

IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA14-570

Filed: 2 June 2015

Ashe County, No. 12 SP 98

IN THE MATTER OF THE FORECLOSURE of a Deed of Trust executed by Michael James Garvey and Jane Holzer Godbrey a/k/a Emily J. Holzer a/k/a Jane Holzer and Jacqueline Holzer dated March 9, 2004, and recorded on April 14, 2004, in Book 311 at Page 347, Ashe County Registry; Substitute Trustee Services, Inc., Substitute Trustee.

Appeal by respondent from order entered 12 August 2013 by Judge Richard L. Doughton in Ashe County Superior Court. Heard in the Court of Appeals 6 November 2014.

*Hutchens, Senter, Kellam & Pettit, P.A., by Lacey M. Moore, for petitioner-appellee.*

*Katherine S. Parker-Lowe for respondent-appellant.*

GEER, Judge.

Respondent Michael J. Garvey appeals from an order allowing petitioner, Substitute Trustee Services, Inc., to proceed with foreclosure on certain real property that Mr. Garvey owned. On appeal, Mr. Garvey primarily argues that the superior court failed to conduct a de novo hearing as required by N.C. Gen. Stat. § 45-21.16(d1) (2013) and failed to make specific findings of ultimate fact and conclusions of law as required by Rule 52(a)(1) of the Rules of Civil Procedure. We agree that the superior court's order lacked sufficient findings of fact to comply with Rule 52(a)(1). Moreover, we cannot determine from the order or the transcript whether the superior court

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conducted a de novo hearing as required by statute, as opposed to essentially engaging in an appellate review of the order of the clerk of superior court. We, therefore, reverse and remand for a de novo hearing and entry of an order compliant with Rule 52(a)(1).

## Facts

On 9 March 2004, Mr. Garvey executed a mortgage with Quicken Loans Inc. in the amount of \$80,700.00. The mortgage included an Adjustable Rate Note (“ARN”), a Second Home Rider, and an Adjustable Rate Rider. The mortgage was secured with property in West Jefferson, North Carolina by a deed of trust executed by Mr. Garvey, Jane Holzer Godbrey, and Jaqueline Holzer.

The ARN was endorsed by Quicken Loans to Countrywide Document Custody Services, then by Countrywide Document Custody Services to Countrywide Home Loans Inc., and then by Countrywide Home Loans in blank. At some point, Countrywide Home Loans changed its name to BAC Home Loans Servicing LP, which subsequently merged with Bank of America, N.A.

Mr. Garvey defaulted on the mortgage, and on 27 August 2012, Substitute Trustee Services filed “AMENDED NOTICE OF HEARING PRIOR TO FORECLOSURE OF DEED OF TRUST.” This notice explained that petitioners intended to foreclose on the West Jefferson real property by power of sale. It further explained that petitioners

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have the right to appear at the hearing and contest the evidence that the clerk is to consider under G.S. 45-21.16(d). To authorize the foreclosure the clerk must find the existence of (i) a valid debt of which the party seeking to foreclose is the holder, (ii) a default, (iii) a right to foreclose under the instrument, (iv) notice to those entitled to notice, and (v) that the underlying mortgage debt is not a home loan as defined in G.S. 45-101(1b), or if the loan is a home loan under G.S. 45-101(1b), that the pre-foreclosure notice under G.S. 45-102 was provided in all material respects, and that the periods of time established by Article 11 of this Chapter have elapsed, and (vi) that the sale is not barred by G.S. 45-21.12A.

Mr. Garvey served petitioner Bank of America with a request for admissions on 17 September 2012 and with a request for production of documents on 25 September 2012. On 15 November 2012, Mr. Garvey filed a motion to compel and motion for sanctions on the grounds that petitioners had not responded to his discovery requests. Bank of America responded by filing, on 12 December 2012, a motion for a protective order, contending that Mr. Garvey's discovery requests were not relevant to the subject matter of the power of sale foreclosure action and that respondents were required to file a separate civil action in superior court if they wished to conduct discovery.

On 8 January 2013, Pam W. Barlow, Clerk of Superior Court for Ashe County, held a hearing on whether the substitute trustee was entitled to foreclose by power of sale. That same day, Ms. Barlow entered an order denying Mr. Garvey's motion to compel and motion for sanctions and granting Bank of America's motion for protective

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order. She also entered an order that day “find[ing] that the Substitute Trustee can proceed to foreclose under the terms of the . . . Deed of Trust and give notice of and conduct a foreclosure sale as by statute provided.” On 15 January 2013, Mr. Garvey and Ms. Holzer filed a notice of appeal from the clerk’s order authorizing the foreclosure. In addition, on 2 August 2013, respondents filed a second request for admissions and a second request for production of documents.

On 12 August 2013, a hearing was held as a result of respondents’ notice of appeal in Ashe County Superior Court. At that hearing, Mr. Garvey appeared pro se. Petitioners submitted to the court a copy of the mortgage and what was represented to be the original ARN, as well as a “MILITARY AFFIDAVIT,” an “AFFIDAVIT OF DEFAULT,” and an “AFFIDAVIT OF PAYMENT HISTORY.” Although Mr. Garvey appears to have prepared evidence to introduce to the superior court, he ultimately introduced no evidence other than his own statement that Ms. Holzer did not receive written notice of the hearing.<sup>1</sup>

On 12 August 2013, the superior court entered a written order providing in pertinent part:

It appear[s] to the Court that the Appeal is properly before this Court, that all parties have been given adequate and timely notice of the hearing on this matter, that Andrew Cogbill appeared and represented Bank of

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<sup>1</sup>Apparently Jane Holzer Godbrey had passed away prior to this hearing. A guardian ad litem appeared at the hearing on behalf of any unknown heirs.

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America, N.A. and Substitute Trustee Services, Inc., and that Michael J. Garvey appeared *pro se*.

NOW, THEREFORE, IT IS ORDERED, ADJUDGED AND DECREED that:

1. That Bank of America, N.A. has satisfied the requirements set forth in N.C. Gen. Stat. § 45-21.16 and the Substitute Trustee is entitled to proceed with the foreclosure sale; and

2. That the Clerk of Superior Court's January 8, 2013 Order be and the same herewith is affirmed.

On 21 August 2013, Mr. Garvey filed a *pro se* notice of appeal. Subsequently, Katherine S. Parker-Lowe gave notice of appearance on behalf of Mr. Garvey and filed an amended notice of appeal to reflect her representation.

Discussion

Upon the filing and service of a notice of hearing on a mortgagee's or trustee's request to foreclose pursuant to a power of sale, N.C. Gen. Stat. § 45-21.16(d) provides that the clerk of court in the county where the land or any portion of it is situated shall conduct a hearing at which "the clerk shall consider the evidence of the parties and may consider, in addition to other forms of evidence required or permitted by law, affidavits and certified copies of documents." The statute further provides:

If the clerk finds the existence of (i) valid debt of which the party seeking to foreclose is the holder, (ii) default, (iii) right to foreclose under the instrument, (iv) notice to those entitled to such under subsection (b), (v) that the underlying mortgage debt is not a home loan as defined in G.S. 45-101(1b), or if the loan is a home loan under G.S. 45-

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101(1b), that the pre-foreclosure notice under G.S. 45-102 was provided in all material respects, and that the periods of time established by Article 11 of this Chapter have elapsed, and (vi) that the sale is not barred by G.S. 45-21.12A, then the clerk shall authorize the mortgagee or trustee to proceed under the instrument, and the mortgagee or trustee can give notice of and conduct a sale pursuant to the provisions of this Article.

*Id.*

The order of the clerk following the hearing set out in N.C. Gen. Stat. § 45-21.16(d) “may be appealed to the judge of the district or superior court having jurisdiction at any time within 10 days after said act. *Appeals from said act of the clerk shall be heard de novo.*” N.C. Gen. Stat. § 45-21.16(d1) (emphasis added). In reviewing the superior court’s order under § 45-21.16(d1), this Court first determines whether the superior court applied the proper scope of review. *In re Watts*, 38 N.C. App. 90, 94-95, 247 S.E.2d 427, 430 (1978). If so, then this Court decides only “ ‘whether competent evidence exists to support the trial court’s findings of fact and whether the conclusions reached were proper in light of the findings.’ ” *In re Foreclosure of Gilbert*, 211 N.C. App. 483, 487, 711 S.E.2d 165, 169 (2011) (quoting *In re Adams*, 204 N.C. App. 318, 320, 693 S.E.2d 705, 708 (2010)).

Mr. Garvey first argues on appeal that the superior court, in its order, failed to make adequate findings of fact and conclusions of law in violation of Rule 52(a)(1). The parties in this appeal all assume that Rule 52(a)(1) applies to proceedings under N.C. Gen. Stat. § 45-21.16(d1), and this Court has previously held that “[a] foreclosure

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under power of sale is a type of special proceeding, to which our Rules of Civil Procedure apply.” *Lifestore Bank v. Mingo Tribal Pres. Trust*, \_\_\_ N.C. App. \_\_\_, \_\_\_, 763 S.E.2d 6, 9 (2014), *disc. review denied*, \_\_\_ N.C. \_\_\_, \_\_\_ S.E.2d \_\_\_, 2015 WL 1809347, 2015 N.C. Lexis 297 (Apr. 9, 2015). *See also* N.C. Gen. Stat. § 1-393 (2013) (“The Rules of Civil Procedure . . . are applicable to special proceedings, except as otherwise provided.”).

Nonetheless, a recent unpublished opinion cited *Furst v. Loftin*, 29 N.C. App. 248, 224 S.E.2d 641 (1976), as establishing that “our Rules of Civil Procedure generally do not apply in the context of a foreclosure proceeding brought under N.C. Gen. Stat. § 45-21.16 . . . .” *In re Foreclosure by Cornish*, \_\_\_ N.C. App. \_\_\_, 753 S.E.2d 743, 2013 N.C. App. LEXIS 1327, at \*7, 2013 WL 6669278, at \*3 (2013) (unpublished). *Furst* did in fact “reject plaintiffs’ contention and the trial court’s conclusion that the foreclosure of the deed of trust under the power of sale contained therein [was] an action or proceeding subject to the Rules of Civil Procedure.” 29 N.C. App. at 255, 224 S.E.2d at 645. However, *Furst* did not address whether the action before it -- an “action to have defendants restrained and enjoined” from foreclosing by power of sale, *id.* at 250, 224 S.E.2d at 642 -- was a “special proceeding” to which the Rules of Civil Procedure would have applied under N.C. Gen. Stat. § 1-393. Significantly, after holding that the action before it was not subject to the Rules of Civil Procedure, the Court specifically “noted that the foreclosure in this case antedated the 1975

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amendments to Article 2A of G.S. Chapter 45[.]” which enacted N.C. Gen. Stat. § 45-21.16(d).<sup>2</sup> *Furst*, 29 N.C. App. at 255, 224 S.E.2d at 645. Moreover, N.C. Gen. Stat. § 45-21.16(d1), governing the hearing before the superior court, was not enacted until 1993, 17 years after *Furst*. See 1993 N.C. Sess. Laws ch. 305, § 8. Thus, *Furst* did not hold that the Rules of Civil Procedure are inapplicable to foreclosures by power of sale initiated under N.C. Gen. Stat. § 45-21.16(d) and (d1).

*Lifestore Bank*, therefore, controls, and the proceeding below was a special proceeding to which Rule 52(a)(1) applied. See also *In re Cooke*, 37 N.C. App. 575, 576, 246 S.E.2d 801, 803 (1978) (“[Petitioner] commenced this special proceeding . . . before the Clerk . . . seeking an order, pursuant to G.S. 45-21.16, allowing him to proceed to sell the property under the power of sale contained in the deed of trust.” (emphasis added)). Cf. *In re Foreclosure of Vogler Realty, Inc.*, 365 N.C. 389, 400, 722 S.E.2d 459, 467 (2012) (“Indisputably, a foreclosure by power of sale is a special proceeding.” (Newby, J., dissenting)).

Rule 52(a)(1) provides that “[i]n all actions tried upon the facts without a jury . . . , the court shall find the facts specially and state separately its conclusions of law thereon and direct entry of the appropriate judgment.” It is well established that “the purpose for requiring findings of fact and conclusions of law under Rule 52 [is] to allow meaningful appellate review[.]” *N.C. Indus. Capital, LLC v. Clayton*, 185 N.C.

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<sup>2</sup>See 1975 N.C. Sess. Laws ch. 492, § 2 (enacting N.C. Gen. Stat. § 45-21.16(d)).



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App. 356, 370-71, 649 S.E.2d 14, 24 (2007). According to our Supreme Court, Rule 52(a) “require[s] the trial judge to do the following three things *in writing*: ‘(1) to find the facts on all issues of fact joined on the pleadings; (2) to declare the conclusions of law arising on the facts found; and (3) to enter judgment accordingly.’” *Hinson v. Jefferson*, 287 N.C. 422, 428, 215 S.E.2d 102, 106 (1975) (emphasis added) (quoting *Coggins v. City of Asheville*, 278 N.C. 428, 434, 180 S.E.2d 149, 153 (1971)). Further, this Court has explained that Rule 52(a) requires the findings to be “‘*specific findings* of the ultimate facts established by the evidence, admissions and stipulations . . . .’” *Overcash v. N.C. Dep’t of Env’t & Natural Res.*, 179 N.C. App. 697, 708, 635 S.E.2d 442, 449 (2006) (quoting *Quick v. Quick*, 305 N.C. 446, 452, 290 S.E.2d 653, 658 (1982)).

Under N.C. Gen. Stat. § 45-21.16(d1), the superior court is required to make findings regarding whether the six criteria of N.C. Gen. Stat. § 45-21.16(d) have been satisfied. *In re Foreclosure of Carter*, 219 N.C. App. 370, 373, 725 S.E.2d 22, 24 (2012). In other words, the superior court must make specific findings of fact relating to (1) the existence of a valid debt of which the party seeking to foreclose is the holder, (2) the occurrence of a default, (3) the existence of a right to foreclose under the instrument at issue, (4) the giving of notice to those entitled to receive notice, (5) whether the mortgage debt is a home loan under N.C. Gen. Stat. § 45-101(1b) (2013),

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and (6) whether the sale is barred by N.C. Gen. Stat. § 45-21.12A (2013). 219 N.C. App. at 372, 725 S.E.2d at 24.

Here, the only specific findings in the superior court's order were that "the Appeal is properly before this Court, [and] that all parties have been given adequate and timely notice of the hearing on this matter . . . ." After that single recitation of fact -- which was not even labeled as a finding of fact -- the superior court made no express conclusions of law, but rather moved directly to the decretal portion of the order. As part of the decree, the superior court concluded that "Bank of America, N.A. has satisfied the requirements set forth in N.C. Gen. Stat. § 45-21.16 and the Substitute Trustee is entitled to proceed with the foreclosure sale[.]" The superior court then ordered that "the Clerk of Superior Court's January 8, 2013 Order be and the same herewith is affirmed." In sum, the superior court only found one of the six criteria: that proper notice was given.

Bank of America, however, argues that Rule 52(a) was satisfied because the superior court's written order summarily concluded that petitioners "ha[d] satisfied the requirements" of the statute. According to Bank of America, this statement satisfies Rule 52(a) because it indicates that the superior court necessarily found the existence of all required facts and conclusions of law under N.C. Gen. Stat. § 45-21.16(d). Bank of America's position, if adopted, would eviscerate Rule 52(a)'s

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requirement of findings of fact since it effectively requires us to infer from a conclusion of law that the superior court made all the pertinent findings of fact.

The sole case relied upon by Bank of America -- *In re Gilmore*, 206 N.C. App. 596, 698 S.E.2d 768, 2010 N.C. App. LEXIS 1582, 2010 WL 3220675 (2010) (unpublished) -- does not support its position.<sup>3</sup> In *Gilmore*, this Court reversed an order allowing foreclosure, noting that “the superior court’s order lacks the requisite fifth finding required by revised N.C.G.S. § 45-21.16(d).” *Id.*, 2010 N.C. App. LEXIS 1582, at \*8, 2010 WL 3220675, at \*3. This Court pointed out that although the clerk’s order contained a finding on that issue, “[i]n an appeal of a foreclosure order, a *de novo* hearing occurs, not just a *de novo* review of the Clerk’s order. Therefore, the superior court’s order does not merely ‘affirm’ the clerk’s order, but replaces it as the order of foreclosure. As such, it must contain all the statutorily required findings, and the fifth finding is absent from the superior court’s order.” *Id.* (internal citation omitted).

In short, under N.C. Gen. Stat. § 45-21.16(d1), because the superior court was required to conduct a *de novo* hearing and not just a *de novo* review, the superior

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<sup>3</sup>We note that Bank of America contends that because the panel in *Gilmore* was presented with “a similar situation” as the one here, *Gilmore* “has precedential value to the material issue before this Court.” To the contrary, while an unpublished opinion from a prior panel of this Court with substantially similar facts may be persuasive to the case on appeal, it nonetheless carries no binding precedential weight. See *Espinosa v. Tradesource, Inc.*, \_\_\_ N.C. App. \_\_\_, \_\_\_ n.9, 752 S.E.2d 153, 165 n.9 (2013) (“Unpublished opinions lack any precedential value and are not controlling on subsequent panels of this Court. N.C.R. App. P. 30(e).”), *disc. review denied*, \_\_\_ N.C. \_\_\_, 763 S.E.2d 391 (2014).

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court, in this case, was required -- like the superior court in *Gilmore* -- to make its own findings of fact as to each of the statutorily-required factors set forth in N.C. Gen. Stat. § 45-21.16(d). Because the superior court did not do so, we must reverse and remand.

Further, Mr. Garvey also argues that the superior court erred in failing to conduct a de novo hearing. The lack of findings of fact hinders our ability to review this issue. We cannot determine from the order whether the superior court in fact did conduct the de novo hearing mandated by statute as opposed to conducting an appellate review of the clerk's order. Although Bank of America points to the transcript as suggesting that the superior court conducted a de novo hearing, the transcript is ambiguous -- it is not obvious that the superior court understood its role.

The superior court stated that Mr. Garvey was "entitled to a de novo *review* of the clerk's order," identified the proceeding as an "appeal," and explained that the court's "review is to review [the clerk's] findings and to determine whether or not there is sufficient evidence of each and every one of those." (Emphasis added.) These quotes suggest that the superior court was reviewing the clerk's order to determine whether it was supported by the evidence. Bank of America, however, points to the superior court's statement that its duty was "to review those findings [made by the clerk] in this proceeding, de novo. And if I find that all those things exist, then I'm *required to uphold her findings*." (Emphasis added.) Far from clarifying how the

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superior court viewed its role, the quote relied upon by Bank of America is itself unclear -- it contains indications both that the superior court understood that it was to make its own findings of fact and that the superior court believed it was reviewing the clerk's findings of fact.

Consequently, on remand, the superior court must apply the correct standard. It must conduct a de novo hearing followed by entry of an order setting out the superior court's own findings of fact regarding the criteria set forth in N.C. Gen. Stat. § 45-21.16(d). Based on those findings of fact, the superior court must then make its own conclusions of law deciding whether to authorize the Substitute Trustee to proceed to foreclose on the property at issue.

Because of our disposition of this appeal, remanding for a de novo hearing before the superior court, we need not address Mr. Garvey's remaining arguments. Those arguments either address the hearing before the clerk, involve issues that should be addressed in the first instance by the superior court, or argue alleged errors that may not recur on remand.

REVERSED AND REMANDED.

Judges STEELMAN and STEPHENS concur.