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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA16-1266

Filed: 20 June 2017

Guilford County, No. 15-CVS-1370

BANK OF NORTH CAROLINA, Plaintiff,

v.

15 RIVER PROJECT, LLC, LARRY BROWN and LAWRENCE MARK PERLE,
Defendants.

Appeal by defendants from order entered 9 March 2016 by Judge David L. Hall
in Guilford County Superior Court. Heard in the Court of Appeals 3 May 2017.

Roberson Haworth & Reese, P.L.L.C., by Alan B. Powell and Christopher C. Finan, for plaintiff-appellee.

Carlton Law Group, PLLC, by Alfred P. Carlton, Jr., for defendants-appellants.

DIETZ, Judge.

The issue presented in this case is straightforward: can a bank both foreclose on property securing a promissory note and simultaneously sue the debtor and guarantors of the note for breach of contract? As explained below, the well-settled answer to that question is yes. We thus affirm the trial court.

Facts and Procedural History

In 2012, Defendant 15 River Project, LLC borrowed one million dollars from Bank of North Carolina, secured by a deed of trust on real property in Brunswick County. Defendants Larry Brown and Lawrence Mark Perle personally guaranteed the loan.

15 River Project defaulted on the loan and the bank foreclosed on the property securing the loan through the power of sale clause in the deed of trust. At the public sale, the bank submitted a bid for \$187,000. 15 River Project submitted an upset bid for \$1,040,743.93 but later defaulted on the upset bid. As a result, the substitute trustee obtained permission to resell the property.

In the meantime, Bank of North Carolina sued 15 River Project and the two loan guarantors for breach of the loan contract. Defendants answered the complaint and also moved to dismiss the action or to abate it pending completion of the foreclosure sale. The bank responded with a motion for judgment on the pleadings. The trial court heard the motions on 1 February 2016. On 9 March 2016, the court denied Defendants' motions, granted the bank's motion, and entered a judgment against Defendants for \$1,036,744.94, plus interest, costs, and attorneys' fees. Defendants timely appealed. While this appeal was pending, the substitute trustee sold the property to a third-party purchaser at a new foreclosure sale.

Analysis

Defendants rely entirely on a single, flawed argument to challenge the trial court's entry of judgment against them: they contend that, after the bank pursued the foreclosure sale, it could no longer sue Defendants on the underlying promissory note. Instead, Defendants contend that the bank's only remedy is through the provisions of the deficiency judgment statutes.

This argument is flatly inconsistent with our precedent. This Court repeatedly has held that lenders "may sue to collect on the unpaid note or foreclose on the land used to secure the debt, *or both*, until [they collect] 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) (emphasis added) (citing *Federal Land Bank v. Whitehurst*, 203 N.C. 302, 308, 165 S.E. 793, 795 (1932)); *see also In re Foreclosure of a Deed of Trust Executed by Herndon*, __ N.C. App. __, __, 781 S.E.2d 524, 527 (2016); *Lifestore Bank v. Mingo Tribal Pres. Trust*, 235 N.C. App. 573, 578, 763 S.E.2d 6, 10 (2014).

Defendants argue that we should ignore this case law because it renders the deficiency judgment statutes "inoperative or insignificant." Those deficiency judgment statutes (and, in particular, N.C. Gen. Stat. § 45–21.36) provide protections to borrowers when a lender forecloses on property and then buys the property at the foreclosure sale. Put simply, the statutes ensure that the borrower will only be liable for a deficiency exceeding the fair market value of the secured property if the lender

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purchases the property for less than fair market value. *NCNB Nat. Bank of N.C. v. O'Neill*, 102 N.C. App. 313, 316, 401 S.E.2d 858, 859 (1991).

Defendants' argument suffers from two fatal flaws. First, nothing in this Court's precedent prohibits a borrower from using the deficiency judgment statute as a defense in an action, like this one, to recover on the note. Thus, we see no reason why adhering to our existing precedent would render the deficiency judgment statute meaningless. Second, and more fundamentally, this is not even a case in which the deficiency judgment statute would apply. Bank of North Carolina did not buy the property at the foreclosure sale (an unrelated third party did), meaning Defendants could not assert section 45–21.36 as a defense on these facts. Accordingly, Defendants' argument concerning the deficiency judgment statutes is meritless.

Defendants next contend that the bank's suit on the note is barred by *res judicata*. Defendants rely on our Supreme Court's recent decision in *In re Lucks*, ___ N.C. ___, 794 S.E.2d 501 (2016) to support this argument. But *Lucks* hurts, not helps, Defendants' position.

As an initial matter, *Lucks* involved a case in which the clerk of superior court declined to authorize the power of sale foreclosure. The *res judicata* issue arose because of that rejection of the lender's attempt to foreclose on the property. *Lucks*, ___ N.C. at ___, 794 S.E.2d at 503–04. Here, by contrast, the clerk authorized the foreclosure sale. More importantly, the Supreme Court in *Lucks* held that, although

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the clerk’s rejection of the attempted power of sale foreclosure prohibited the creditor “from proceeding again with non-judicial foreclosure based on the same default,” it could “nonetheless proceed with foreclosure by judicial action.” *Id.* at ___, 794 S.E.2d at 507 (emphasis omitted). In other words, the Court expressly held that the rejection of a power of sale foreclosure would not bar a future attempt at judicial foreclosure for the same default (or, by extension, a future attempt to recover in an action for breach of the loan contract). In sum, *Lucks* does not hold that Bank of North Carolina’s suit to recover on the note is barred by *res judicata*—if anything, *Lucks* indicates that the bank’s suit is entirely appropriate in this context. We therefore reject Defendants’ argument.

Conclusion

For the reasons stated above, we affirm the trial court.

AFFIRMED.

Judges CALABRIA and MURPHY concur.

Report per Rule 30(e).