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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA16-739

Filed: 21 February 2017

Mecklenburg County, No. 15 CVS 9933

BANK OF THE OZARKS, as successor by merger to First National Bank of Shelby, North Carolina, Plaintiff,

v.

KINGS MOUNTAIN PROPERTIES, LLC and REGINALD S. WALLACE, Defendants.

Appeal by Defendants from order entered 28 March 2016 by Judge Hugh B. Lewis in Mecklenburg County Superior Court. Heard in the Court of Appeals 30 November 2016.

Mullen Holland & Cooper, P.A. by John H. Russell, Jr. for Plaintiff-Appellee.

Redding Tison & Jones, PLLC, by Joseph R. Pellington and David G. Redding for Defendant-Appellants.

HUNTER JR., Robert N., Judge.

Kings Mountain Properties, LLC (“Kings Mountain”) and Reginald S. Wallace (“Wallace”) (together, “Defendants”) appeal the trial court’s 28 March 2016 order granting summary judgment to Bank of the Ozarks (“Ozarks”). Defendants contend the trial court erred in holding there was no genuine issue of material fact as to

whether deeds in lieu of foreclosure granted to Ozarks released Defendants from their underlying obligations. We affirm the trial court's grant of summary judgment.

I. Facts and Background

On 26 May 2015, Ozarks filed a verified complaint in Mecklenburg County Superior Court seeking to enforce the terms of two promissory notes granted to it by Kings Mountain and personally guaranteed by Wallace. Ozarks contended it was entitled to a deficiency judgment against Defendants jointly and severally to recoup the balance of the promissory notes after the real property securing the notes had been sold at foreclosure.

Defendants answered on 31 August 2015, moving to dismiss Ozarks' complaint for failure to state a claim, and asserting in the alternative the defenses of compromise and settlement, release, accord and satisfaction, laches, and statute of limitations. Defendants contended Ozarks had no right to a deficiency judgment under the terms of a subsequent settlement agreement entered into by the parties.

On 5 February 2016, the parties agreed to a set of stipulated facts and exhibits in lieu of discovery, including the following facts relevant to this appeal.

In 2007, Kings Mountain and Ozarks' predecessor in interest entered into and executed two separate loan agreements. The first agreement, dated 10 January 2007 in the amount of \$384,620.00, pertained to a parcel of real property on Phifer Road in Cleveland County, North Carolina ("Phifer Road loan"). The second agreement,

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dated 8 March 2007 in the amount of \$100,000.00, pertained to a parcel of real property on Lake Montonia Road, also in Cleveland County (“Lake Montonia Road loan”).

For each loan, Kings Mountain granted Ozarks’ predecessor in interest a promissory note, a deed of trust securing the note, and a personal guaranty by Wallace. Subsequently, Kings Mountain defaulted on both loan agreements by “failing to make periodic payments consistent with the terms” of the loans.

On 3 November 2011, Kings Mountain filed a petition in bankruptcy in the United States Bankruptcy Court for the Western District of North Carolina, seeking reorganization under Chapter 11. On 18 March 2013, the Bankruptcy Court issued a consent order resolving Ozarks’ predecessor in interest’s objection to confirmation of the bankruptcy plan and ordering Kings Mountain to amend the plan to incorporate the terms of the order. The order further provided:

Should [Ozarks] elect, [Kings Mountain] shall as soon as requested to do so execute and deliver to [Ozarks] deeds in lieu of foreclosure for all or any portion of the Property for [Ozarks] to hold in escrow subject to [Kings Mountain’s] compliance with the terms of this Order, or until 1 December 2013 when [Ozarks] shall have the right to record the deeds.

On 3 September 2013, Ozarks filed a motion to compel turnover of the deeds in lieu. Ozarks amended its motion on 6 September 2013 “clarifying that Bank of the Ozarks had relief from the Bankruptcy Stay” with respect to the Phifer Road and

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Lake Montonia Road deeds in lieu. After the hearing, but before the court's order on the motion to compel, Defendants delivered the deeds in lieu to Ozarks. In relevant part, the deeds in lieu stated:

Whereas, the Grantor has requested, in lieu of foreclosure of the Deeds of Trust by Grantee, that the Grantor be permitted to convey the Property to the Grantee in consideration of the *full satisfaction of the debt secured by the Deeds of Trust and in further consideration of the Grantee cancelling the Deeds of Trust of record*; and upon conveyance of the Property by the Grantor to the Grantee, the Grantee is willing to cancel the Deeds of Trust.

Now, therefore, in *consideration of the full satisfaction of the debt of the Grantor and the cancellation of the Deeds of Trust*, the Grantor does hereby transfer and convey to the Grantee, its successors and assigns, in fee simple absolute, that certain piece, parcel, lot or tract of land, together with all improvements located thereon and fixtures attached thereto, lying in Cleveland County, North Carolina, and more particularly described as follows [in a subsequent exhibit]. (emphasis added)

Each deed in lieu was accompanied by an estoppel affidavit signed by Wallace, stating “the consideration for the Deed was and is the full cancellation of the debts, obligations, costs, and charges secured by that certain Deed of Trust heretofore existing on the Property[.]”

On 30 September 2013, the Bankruptcy Court issued an order granting the motion to compel turnover. The order noted Ozarks was “free at any time to record one or more of the Deeds in Lieu and/or to commence state court foreclosure proceedings with respect to one or more of the tracts of Realty[.]”

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The bankruptcy action against Kings Mountain was dismissed on 6 November 2013, because a bankruptcy plan had not been confirmed within the time set by the court.

Following this order, Ozarks “proceeded as provided in the Deeds of Trust and initiated foreclosure under the Deeds of Trust, directing the Trustee to foreclose on the parcels of real property described therein.” The Phifer Road and Lake Montonia Road properties were sold at foreclosure on or about 18 June 2014. After sale of the Phifer Road property, \$270,299.30 was applied to the balance of the loan, leaving an outstanding obligation of \$151,713.36. After sale of the Lake Montonia Road property, \$75,930.05 was applied to the balance of that loan, leaving an outstanding obligation of \$47,618.70.

Along with these stipulated facts, the parties submitted thirteen exhibits to the trial court: (1) the Phifer Road promissory note; (2) the Phifer Road deed of trust; (3) the Phifer Road personal guaranty; (4) the Lake Montonia Road promissory note; (5) the Lake Montonia Road deed of trust; (6) the Lake Montonia Road personal guaranty; (7) a note modification agreement describing Defendant’s schedule of payments; (8) the 18 March 2013 Bankruptcy Court consent order; (9) the Phifer Road deed in lieu of foreclosure and estoppel affidavit; (10) the Lake Montonia Road deed in lieu of foreclosure and estoppel affidavit; (11) the 30 September 2013 Bankruptcy Court order granting Ozarks’ motion to compel; (12) the final report of foreclosure

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sale on the Phifer Road property; and (13) the final report of the foreclosure sale on the Lake Montonia Road property.

On 5 February 2016, Ozarks filed a motion for summary judgment on the basis of the stipulated facts and exhibits. Attached to its motion was the affidavit of Denise Schmidt (“Ms. Schmidt”), reaffirming the stipulated facts.

On 24 February 2016, the trial court held a hearing on the motion. The trial court filed its order on 28 March 2016 granting summary judgment to Ozarks. Based on the stipulated facts and exhibits, as well as the evidence introduced at the hearing, the trial court made the following conclusions of law:

1. The promissory notes, Deeds of Trust and personal guaranties in this case are governed by the basic doctrines and remedies of contract law applicable to sales of land. Upon a breach of contract for the sale of land by the vendor, the most common remedies utilized in North Carolina by the vendee include: (1) standing on the contract and suing at law for damages for breach; (2) affirming the contract by going into equity and seeking specific performance or specific performance with abatement; or (3) rescinding the contract and recovering what the vendee has paid. The vendor can also declare the vendee’s contract rights to be forfeited and bring an action to quiet title. However, the court may refuse to allow a forfeiture and order a foreclosure sale.
2. Once the vendor has breached, the vendee’s actions are governed by the election of remedies doctrine. That is to say, the vendee must elect between affirming the contract through the damages or specific performance route and disaffirming the contract through the remedy of rescission. If return to the status quo in a rescission action is rendered impossible due to the sale of the subject

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property, crediting the vendors with the purchase price is an equitable solution where the circumstances warrant it. Thus, where a foreclosure sale of property subject to a rescission action prevents a reconveyance of the property, the plaintiffs who no longer own the property may be permitted to recover the balance awarded in restitution.

3. The Deeds in Lieu and Estoppel Affidavits executed by the Defendants and release language contained therein are also governed by principles applicable to unilateral contracts. Option contracts for the sale of land are one familiar form of unilateral contracts. In an option contract, the Optionor offers to sell certain property and promises to keep his offer open for a stated period of time. The contract is complete when the Optionee exercises the option according to its terms, either by giving notice of acceptance or tendering the purchase price. It is no objection to the validity of the contract that the holder of the option is under no obligation to exercise it

4. If the Bankruptcy Court action had remained intact until resolution then the doctrine of election of remedies would have applied. However, the defendants voided the election when the bankruptcy action was dismissed.

5. The actions of presenting the Deed in Lieu and then dismissing the bankruptcy action were unilateral actions by the defendants which prevented the plaintiff from exercising the option of filing a general unsecured claim for that amount of a deficiency and [fully participate] in any confirmed plan as indicated in the Bankruptcy Court's Order of March 18, 2013.

6. As a result of such unilateral action, Plaintiff is allowed by law to conduct a foreclosure sale and hold the defendants responsible for the deficiency.

7. Plaintiff's claims are not barred by the affirmative defenses raised in the Answer, including the defenses of compromise and settlement, accord and satisfaction, and

release.

The court subsequently ordered Defendants, jointly and severally, to pay the deficiencies owed on the Phifer Road and Lake Montonia Road loans, the costs of the action, and Ozarks' attorney's fees. Defendants filed a timely and proper notice of appeal on 26 April 2016.

II. Jurisdiction

Defendants appeal the trial court's 28 March 2016 order granting summary judgment. Because this order is the final judgment of the superior court in a civil action, jurisdiction is proper in this court pursuant to N.C. Gen. Stat. § 7A-27(b)(1) (2015).

III. Standard of Review

This Court reviews the trial court's grant of summary judgment *de novo*. *In re Will of Jones*, 362 N.C. 569, 573, 669 S.E.2d 572, 576 (2008). The court must review the record in the light most favorable to the non-movant and draw all inferences in the non-movant's favor. *Dobson v. Harris*, 352 N.C. 77, 83, 530 S.E.2d 829, 835 (2000). *See also Caldwell v. Deese*, 288 N.C. 375, 378, 218 S.E.2d 379, 381 (1975); *Norfolk & W. Ry. Co. v. Werner Indus.*, 286 N.C. 89, 98, 209 S.E.2d 734, 739 (1974).

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

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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(c) (2015).

A party opposing a motion for summary judgment must establish only that there is a genuine issue of material fact; it need not show it would prevail on the issue at trial. *In re Will of Edgerton*, 29 N.C. App. 60, 63, 223 S.E.2d 524, 526 (1976). With regard to affirmative defenses, summary judgment is appropriate if the moving party “establishes that the non-movant cannot prevail on at least one of the elements of his affirmative defense.” *Fayetteville Publ’g Co. v. Advanced Internet Techs.*, 192 N.C. App. 419, 428, 665 S.E.2d 518, 524 (2008).

IV. Analysis

A. Summary Judgment

Defendants argue the trial court erred when it found there was no genuine issue of material fact. Specifically, Defendants contend the language of the deeds in lieu of foreclosure create at least a question as to whether Ozarks granted Defendants a release or an accord and satisfaction discharging the debt. However, we hold the trial court properly concluded there was no genuine issue as to material fact as to either the underlying deficiency claim or Defendants’ affirmative defenses.

i. Breach of Contract

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The elements of a claim for breach of contract are “(1) existence of a valid contract and (2) breach of the terms of [the] contract.” *McLamb v. T.P. Inc.*, 173 N.C. App. 586, 588, 619 S.E.2d 577, 580 (2005).

There is no genuine issue of material fact as to whether Ozarks was entitled to judgment as a matter of law on its breach of contract claim. Neither party disputes the validity of the deeds of trust, and no defect is readily apparent in the record as to offer, acceptance, consideration, and the capacity of the parties to contract. We conclude they constitute valid contracts. As to breach, under the terms of the Phifer Road and Lake Montonia Road deeds of trust, default results when “[a]ny party obligated on the Secured Debt fails to make payment when due[.]” Defendants do not dispute they were in default, stipulating to the fact that they failed to make periodic payments as required by the notes. Thereafter, the terms of the deeds of trust entitled Ozarks to accelerate the debt, demand payment of all fees, charges, interest, and principal, and foreclose on the properties. Defendants could have remedied default by making full payment on the debt owed. Nevertheless, the stipulated facts reflect Defendants subsequently “failed to pay or satisfy their obligations. . . .” As a result, the record establishes there was a valid contract which was breached by Defendants when they defaulted on their payments and failed to provide a remedy under the terms of the contract. Thus, there is no genuine issue of material fact as to whether Defendants breached the terms of the deeds of trust.

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ii. Personal Guaranty

A “guaranty of payment is an absolute promise to pay the debt of another if the debt is not paid by the principal debtor.” *Craftique Inc. v. Stevens & Co.*, 321 N.C. 564, 566, 364 S.E.2d 129, 131 (1988). If the terms are “clear and unambiguous, its meaning is a matter of law for the court.” *Id.*

We also hold no genuine issue of material fact exists as to whether Wallace is obligated to repay the deficiency under the terms of his personal guaranty. The terms of that agreement state “no act or thing need occur to establish” Wallace’s liability under the personal guaranty. Rather, upon signing the guaranty, Wallace agreed to an “absolute, unconditional and continuing guaranty of payment of the indebtedness” that could not be revoked until the lender received written notice from Wallace. Defendant does not argue these terms are ambiguous. As a result, we hold the trial court correctly concluded there is no genuine issue of material fact as to Wallace’s obligations under the guaranties.

iii. Affirmative Defenses

Finally, we conclude there was no question of material fact as to Defendants’ ability to bring the affirmative defenses of release or accord and satisfaction. When a borrower breaches the terms of a mortgage or deed of trust, “a creditor-mortgagee . . . has an election of remedies. Upon default, it may sue to collect on the unpaid note or foreclose on the land used to secure the debt, or both, until it collects

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the amount of debt outstanding.” *G.E. Capital Mortg. Servs., Inc. v. Neely*, 135 N.C. App. 187, 192, 519 S.E.2d 553, 557 (1999). *See also Federal Land Bank v. Whitehurst*, 203 N.C. 302, 308, 165 S.E. 793, 795 (1932). When a “foreclosure sale of real property which secures a non-purchase money mortgage fails to yield the full amount of due debt, the mortgagee may sue for a deficiency judgment.” *Carolina Bank v. Chatham Station, Inc.*, 186 N.C. App. 424, 428, 651 S.E.2d 386, 389 (2007).¹

Under the doctrine of accord and satisfaction, a pre-existing, uncontested debt may be discharged in exchange for less than the original consideration provided there is both an “accord, which is an agreement whereby one of the parties undertakes to give or perform and the other to accept in satisfaction of a claim . . . something other than or different from what he is or considers himself entitled to,” as well as a “satisfaction, which is the execution or performance of such agreement.” *Baillie Lumber Co. v. Kincaid Carolina Corp.*, 4 N.C. App. 342, 349, 167 S.E.2d 85, 90 (1969) (citation omitted).

Similarly, a release is an agreement between the parties “which gives up or abandons a claim or right to the person against whom the claim exists or the right is to be enforced or exercised.” *Fin. Servs. of Raleigh, Inc. v. Barefoot*, 163 N.C. App. 387, 392, 594 S.E.2d 37, 41 (2004) (citation omitted).

¹ We note our state’s anti-deficiency statutes do not apply in this case, because Kings Mountain is not a natural person, the deeds of trust do not represent part of the properties’ purchase price, and the properties are not Defendants’ primary residences. *See* N.C. Gen. Stat. §§ 45-21.38, 45-21-38A (2015).

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Defendants contend there is at least a question of material fact as to whether the language of the deeds in lieu of foreclosure operated as an accord and satisfaction or release of the original deeds of trust. Because the deeds in lieu of foreclosure were awarded as part of a bankruptcy plan that was dismissed, the deeds became inoperative upon dismissal of the bankruptcy action, and could not subsequently serve as the basis for an accord and satisfaction or release.

Under the United States Bankruptcy Code, the commencement of a bankruptcy case under Title 11 creates an estate comprised of, among other things, “all legal or equitable interests of the debtor in property as of the commencement of the case.” 11 USC § 541(a)(1) (2016). Upon creation of the estate, the debtor must deliver all applicable property to the bankruptcy trustee. 11 USC § 542(a) (2016). At the same time, an automatic stay prevents creditors from, *inter alia*, “any act to create, perfect, or enforce against property of the debtor any lien to the extent that such lien secures a claim that arose before the commencement of the case under this title[.]” 11 USC § 362(a)(5) (2016). The stay continues until property is removed from the estate, or until the case is closed, dismissed, or a discharge is granted or denied. 11 USC § 362(c) (2016). Until that time, the trustee is authorized to avoid all post-petition transfers of estate property that are not authorized by other provisions of the bankruptcy code or are not authorized by the bankruptcy court. 11 USC § 549(a) (2016).

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Just as the effect of creating a bankruptcy petition results in an automatic transfer of all of debtors property to the estate, the dismissal of a bankruptcy action “revests the property of the estate in the entity in which such property was vested immediately before the commencement of the case under this title.” 11 USC § 349(b)(3) (2016). The “basic purpose of the subsection is to undo the bankruptcy case, as far as practicable, and to restore all property rights to the position in which they were found at the commencement of the case.” H.R. Rep. No. 95-595, 95th Cong. 1st Sess. 338 (1977).

An examination of the orders allowing Ozarks’ predecessor in interest to request the deeds in lieu of foreclosure indicates the deeds were to serve as a transfer under the auspices of the bankruptcy action and as part of the bankruptcy plan. The Bankruptcy Court’s 18 March 2013 consent order resolving the bank’s objection to confirmation of the bankruptcy plan provided Defendants would amend the bankruptcy plan and incorporate the terms of the consent order. The order stated Ozarks’ predecessor in interest could request deeds in lieu of foreclosure to be held in escrow subject to Defendants’ compliance with the consent order or until 1 December 2013, when the stay would be lifted and the bank would be free to record the deeds.

While the subsequent order granting Ozarks’ motion to compel provided Ozarks was free to choose to record the deeds or pursue foreclosure proceedings without further action of the bankruptcy court, this order did not remove the property

from the bankruptcy estate. To the contrary, the 18 March 2013 order specified that the terms of the consent order would become part of the bankruptcy plan, and the order to compel provided that as long as title remained with the debtor, and the Chapter 11 case remained pending, the bankruptcy court was to be given notice of any sale. Consequently, dismissal of the bankruptcy action vacated the orders allowing and compelling the delivery of the deeds in lieu of foreclosure and revested the property in Kings Mountain as it had been prior to the creation of the bankruptcy estate. *See* 11 USC § 349(b)(3) (2016).

Thus, because the deeds in lieu of foreclosure were part of the dismissed bankruptcy action, they cannot possibly constitute an agreement to satisfy the underlying debt or to release Defendants from their obligations under the deeds of trust and personal guaranties. Consequently, we hold there was no genuine issue of material fact as to whether Defendants were entitled to these affirmative defenses, and conclude Ozarks was entitled to summary judgment as a matter of law on its breach of contract and personal guaranty claims.

B. Reliance on Matters Outside the Record

Defendants also contend the trial court relied on evidence not contained in the record when it referred to the motion of the administrator to dismiss the bankruptcy action and the Bankruptcy Court's order of dismissal in granting summary judgment in favor of Ozarks. We disagree.

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We have repeatedly held the trial court may consider “any other material which would be admissible in evidence or of which judicial notice may properly be taken” when considering a motion for summary judgment. *Kessing v. National Mtg. Corp.*, 278 N.C. 523, 533, 180 S.E.2d 823, 829 (1971). *See also Dendy v. Watkins*, 288 N.C. 447, 452, 219 S.E.2d 214, 217 (1975); *Gebb v. Gebb*, 67 N.C. App. 104, 107, 312 S.E.2d 691, 694 (1984). Facts which are capable of judicial notice include court documents which are “capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.” *In re Foreclosure of the Deed of Trust of Hackley*, 212 N.C. App. 596, 601-02, 713 S.E.2d 119, 123 (2011) (quoting N.C. Gen. Stat. § 8C-1, Rule 201(d) (2015)).

Because our federal courts are generally sources whose accuracy cannot reasonably be questioned, and because neither party actually questioned the accuracy of the documents before the trial court, we hold the trial court did not err in considering the bankruptcy court documents at summary judgment.

For the foregoing reasons, the trial court’s order granting summary judgment to Ozarks is

AFFIRMED.

Judges STROUD and DAVIS concur.

Report per Rule 30(e).