An unpublished opinion of the North Carolina Court of Appeals does not constitute controlling legal authority. Citation is disfavored, but may be permitted in accordance with the provisions of Rule 30(e)(3) of the North Carolina Rules of Appellate Procedure.

IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA17-483

Filed: 6 February 2018

Gaston County, No. 14 SP 50

IN THE MATTER OF THE FORECLOSURE OF A DEED OF TRUST EXECUTED BY JASON LINDSEY SMITH AND SHANNON FRIDAY SMITH DATED APRIL 27, 2007 AND RECORDED IN BOOK 4315 AT PAGE 2450 IN THE GASTON COUNTY PUBLIC REGISTRY, NORTH CAROLINA.

Appeal by Jason Lindsey Smith and Shannon Friday Smith ("Homeowners") from order entered 13 December 2016 by Judge C.W. Bragg in Gaston County Superior Court. Heard in the Court of Appeals 2 October 2017.

The Law Office of John T. Benjamin, Jr., P.A., by John T. Benjamin, Jr., and Benjamin W. Smith, for the Petitioner-Appellee.

James W. Surane for the Respondent-Appellant.

DILLON, Judge

Bank of America (the "Bank") is the holder of a note made by Homeowners, secured by Homeowners' residence in Gaston County. The Bank commenced this matter to seek an order of foreclosure on Homeowners' residence, alleging that Homeowners were in default on the note.

In November 2015, the assistant clerk of court entered an order allowing the foreclosure to proceed. The Homeowners appealed to the superior court. In December

2016, after a hearing on the matter, the trial court entered an Order allowing the foreclosure sale to proceed. Homeowners timely appealed to this Court.

On appeal, Homeowners make two arguments.

First, Homeowners argue that the trial court erred in finding that Homeowners were in default. There was evidence in the record which tended to show as follows: Under the terms of their note with the Bank, Homeowners were required to make monthly mortgage payments consisting of principal and interest, and also a monthly escrow for taxes and insurance. In 2010, Homeowners fell several months behind in their payments. During that time period, the Bank paid to keep the taxes and insurance on the residence current to protect its interest in the property.

On 5 January 2011, the Bank sent the Homeowners a notice indicating that a little over $32,000 was due to reinstate the loan, and that the calculation was good through 14 January 2011. The notice also indicated that if the Homeowners paid this amount, the monthly payment going forward might increase based on a readjustment of the required monthly escrow payment for taxes and insurance. On 19 January 2011, the Homeowners paid a little less than $32,000. The regular monthly payment going forward, though, increased; and the Homeowners fell behind once again. Specifically, Homeowners made partial payments in February and March 2011, but made no payments thereafter.

In April and May 2011, the Bank sent Homeowners "acceleration warning" letters. In June 2011, the Bank sent the Homeowners a notice of its intent to accelerate the loan if the default was not cured. The Homeowners did not cure the default.

We conclude that there was sufficient evidence in the record to support the court's finding that the Homeowners were in default. Accordingly, the Homeowners' first argument is overruled.[1]

In their second argument, the Homeowners contend that they were not afforded the pre-foreclosure notice required under N.C. Gen. Stat. § 45-102 (2015). Section 45-102 requires that a homeowner receive a notice informing him or her of the availability of resources to avoid foreclosure and that this notice be sent to the homeowner at least forty-five (45) days before the filing for a notice of hearing in a foreclosure proceeding on a primary residence. Here, the Homeowners point to evidence that they received the pre-foreclosure notice on 10 January 2014, a mere four (4) days before the Bank filed its notice of hearing on 14 January 2014.

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[1] We note that the Homeowners have made a number of arguments as to why they should have been excused from making all payments due, when due. These arguments generally concern the Bank's conduct and course of dealing, including the Bank's promises to give the Homeowners extra time to catch up or conduct that might constitute a waiver of the Homeowners' default. However, the Homeowners do not dispute that they failed to make all payments as the payments became due, as required by the loan agreement. The arguments advanced by the Homeowners are "equitable" in nature, and may not be raised here. As our Supreme Court has held, "[e]quitable defenses to foreclosure. . . may not be raised in a hearing pursuant to N.C.G.S. § 45-21.16 or on appeal therefrom but must be asserted in an action to enjoin the foreclosure sale under N.C.G.S. § 45-21.34." *In re Foreclosure of Goforth*, 334 N.C. 369, 374, 432 S.E.2d 855, 859 (1993).

We hold that the trial court properly found the pre-foreclosure notice complied with N.C. Gen. Stat. § 45-102. The trial court found and the record shows (1) that though a notice of hearing was sent on 14 January 2014, no hearing was held based on that notice; and (2) that ten months later, on 12 November 2014, the trustee sent the Homeowners the notice of rescheduled hearing, well more than 45 days after the Homeowners received the pre-foreclosure notice required pursuant to N.C. Gen. Stat. § 45-102. The hearing before the trial court in November 2015 was based on this 12 November 2014 notice. Therefore, we hold that Homeowners' had more than 45 days' notice of their pre-foreclosure rights before receiving the effective notice of a foreclosure hearing.

AFFIRMED.

Chief Judge McGEE and Judge CALABRIA concur.

Report per Rule 30(e).