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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA17-806

Filed: 17 July 2018

Mecklenburg County, No. 16-SP-1112

IN RE: FORECLOSURE REGARDING MARGARETA BLACKWELL – OLD STONE  
CROSSING AT CALDWELL CREEK.

Appeal by Movant from order entered 24 February 2017 by Judge Linwood O.  
Foust in Mecklenburg County Superior Court. Heard in the Court of Appeals 27  
November 2017.

*The Cooper Legal Firm, PC, by Stephanie L. Cooper, for movant-appellant.*

*Sellers, Ayers, Dortch & Lyons, P.A., by Michelle Massingale Dressler, for  
substitute trustee-appellee.*

MURPHY, Judge.

Dunsmure failed to appeal the Clerk’s *Order of Resale* and only appealed denial of the *Motion to Set Aside Default on Bid*. We find that we do not have jurisdiction over this appeal because Dunsmure failed to appeal the final order within thirty days as required by N.C. R. App. P. 3(c). Whether a party has timely appealed an order is a jurisdictional matter. *Morehead v. Wall*, 224 N.C. App. 588, 591, 736 S.E.2d 798, 801 (2012) (“The provisions of Rule 3 are jurisdictional, failure to follow the

requirements [of the Rules of Appellate Procedure] requires dismissal of an appeal.”).

Accordingly, we dismiss this appeal.

### **BACKGROUND**

Caldwell Creek Property Owners’ Association filed a Claim of Lien on 15 January 2016, imposing a lien pursuant to N.C.G.S. § 47F-3-116 on real property located in Charlotte. A Notice of Hearing to Foreclose the Claim of Lien was filed on 18 March 2016. The law firm of Sellers, Ayers, Dortch & Lyons, P.A., was appointed by the Association to serve as Trustee. The Order Permitting Foreclosure of the Claim of Lien was entered on 29 April 2016. The Report of Sale was filed on 2 June 2016, but an upset bid was filed on 10 June 2016 by “Dunsmore, LLC.”<sup>1</sup>

Trustee contacted Dunsmore by certified mail on 21 June 2016 informing Dunsmore that the upset bid was final, payment was due, and to contact Trustee within 10 days of 21 June 2016. Otherwise, the letter informed Dunsmore that it would be in default and a resale of the property would be ordered. The letter was mailed on 22 June 2016. Trustee was contacted by a representative of Dunsmore on 7 July 2016, more than 10 days after the letter was mailed. As a result, the Clerk entered an Order of Resale on 14 July 2016.

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<sup>1</sup> The upset bid was submitted in the name of “Dunsmore, LLC” on 10 June 2016. However, on 7 July 2016 it was indicated for the first time that the correct name was “Dunsmore, LLC.” Based on testimony at trial, the trial court determined that “Dunsmore, LLC” was not formed until after the upset bid was submitted. Regardless, the trial court found the naming discrepancy to be a scrivener’s error, but determined this was not relevant to the finding that neither “Dunsmore, LLC” nor “Dunsmore, LLC” tendered payment after placing its upset bid.

Instead of appealing the Clerk's order, Dunsmure filed a *Motion to Set Aside Default on Bid* on 20 July 2016. On 16 August 2016, the Clerk denied Dunsmure's motion. On 24 August 2016, Dunsmure only appealed the Clerk's 16 August 2016 motion. The trial court dismissed Dunsmure's appeal and upheld the Clerk's order finding Dunsmure in default. Dunsmure then appealed the denial of the *Motion to Set Aside Default on Bid* to this Court.

### ANALYSIS

"Non-judicial foreclosure by power of sale arises under contract and is not a judicial proceeding." *In re Lucks*, 369 N.C. 222, 225, 794 S.E.2d 501, 504 (2016). "The General Assembly has crafted [N.C.G.S.] Chapter 45 to be the comprehensive and exclusive statutory framework governing non-judicial foreclosures by power of sale. The Rules of Civil Procedure do not apply unless explicitly engrafted into the statute." *Id.* at 226, 794 S.E.2d at 505. Chapter 45 states in relevant part that "[w]hen the highest bidder at a sale or resale or any upset bidder fails to comply with his bid upon tender to him of a deed for the real property or after a bona fide attempt to tender such a deed, the clerk of superior court may, upon motion, enter an order authorizing a resale of the real property." N.C.G.S. § 45-21.30(c) (2017).

Dunsmure argues that:

the issue presented was properly brought as a Rule 55(b) motion which would have resulted in a Rule 60(b) set aside of the Order as a whole including the Order for Resale. Under N.C. R. Civ. P. 55(d), for good cause shown the court

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may set aside an entry of default, and, if a judgment by default has been entered, the judge may set it aside in accordance with N.C. R. Civ. P. 60(b), N.C. R. Civ. P. 55(d). [Dunsmure] moved to set aside the default for good cause shown based on the failure of the [Trustee] to act in good faith regarding the ministerial error in the bidding name and no tender of a deed.

Dunsmure’s argument does not address the fact that the Rules of Civil Procedure do not apply to Chapter 45 proceedings unless “explicitly engrafted into the statute.” *Lucks*, 369 N.C. at 226, 794 S.E.2d at 505. Further, Dunsmure’s argument does not address the failure to appeal the Clerk’s *Order of Resale*. Even if Dunsmure’s motion was converted into a Rule 60 motion—an issue that we need not reach—we have previously stated that a Rule 60 motion “cannot be used as a substitute for an appeal of the underlying order to correct errors of law.” *Morehead*, 224 N.C. App. at 592, 736 S.E.2d at 801. In addition, “[m]otions entered pursuant to Rule 60 do not toll the time for filing a notice of appeal.” *Id.* Dunsmure had thirty days after the entry of the Clerk’s *Order of Resale* on 14 July 2016 to appeal in accordance with N.C. R. App. P. 3(c). Dunsmure’s *Motion to Set Aside Default on Bid* seeks to appeal errors of law, and a Rule 60 motion does not toll a notice of appeal. We conclude that the window to appeal the Clerk’s *Order of Resale* has passed and we cannot reach the merits of Dunsmure’s argument through the appeal of the *Motion to Set Aside Default on Bid*.

Furthermore, Dunsmure has not proven how anyone other than itself is at fault for failing to provide payment to Trustee within the timeframe set out in Trustee's letter. It is uncontroverted that Dunsmure did not tender payment within the required time period. Here, the Rules of Civil Procedure that Dunsmure relies on to appeal its *Motion to Set Aside Default on Bid* are not engrafted into Chapter 45. See N.C.G.S. § 45; *Lucks*, 369 N.C. at 226, 794 S.E.2d at 505. We conclude that Chapter 45 does not provide Dunsmure with the remedy it seeks. Finally, Dunsmure did not petition this court to grant certiorari pursuant to N.C. R. App. P. 21(a)(1), and we do not otherwise have jurisdiction to hear this appeal. If Dunsmure had appealed the Clerk's *Order of Resale* within thirty days after the entry of judgment in accordance with N.C. R. App. P. 3(c), then we would have jurisdiction to hear the merits of this appeal.

### **CONCLUSION**

Dunsmure failed to appeal the Clerk's *Order of Resale* and only appealed denial of the *Motion to Set Aside Default on Bid*. We find that we do not have jurisdiction over this appeal because Dunsmure failed to appeal the final order within thirty days as required by N.C. R. App. P. 3(c). Therefore, we are unable to reach the merits of Dunsmure's arguments and dismiss this appeal.

DISMISSED.

Chief Judge McGEE and Judge ELMORE concur.

IN RE: BLACKWELL FORECLOSURE

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Report per Rule 30(e).