

IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA14-937

Filed: 21 April 2015

Buncombe County, No. 13 SP 928 and 13 SP 929

In the Matter of the Foreclosure of the Deeds of Trust executed by Grover C. Brown and wife, Margaret C. Brown dated April 1, 1980, recorded in Book 949 at Page 109, and Book 949 at Page 111 of the Buncombe County Registry.

Appeal by respondents from order entered 9 April 2014 by Judge J. Thomas Davis in Buncombe County Civil Court. Heard in the Court of Appeals 4 March 2015.

*BULL & REINHARDT, PLLC, by Adam W. Bull, for appellee.*

*Wilder Wadford, for appellants.*

ELMORE, Judge.

On 1 April 1980, Sherrill Brown and Merton L. Brown conveyed two pieces of real property in Buncombe County to Grover C. Brown and Margaret C. Brown (“appellants”) by two warranty deeds. Grover C. Brown was Sherrill Brown’s father and Merton Brown was Grover’s step-mother. In exchange for the conveyance, appellants executed two purchase money promissory notes, secured by separate deeds of trust, in the amounts of \$245,000.00 (“Note 1”) and \$55,000.00 (“Note 2”). The principal and interest due on the notes was payable to Sherrill and Merton Brown in monthly installments over the next thirty years. The parties have stipulated that the maturity date on the notes was 1 April 2010. A deed of trust securing Note 1 was

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recorded in Book 949 at Page 109. A deed of trust securing Note 2 was recorded in Book 949 at Page 111, with both deeds of trust appearing on record in the Buncombe County Registry of Deeds. Both deeds of trust contain provisions allowing for acceleration of the indebtedness upon default.

Upon Sherrill Brown's death in 1988, Merton Brown, as executrix of his estate, assigned herself Sherrill Brown's interest in Note 1 and Note 2, which had remaining principal balances of \$214,572.26 and \$48,169.03, respectively.

Appellants continued to make payments on both notes until 1 February 1995. At that time, the remaining principal balance was \$214,572.26 on Note 1 and \$48,169.03 on Note 2. After appellants made their final payment in 1995, Merton Brown did not accelerate the amounts due under Note 1 or Note 2.

In April 1995, Grover Brown offered Merton Brown \$100,000.00 in proceeds from the sale of dairy cattle as payment on Note 1 and Note 2. Merton Brown refused to accept the \$100,000.00. Merton Brown informed Grover Brown that she had forgiven the debts and would not foreclose on the deeds of trust. In reliance on this, Grover Brown and Margaret Brown ceased making additional payments on the notes.

Appellants allegedly used the \$100,000.00 to convert the property into a beef cattle, hay, and tobacco farm, which is how it currently operates today. Both parties concede that after 1 April 1980, Sherrill B. Brown and Merton L. Brown resided on the property described in the deeds of trust for the remainder of their respective lives.

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There is evidence in the record that appellants were Merton Brown's primary caretakers until her death in October 2012.

Appellants live on a lot adjacent to the mortgaged property and their two sons live on portions of the mortgaged property. Appellants and their family have farmed and maintained the property since 1980. Therefore, appellants have been in actual possession of the subject property for over thirty-three years, and for more than eighteen years since the last payment was made on Note 1 and Note 2.

The deeds of trust securing the notes were never cancelled on the record in the Buncombe County Registry, and both deeds contain a power of sale as contemplated by the Foreclosure Statute of Limitations. As the holder of Note 1 and Note 2, the Estate of Merton Brown accelerated payment on the notes after Merton Brown's death, demanding that appellants tender a total of \$1,288,969.81 in full satisfaction of their indebtedness. Appellants were unable to meet the Estate's demand.

On 8 October 2012, the Executor of Merton Brown's estate commenced this foreclosure action. The matter came on for a hearing before the trial court on 9 April 2014. The trial court found as a matter of law that debts evidenced in Note 1 and Note 2 had not been discharged in full in April of 1995. As such, the trial court found that the notes were currently in default and that the Trustee was authorized and had the right to proceed with the sale and foreclosure of the property described in the deeds of trust.

Appellants have appealed the trial court's determination.

**I. Analysis**

Appellants argue that the trial court erred in concluding that the statute of limitations does not bar foreclosure in this matter. We disagree.

N.C. Gen. Stat. § 1-47 sets a ten-year statute of limitations during which time a foreclosure action may be commenced. The statute provides:

For the foreclosure of a mortgage, or deed in trust for creditors with a power of sale, of real property, where the mortgagor or grantor has been in possession of the property, within ten years after the forfeiture of the mortgage, or after the power of sale became absolute, or within ten years after the last payment on the same.

N.C. Gen. Stat. § 1-47 (2013).

Therefore, in order for a foreclosure to be barred under this section, two events must occur: (1) the lapse of ten years after the forfeiture or after the power of sale becomes absolute or after the last payment, and (2) the mortgagor remains in absolute possession during the entire ten-year period. *Matter of Lake Townsend Aviation, Inc.*, 87 N.C. App. 481, 484, 361 S.E.2d 409, 411 (1987). “These two requirements must be coexistent.” *Id.*

In the instant case, the parties have stipulated that the maturity date of the notes was 1 April 2010. The last payment on the notes was made in February 1995, more than ten years before this foreclosure proceeding was initiated. As such, the central question on appeal is when did the power of sale become absolute—on the

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date of the last payment or on the date of maturity? To answer this question, we must consider whether the conditions set forth in N.C. Gen. Stat. § 1-47 are interpreted as beginning to run ten years from the later of the three conditions it sets forth (lapse of ten years after the forfeiture, after the power of sale becomes absolute, or after the last payment) or from the earlier occurrence of the conditions.

Appellants' position is that the statute of limitations begins to run when any of the statutory conditions *first* occurs. In the instant case, the first statutory condition to occur was the date of the last payment (date of default), which was in February 1995. Thus, according to appellants, the statute of limitations for the foreclosure action began to run in 1995 and expired ten years later, in 2005. Appellants thus argue that this foreclosure action is barred by the statute of limitations.

We are not persuaded by appellants' argument. In *E. H. & J. A. Meadows Co. v. Bryan*, 195 N.C. 398, 401-02, 142 S.E. 487, 489-90 (1928), our Supreme Court concluded:

A provision in a mortgage or deed of trust by the terms of which the maturity of a note or of notes secured thereby is accelerated, for the purpose of foreclosure, upon a default of the maker, confers upon the mortgagee or trustee an option to foreclose, at the date of such default, by the exercise of a power of sale, contained in the mortgage or deed of trust, or by civil action. This option may be waived by the mortgagee, or by the holder of the notes secured by the deed of trust. *In the absence of evidence tending to show some action on the part of the mortgagee [to accelerate the*

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*loan] . . . waiver will be conclusively presumed. In that event, the statute of limitations will not begin to run from the date of such default, and an action to foreclose said mortgage or deed of trust will not be barred, **until after the expiration of ten years from the maturity of all the notes secured thereby**, notwithstanding the provision for the acceleration of the maturity of notes not due at date of such default. A power of sale contained in a mortgage or deed of trust may be exercised at any time within ten years after the maturity of any note, secured by the said mortgage or deed of trust, according to its tenor, for the purpose of enforcing its payment out of the proceeds of a sale of the land.*

*Id.*

*Bryan* stands for the proposition that the statute of limitations does not begin to accrue on the date of default (last payment), but instead begins on the date of maturity of the loan, unless the note holder or mortgagee has exercised his or her right of acceleration.<sup>1</sup> However, if payment on a promissory note is accelerated, the power of sale would begin to run on the date of acceleration.

This legal principal is evidenced in *Matter of Lake Townsend Aviation, Inc.*, 87 N.C. App. 481, 361 S.E.2d 409 (1987). On 22 May 1970, Lake Townsend executed a \$12,000 note payable to the mortgagee. *Id.* at 482, 361 S.E.2d at 410. However, Lake Townsend never made any payments on this note. *Id.* at 486, 361 S.E.2d at 412. Although the mortgagee sent letters to Lake Townsend demanding payment and

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<sup>1</sup> We note that the statute of limitations our Supreme Court was interpreting in *Bryan* contains the same language as our present statute, N.C. Gen. Stat. § 1-47.

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threatening to accelerate the note, this Court found that the mortgagee did not in fact accelerate payment on the note. *Id.* Since the mortgagee failed to exercise the acceleration clause, this Court held that the statute of limitations did not begin to run until 1 June 1976, the maturity date or the day the last payment on the \$12,000 note was due. *Id.* Notably, the *Lake Townsend* court did not conclude that the statute of limitations began to accrue on the date of default, which would have been the date that the first payment on the note was due. *See id.*

In the instant case, the trial court found (and the parties do not dispute) that, after appellants' final payment in 1995, Merton Brown did not accelerate the amounts due under either Note 1 or Note 2. Since Merton Brown elected not to exercise either of the notes' acceleration clauses, the power of sale did not become absolute until the date that the final payments were due. As such, the statute of limitations did not begin to accrue until April 2010, the stipulated maturity date for each note. *See id.* at 486, 361 S.E.2d at 412. Had there been a prior acceleration of the total indebtedness, the power of sale would have become absolute at that time and the statute of limitations would have started to run. However, this is not the scenario in the present case.

The trial court correctly applied N.C. Gen. Stat § 1-47(3), finding that it is the later of the provisions contained in the statute that triggers the accrual of the statute of limitations. Because foreclosure proceedings were initiated in 2012, well within

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the ten-year statute of limitations, N.C. Gen. Stat. § 1-47(3) does not bar the foreclosure action on either Note 1 or Note 2. We affirm.

Affirmed.

Judges GEER and INMAN concur.