).

The “pleadings, depositions, answers to interrogatories, and admissions on file,” establish: (1) the Chapmans’ note was originally payable to Mountain 1st; (2) the note was negotiated and transferred to RMS on or before 20 April 2006, as evidenced by an allonge attached to the original note, signed by Mountain 1st and payable to the order of RMS; (3) RMS negotiated and transferred possession of the note to NetBank, on or before 30 June 2006, as evidenced by a second allonge attached to the original note signed by RMS and payable to NetBank; (4) NetBank negotiated and transferred possession of the note to Wells Fargo on 30 June 2006, evidenced by an indorsement on the RMS allonge signed by NetBank and payable to Wells Fargo; (5) Wells Fargo negotiated and transferred possession of the note to

HSBC on 30 October 2012, as evidenced by an indorsement on the RMS allonge signed by Joan M. Mills, Vice President of Wells Fargo, and payable in blank, or to bearer. HSBC holds physical possession of the original note signed by the Chapmans. N.C. Gen. Stat. § 1A-1, Rule 56(c).

The Chapmans failed to forecast evidence sufficient to rebut or overcome the legal presumption and physical fact that HSBC is the holder of the original Chapman promissory note. *See Bass*, 366 N.C. at 470, 738 S.E.2d at 177 (The borrower's "bare assertions" did not constitute evidence to support a finding that the indorsement signature was forged or unauthorized, the presumption in favor of the signature prevailed, and the bank was not required to prove the signature was vaild.).

D. HSBC's Entitlement to the Escrow Funds

The deed of trust provides to HSBC, as the note holder, a security interest in all proceeds from the sale of the real property, and the right to collect the balance due under the note. The priority security interest in the deed of trust attached to the escrowed proceeds immediately upon the sale of the secured property to Pflum. *See In re Castillian Apartments, Inc.*, 281 N.C. 709, 711, 190 S.E.2d 161, 162 (1972) (The funds from the sale of real property "are constructively, at least, real property, and belong to the mortgagor or his assigns."). As discussed and held above, the execution and recording of the Certificate of Satisfaction by Mountain 1st was

invalid, because Griffin was not “a person entitled to enforce [the] instrument,” and his actions had no legal effect on HSBC’s note holder status. N.C. Gen. Stat. § 25-3-604(a) (2013).

As the Chapmans concede, the purpose of the Escrow Agreement was to ensure the holder of the note was paid from the closing proceeds. No genuine issue of fact exists to challenge HSBC’s note holder status and physical possession of the original note with an unpaid balance. The trial court properly ordered the escrowed funds from the sale of the property to be paid to HSBC.

IV. Award of Attorneys’ Fees

The Chapmans argue the trial court erred in awarding attorneys’ fees in favor of HSBC. They assert they were not provided the required statutory notice of HSBC’s intent to collect attorneys’ fees. We disagree as the uncontroverted evidence shows otherwise.

N.C. Gen. Stat. § 6-21.2 allows for an award of attorneys’ fees in actions to enforce obligations owed under a promissory note, if the note provides for the payment of attorneys’ fees. N.C. Gen. Stat. § 6-21.2 (2013). Under the statute, a provision in the note for “reasonable fees” results in an award of fifteen percent of the outstanding balance owed on the note. N.C. Gen. Stat. § 6-21.2(2) (2013). “As to notes and other writing(s) evidencing an indebtedness arising out of a loan of money to the debtor, the ‘outstanding balance’ shall mean the principal and interest owing

at the time suit is instituted to enforce any security agreement securing payment of the debt and/or to collect said debt.” N.C. Gen. Stat. § 6-21.2(3) (2013). Here, the promissory note and deed of trust both contain provisions permitting the holder of the note and beneficiary of the deed of trust to collect their reasonable attorneys’ fees upon breach and default. “Reasonable attorneys’ fees” would equal fifteen percent of the outstanding balance owed on the note at the time HSBC filed its third party complaint and counterclaim. *Id.*

The statute also contains a notice provision, which requires the individual or entity seeking to enforce the note and/or deed of trust to notify the debtor “that the provisions relative to payment of attorneys’ fees in addition to the ‘outstanding balance’ shall be enforced and that [the debtor] has five days from [providing] such notice to pay the ‘outstanding balance’ without the attorneys’ fees.” N.C. Gen. Stat. § 6-21.2(5) (2013). If the debtor pays the “outstanding balance” prior to the expiration of five days, then the obligation to pay attorneys’ fees becomes void and unenforceable. *Id.*

“[T]he purpose of G.S. 6-21.2 is to allow the debtor a last chance to pay his outstanding balance and avoid litigation, not to reward the prevailing party with the reimbursement of his costs in prosecuting or defending the action.” *Trull v. Central Carolina Bank & Trust*, 124 N.C. App. 486, 491, 478 S.E.2d 39, 42 (1996), *aff’d in part, review dismissed in part*, 347 N.C. 262, 490 S.E.2d 238 (1997).

The closing attorney discovered the Certificate of Satisfaction when the Chapmans were under contract to sell the property to Pflum. Prior to the closing, the Chapmans entered into the Escrow Agreement with Wells Fargo, the note holder and secured party, who claimed entitlement to the sale proceeds. The Escrow Agreement states the escrow agent shall retain the escrowed funds

until such time as a written agreement is entered into between Wells Fargo Bank/Wells Fargo Home Mortgage and [the Chapmans] regarding the validity and/or satisfaction of the aforesaid purported debt and Mortgage on the Real Property and the disposition of the Escrow Amount, or until such time as a court of competent jurisdiction, upon the institution of a declaratory judgment civil action by the Escrow Agent and after due notice to Wells Fargo Bank/Wells Fargo Home Mortgage, enters a final judgment regarding the validity and/or satisfaction of the aforesaid purported debt and mortgage on the Real property and the disposition of the Escrow Amount.

HSBC stepped into the shoes of Wells Fargo when Wells Fargo assigned and delivered physical possession of the note to HSBC. *See* N.C. Gen. Stat. § 25-3-203(b) (2013) (“Transfer of an instrument . . . vests in the transferee any right of the transferor to enforce the instrument[.]”) Pursuant to the Escrow Agreement, the Chapmans could have entered into a written agreement with HSBC, the transferee, and relinquished the escrowed funds to HSBC.

On 30 October 2012, following the execution of the Escrow Agreement, Wells Fargo assigned the note to HSBC and relinquished its claim to the sale proceeds. The escrow agent filed the complaint in February of 2013, and sought a court order

declaring the rights and interests of the parties to the escrowed funds. The Chapmans filed an answer. HSBC filed a motion to dismiss, answer, counterclaim, cross-claim, and third party complaint.

HSBC's pleading states:

The Chapmans are hereby notified pursuant to N.C. Gen. Stat. § 6-21.2 that the Chapmans have five days from the date of service of this pleading to pay the Note in full to avoid the payment of HSBC's attorney fees and costs for collection of the Note.

HSBC's pleading contained the statutory notice required by N.C. Gen. Stat. § 6-21.2. The Chapmans received HSBC's notice of intent to collect attorneys' fees, as evidenced by their answer to HSBC's pleading, and failed to release and pay the escrowed funds to HSBC within five days. The trial court properly awarded attorneys' fees in the amount of fifteen percent of the outstanding balance to HSBC as provided in the promissory note and deed of trust the Chapmans agreed to and signed as provided in N.C. Gen. Stat. § 6-21.2(3) (2013).

V. Conclusion

Mountain 1st's erroneous cancellation of the promissory note and deed of trust was invalid and of no legal effect. Mountain 1st was not the note holder or a person entitled to enforce the instrument when the Certificate of Satisfaction was executed and recorded. N.C. Gen. Stat. § 25-3-604(a) (2013). The Chapmans failed to present

evidence to overcome the legal presumption that HSBC is the note holder, and entitled to the escrowed proceeds from the sale of the property.

No genuine issue of material fact exists of HSBC's note holder status. The trial court properly awarded summary judgment in favor of HSBC. The trial court also properly determined that HBSC is entitled to the escrowed funds, and to be paid from the escrowed funds.

HSBC provided the required statutory notice of its intent after five days to collect attorneys' fees in its responsive pleading and counterclaim, as is provided both in the promissory note and deed of trust the Chapmans signed. The trial court did not err in awarding attorneys' fees in favor of HBSC, against the Chapmans, under N.C. Gen. Stat. § 6-21.2. The trial court's order of summary judgment is affirmed.

AFFIRMED.

Judges STEPHENS and HUNTER, JR. concur.