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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA16-166

Filed: 5 July 2017

Mecklenburg County, No. 13 CVS 9596

BANK OF AMERICA, N.A., Plaintiff,

v.

ANGEL L. RIVERA and wife, JENNIFER L. WILSON a/k/a JENNIFER WILSON,  
Defendants.

Appeal by Defendants from order entered 20 March 2015 by Judge Gregory R.  
Hayes in Mecklenburg County Superior Court. Heard in the Court of Appeals 22  
August 2016.

*Ragsdale Liggett PLLC, by Ashley H. Campbell, for Plaintiff-Appellee.*

*Jennifer L. Wilson and Angel L. Rivera pro se.*

INMAN, Judge.

The holder of a promissory note has standing to enforce the note and to foreclose on real property securing the note, even if the holder is not the owner of the note.

Angel Rivera (“Defendant Rivera”) and his wife, Jennifer Wilson (“Defendant Wilson”) (collectively, “Defendants”) appeal an order granting summary judgment in

favor of Bank of America, N.A. (“Plaintiff”). Defendants contend the trial court erred in (1) determining Plaintiff had standing to assert its claim for reformation of the deed of trust, and (2) granting Plaintiff’s motion for summary judgment on Defendants’ counterclaim for fraud upon the court. After careful review, we affirm the trial court.

### **Factual & Procedural History**

Evidence presented at trial tended to show the following:

In March 2008, Defendant Rivera obtained a \$157,500 loan from Plaintiff in order to purchase from Defendant Wilson real property located at 16042 Stuarts Draft Court in Charlotte, North Carolina (the “Property”). The loan was memorialized in a promissory note (the “Note”) secured by a deed of trust on the Property (the “Deed of Trust”) in favor of Plaintiff. Defendant Wilson transferred the Property to Defendant Rivera by deed.

Defendant Rivera appointed Sue Hicks as his attorney-in-fact to execute the closing documents. Under this authority, Sue Hicks signed the Deed of Trust as “Angel L. Rivera by Sue Hicks AIF.” However, the notary block on the Deed of Trust erroneously indicated that Defendant Rivera signed in his personal capacity. The Deed of Trust was recorded on 25 March 2008.

Once Sue Hicks signed the Deed of Trust, Plaintiff took physical possession of the Note and indorsed it in blank, *i.e.*, “payable to bearer and may be negotiated by

transfer of possession alone until specially indorsed.” N.C. Gen. Stat. § 25-3-205 (2015).

Defendant Rivera defaulted on the loan, making his last full payment on 18 January 2011. On 1 February 2011, Defendant Rivera sent Plaintiff a letter demanding the identity of the Note holder. On 16 February 2011, Plaintiff sent Defendant Rivera a letter identifying “Bank of America” as the servicer of the loan and Fannie Mae as the owner of the loan. On 23 February 2011, Plaintiff sent another letter to Defendant Rivera stating Fannie Mae was the owner of the Note.

Plaintiff began foreclosure proceedings on the Property in April 2011 and subsequently found the error—the incorrect notary indication—in the Deed of Trust. On 23 May 2013, Plaintiff filed a verified complaint against Defendants seeking reformation of the Deed of Trust to correct the notary acknowledgment. On 6 December 2013, Defendants asserted counterclaims against Plaintiff, including, *inter alia*, fraud upon the court.

On 22 May 2014, Plaintiff moved for summary judgment on its reformation claim. The matter came on for hearing ON 3 September 2014 in Mecklenburg County Superior Court, Judge Robert C. Ervin presiding. On 25 September 2014, the trial court granted Plaintiff’s motion for summary judgment as to the reformation of the Deed of Trust contingent upon a determination that Plaintiff had standing to bring the suit.

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On 19 February 2015, Plaintiff filed a renewed motion for summary judgment, including an affidavit signed by Plaintiff's assistant vice president stating that Plaintiff was the current holder of the debt. The matter came on for hearing on 10 March 2015 in Mecklenburg County Superior Court, Judge Gregory R. Hayes presiding. On 20 March 2015, after reviewing the Note, the trial court entered an order concluding that Plaintiff had standing to assert its claim for reformation of the Deed of Trust and granting Plaintiff's renewed motion for summary judgment. The trial court also entered summary judgment in favor of Plaintiff in regard to Defendants' counterclaims.

On 30 March 2015, Defendants moved to amend the judgment. On 6 July 2015, the trial court entered an order denying Defendants' motion to amend. Defendants timely appealed.

**Analysis**

Defendants argue that Plaintiff lacked standing to bring the reformation suit and that the trial court erred in granting Plaintiff's motion for summary judgment on Defendants' counterclaim for fraud. We disagree.

**I. Standard of Review**

"Our standard of review of an appeal from summary judgment is de novo; such judgment is appropriate only when the record shows 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.’ ” *In re Will of Jones*, 362 N.C. 569, 573, 669 S.E.2d 572, 576 (2008) (quoting *Forbis v. Neal*, 361 N.C. 519, 523-24, 649 S.E.2d 382, 385 (2007)). “Standing is a question of law which this Court reviews de novo.” *Cook v. Union Cty. Zoning Bd. of Adjustment*, 185 N.C. App. 582, 588, 649 S.E.2d 458, 464 (2007) (citations omitted).

## **II. Standing**

Defendants contend that Plaintiff is not a real party in interest and does not have standing to bring its claim for reformation of the Deed of Trust. Specifically, Defendants argue that the Note controls who is the real party in interest, and because Plaintiff sold the Note to Fannie Mae, Plaintiff does not have standing to reform the Deed of Trust. We disagree.

North Carolina case law establishes that “the holder of a note can enforce both the note and the Deed of Trust.” *Greene v. Tr. Servs. of Carolina, LLC*, \_\_ N.C. App. \_\_, \_\_, 781 S.E.2d 664, 671-72 (2016) (citing N.C. Gen. Stat. § 47-17.2 (2013); *Horvath v. Bank of New York, N.A.*, 641 F.3d 617, 623 (4th Cir. 2011)). One way to prove a party is the holder of the note is production of an original note indorsed in blank. *In re Foreclosure of a Deed of Trust Executed by Rawls*, \_\_ N.C. App. \_\_, \_\_, 777 S.E.2d 796, 797-99 (2015). Upon production of the original note indorsed in blank to the court, the party in possession is presumptively the holder. *Id.* at \_\_, 777 S.E.2d at 799 (citations omitted).

Defendants argue that Plaintiff is merely the collector of the Note; however, Plaintiff is also the holder of the Note. Plaintiff produced to the trial court the original Note secured by the Deed of Trust, and the Note was indorsed in blank. As such, Plaintiff is presumptively the holder, and thus can enforce both the Note and the Deed of Trust. *See Greene*, \_\_ N.C. App. at \_\_, 781 S.E.2d at 671-72. In sum, there is no genuine issue of material fact as to Plaintiff's standing to bring the reformation action, and as such, Plaintiff is entitled to judgment as a matter of law.

### **III. Fraud**

Defendants argue that the trial court erred in dismissing their counterclaim against Plaintiff for fraud upon the court. Specifically, Defendants argue that Plaintiff committed fraud by failing to join a necessary party, Fannie Mae, and by filing fraudulent documents—pleadings asserting that Plaintiff has standing to foreclose on the Deed of Trust.<sup>1</sup> Defendants also argue that the two letters sent to them by Plaintiff contradict each other and other evidence, and thus result in fraud upon the court. We disagree.

An independent challenge to a final judgment can be brought to set aside a judgment that is procured by extrinsic fraud or 'fraud upon the court.' 'It is well settled

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<sup>1</sup> Defendants also argue that Plaintiff and its employees engaged in fraud in depositions and affidavits. However, these arguments were not made at trial. Defendants did not preserve this issue for appellate review, and we dismiss this aspect of Defendants' appeal. *See State v. Ellis*, 205 N.C. App. 650, 654, 696 S.E.2d 536, 539 (2010) ("[W]here a theory argued on appeal was not raised before the trial court, the law does not permit parties to swap horses between courts in order to get a better mount in the reviewing court.").

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in North Carolina that in order to sustain a collateral attack on a judgment for fraud upon the court it is necessary that the complaint set forth facts constituting extrinsic or collateral fraud in the procurement of the judgment, and not merely intrinsic fraud[.]’

*George v. McClure*, 245 F. Supp. 2d 735, 738 (M.D.N.C. 2003) (4th Cir. 2004) (brackets and ellipses omitted) (quoting *Scott v. Farmers Coop. Exch., Inc.*, 274 N.C. 179, 182, 161 S.E.2d 473, 476 (1968)). Any claim for fraud includes as an essential element a “[f]alse representation or concealment of a material fact. . . .” *Ragsdale v. Kennedy*, 286 N.C. 130, 138, 209 S.E.2d 494, 500 (1974) (citations omitted).

Here, Defendants’ counterclaim and appellate arguments allege only intrinsic fraud. Equally important, the record reflects that no “[f]alse representation or concealment of a material fact” occurred. The undisputed facts establish that Plaintiff is the holder of the Note, just as Plaintiff’s pleadings asserted and supporting documentary evidence established. So Plaintiff had standing to enforce the Note and was not required to join Fannie Mae as a party.

Additionally, we reject Defendants’ argument that the two letters sent to Defendants by Plaintiff were contradictory and, thus, resulted in fraud upon the court. Both letters stated that Fannie Mae is the owner of the Note—a fact uncontroverted by the evidence. Moreover, at trial, Defendants failed to point to any evidence showing that Plaintiff’s letters contained false statements. In sum, we hold

that the trial court did not err in granting Plaintiff's motion for summary judgment regarding Defendant's counterclaims for fraud against the court.

#### **IV. Sanctions**

We also address Plaintiff's motion for sanctions, filed 16 May 2016. Plaintiff requests this Court enter an order sanctioning Defendants and awarding \$15,300 in attorney's fees to Plaintiff. We remand the matter to the trial court for a determination on sanctions.

Rule 34 of the North Carolina Rules of Appellate Procedure permits this Court to impose sanctions on an appellant where "the appeal was not well grounded in fact and was not warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law[.]" or "the appeal was taken or continued for an improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation[.]" N.C. R. App. P. 34(a)(1)-(2) (2016). Sanctions may be imposed in the form of, *inter alia*, "reasonable expenses, including reasonable attorney fees, incurred because of the frivolous appeal or proceeding[.]" N.C. R. App. P. 34(b)(2)(c). Rule 34(c) allows this Court to remand the case to the trial court for a determination on sanctions, and Rule 34(d) provides that "the person subject to sanction shall be entitled to be heard on that determination in the trial division."

Plaintiff argues that Defendants' appeal was frivolous as "[e]stablished North Carolina case law directly on point supports the trial court's conclusions that



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[Plaintiff] was the holder of the [N]ote with the full power to enforce it.” Additionally, Plaintiff argues that Defendants appealed this action to unnecessarily delay foreclosure, as this is the second proceeding in which Defendants have raised the argument that Plaintiff is not the proper owner of a note, albeit a different note evidencing debt on a different property. *See In re Foreclosure of Real Prop. Under Deed of Trust from Rivera*, 241 N.C. App. 399, 775 S.E.2d 36, No. COA14-944, 2015 WL 3490165, at \*2 (2015) (unpublished). We agree with Plaintiff’s assertion and remand the matter to the trial court to determine the award of sanctions against Defendants.

**Conclusion**

For the aforementioned reasons, we affirm the trial court. Moreover, we remand the matter to the trial court for a determination of sanctions against Defendants pursuant to N.C. R. App. P. 34(b)(2).

AFFIRMED IN PART; REMANDED IN PART.

Chief Judge MCGEE and Judge STROUD concur.

Report per Rule 30(e).